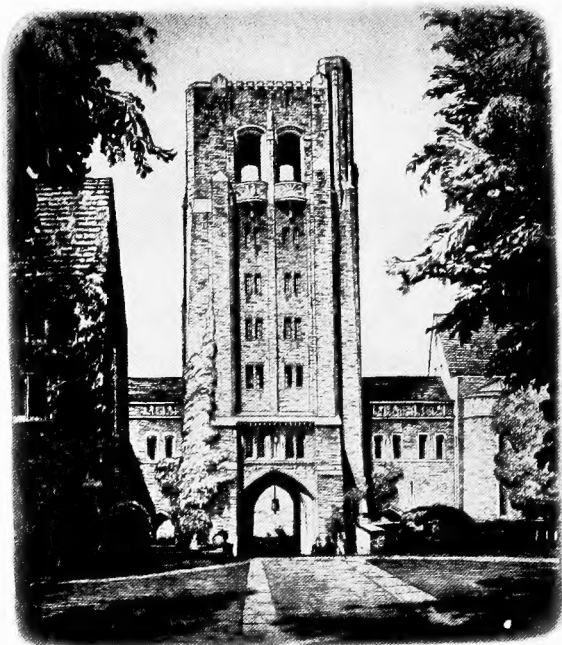




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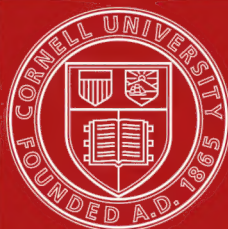
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# A TREATISE ON THE LAW OF RAILROADS

CONTAINING A CONSIDERATION OF THE ORGANIZATION, STATUS  
AND POWERS OF RAILROAD CORPORATIONS, AND OF THE  
RIGHTS AND LIABILITIES INCIDENT TO THE LOCATION,  
CONSTRUCTION AND OPERATION OF RAILROADS;  
TOGETHER WITH THEIR DUTIES, RIGHTS AND  
LIABILITIES AS CARRIERS

INCLUDING BOTH  
STREET AND INTERURBAN RAILWAYS

*oscivsko*  
By BYRON K. ELLIOTT  
AND  
WILLIAM F. ELLIOTT

Authors of ROADS AND STREETS, GENERAL PRACTICE, EVIDENCE

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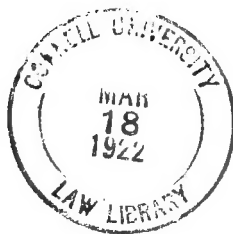
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§ 710 (615). **Generally—Suits by corporations.**—The power to sue and be sued is one of the necessary incidents of a corpora-

tion,<sup>1</sup> since to be recognized by law as a collective body with enforceable rights is essential to its legal existence.<sup>2</sup> It has been held that the consent of a majority of the directors or trustees of a corporation is necessary to entitle it to sue,<sup>3</sup> but it is certainly not the general rule that the directors must take action before a suit can be instituted, and, in any event, in the absence of proof to the contrary, the court will presume that the suit was properly authorized.<sup>4</sup> A corporation may, in general, avail itself of any legal remedies which would be available to an individual under similar circumstances. It may bring an action at law upon a contract,<sup>5</sup> and may by the usual remedies recover damages for any kind of wrong which it suffers.<sup>6</sup> It may sue in trespass for an injury to its business,<sup>7</sup> and in equity, in a proper case, for an injunction to prevent injuries to its prop-

<sup>1</sup> In several of the states it is provided by the state constitutions that all corporations may sue and be sued in courts like natural persons. 4 A. & E. Enc. of Law, 189. In Colorado a corporation may sue and be sued as an individual, and its insolvency does not change the rule. *Breene v. Merchants' &c. Bank*, 11 Colo. 97, 17 Pac. 280.

<sup>2</sup> 3 *Thomp. Corp.* (2d ed.), § 3125; *Whites' Supp. Thomp. Corp.* § 3125. This power existed at common law. 1 *Blackstone Com.* 745. See also *Bangor &c. R. Co. v. Smith*, 47 Maine 34; *Heaston v. Cincinnati &c. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *New Orleans Terminal Co. v. Teller*, 113 La. Ann. 733, 37 So. 624; *Wilder v. Chicago &c. R. Co.*, 70 Mich. 382, 38 N. W. 289, 35 Am. & Eng. R. Cas. 162; *Baltimore &c. R. Co. v. Gallahue*, 12 Grat. (Va.) 655, 65 Am. Dec. 254.

<sup>3</sup> *Dart v. Huston*, 22 Ga. 506. See also *Holmes v. Jewett*, 55

Colo. 187, 134 Pac. 665. But compare *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496, 38 Am. Dec. 561; *Davis v. Memphis &c. R. Co.*, 22 Fed. 883; *Trustees v. Connolly*, 157 Mass. 272, 31 N. E. 1058; *Colman v. West Virginia &c. Co.*, 25 W. Va. 148.

<sup>4</sup> *Bangor R. Co. v. Smith*, 47 Maine 34. See also *Conley v. Daughters &c.* (Tex. Civ. App.), 151 S. W. 877; *Goodale Phonograph Co. v. Valentine*, 69 Wash. 263, 124 Pac. 691. The affidavit in support of an application by a corporation for change of venue on account of local prejudice may be made by the secretary of the corporation. *St. Louis &c. R. Co. v. Fowler*, 113 Mo. 458, 20 S. W. 1069.

<sup>5</sup> *Eakright v. Logansport &c. R. Co.*, 13 Ind. 404.

<sup>6</sup> 3 *Thomp. Corp.* (2d ed.), § 2990, et seq.

<sup>7</sup> A corporation may sue to recover damages for a libel against it in its business. *Metropolitan*

erty.<sup>8</sup> It may have a writ of mandamus to compel the performance by others of legal duties owed to it.<sup>9</sup> In a proper case it may also maintain a bill of interpleader.<sup>10</sup>

**§ 711 (616). When incorporation must be alleged.**—It is frequently required by statute that a plaintiff corporation shall allege the fact of its incorporation,<sup>11</sup> and to do so is always the better practice. A failure to aver corporate existence in an action by or against a corporation cannot, however, be taken advantage of by a demurrer for want of facts.<sup>12</sup> The general rule is that pleading the general issue,<sup>13</sup> or going to trial on the

&c. Co. v. Hawkins, 4 H. & N. 87; Hahnemannian Life Ins. Co. v. Beebe, 48 Ill. 87, 95 Am. Dec. 519; Trenton Mut. Life Ins. Co. v. Perrine, 23 N. J. L. 402; Knickerbocker Life Ins. Co. v. Ecclesine, 42 How. Prac. (N. Y.) 201.

<sup>8</sup> See post, § 726.

<sup>9</sup> See post, § 735.

<sup>10</sup> Salisbury Mills v. Townsend, 109 Mass. 115.

<sup>11</sup> Miller v. Pine Min. Co., 2 Idaho 1206, 31 Pac. 803; Adams v. Lamson &c. Co., 59 Hun 127, 13 N. Y. S. 118; Kaulbach v. Knickerbocker Trust Co., 139 App. Div. 566, 124 N. Y. S. 286; Texas &c. R. Co. v. Virginia &c. Co. (Tex.), 7 S. W. 341; Carpenter v. McCord Lumber Co., 107 Wis. 611, 83 N. W. 764.

<sup>12</sup> John T. Noye Mfg. Co. v. Raymond (Super. Ct. Buff.), 8 Misc. 353, 28 N. Y. S. 693; Fulton Fire Ins. Co. v. Baldwin, 37 N. Y. 648. See also Stanly v. Richmond &c. R. Co., 89 N. Car. 331; Seymour v. Thomas Harrow Co., 81 Ala. 250, 1 So. 45; Nolte v. Lebbert, 34 Ind. 163; Wiles v.

Trustees of Phillipi Church, 63 Ind. 206; Cone Export &c. Co. v. Poole, 41 S. Car. 70, 19 S. E. 203, 24 L. R. A. 289. As shown by the above authorities if a demurrer lies at all for failure to allege the incorporation it seems that to be for want of legal capacity to sue and not for want of sufficient facts. But see Carpenter v. McCord, 107 Wis. 611, 83 N. W. 764.

<sup>13</sup> Mississippi &c. R. Co. v. Cross, 20 Ark. 443; Litchfield Bank v. Church, 29 Conn. 137; Bailey v. Valley &c. Bank, 127 Ill. 332, 19 N. E. 695; Heaston v. Cincinnati &c. R. Co., 16 Ind. 275, 79 Am. Dec. 430; Cicero &c. D. Co. v. Craighead, 28 Ind. 274; Beatty v. Bartholomew &c. Society, 76 Ind. 91; Rockland &c. Co. v. Sewall, 78 Maine 167; Rembert v. South Carolina R. Co., 31 S. Car. 309, 9 S. E. 968. See also 3 Elliott Ev. § 1930; Whites' Supp. Thomp. Corp. § 3223. The rule is different in England and some of the states. Henriquez v. Dutch West Indies Co., 2 Ld. Raym. 1532; Oregonian R. Co. v. Oregon

merits<sup>14</sup> amounts to an admission of plaintiff's corporate existence and capacity to sue. In some states, as apparently at common law, it is not necessary to allege the incorporation of a plaintiff corporation.<sup>15</sup> The theory of the cases so holding is that the "name carries with it the assertion of a fact," and it is sufficient if the name of the plaintiff imports a corporation.<sup>16</sup>

&c. Co., 23 Fed. 232; *Williams v. Bank of Michigan*, 7 Wend. (N. Y.) 540; *Bank of Jamaica v. Jefferson*, 92 Tenn. 537, 22 S. W. 211, 36 Am. St. 100; *Holloway v. Memphis R. Co.*, 23 Tex. 465, 76 Am. Dec. 68; *Jackson v. Bank*, 9 Leigh (Va.) 240. As to plea of nul tiel corporation, see *Johnson v. Hanover &c. Bank*, 88 Ala. 271, 6 So. 909; *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 12 Sup. Ct. 450, 36 L. ed. 162; *Excelsior Draining Co. v. Brown*, 47 Ind. 19; *Schloss v. Montgomery Trade Co.*, 87 Ala. 411, 13 Am. St. 51; 3 *Thomp. Corp.* (2nd ed.), §§ 3227, 3228; *Whites' Supp. Thomp. Corp.* §§ 3227, 3228.

<sup>14</sup> *United States v. Insurance Companies*, 22 Wall. (U. S.) 99, 22 L. ed. 816; *Lehigh Bridge Co. v. Lehigh Coal Co.*, 4 Rawle (Pa.) 9. See *St. Cecilia Academy v. Hardin*, 78 Ga. 39, 3 S. E. 305; *Wright v. Fire Ins. Co.*, 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211; *Sengfelder v. Mutual L. Ins. Co.*, 5 Wash. St. 121, 31 Pac. 428. Corporate capacity need not be proved unless it be challenged by an affirmative allegation of no corporation. *Dry Dock &c. R. Co. v. North &c. R. Co.*, 3 Misc. 61, 22 N. Y. S. 556.

<sup>15</sup> *Union Cement Co. v. Noble*, 15

Fed. 502; *German Reformed Church v. Von Puechelstein*, 27 N. J. Eq. 30. See *Baltimore &c. R. Co. v. Sherman*, 30 Grat. (Va.) 602; note in *Ann. Cas.* 1913C, 336. Many of the states provide by statute that in suits where a corporation is a party, no evidence of its corporate existence need be offered unless the same is denied by verified plea. *Rosenberg v. Claflin Co.*, 95 Ala. 249, 10 So. 521; *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 12 Sup. Ct. 450, 36 L. ed. 162, construing Code Wis. § 4199; *Jones v. Ross*, 48 Kans. 474, 29 Pac. 680; *Canal St. Gravel R. Co. v. Paas*, 95 Mich. 372, 54 N. W. 907; *Swift v. Crawford*, 34 Nebr. 450, 51 N. W. 1034; *Vulcan v. Myers*, 58 Hun 161, 11 N. Y. S. 663; *McElwee Mfg. Co. v. Trowbridge*, 68 Hun 28, 22 N. Y. S. 674. But it has been held that this does not dispense with an allegation that the defendant is a corporation. *State v. Chicago &c. Co.*, 4 S. Dak. 261, 56 N. W. 894, 46 Am. St. 783.

<sup>16</sup> *Smythe v. Scott*, 124 Ind. 183, 24 N. E. 685. See *Cincinnati &c. R. Co. v. McDougall*, 108 Ind. 179, 8 N. E. 571; *Shearer v. R. S. Peele & Co.*, 9 Ind. App. 282, 36 N. E. 455. A mere general allegation that it is a corporation organized and existing under the laws of a



**§ 712 (617). Actions and suits against corporations.**—Suits may, in general, be brought against a corporation upon any cause of action on which an individual will be liable under similar circumstances,<sup>17</sup> and two or more corporations may become jointly liable in the same manner as individuals.<sup>18</sup> It is sufficient at common law to sue a corporation by its corporate name, without an averment of the act of incorporation.<sup>19</sup> But in several of the states an allegation of the defendant's corporate existence must

certain state is generally sufficient. See *Martin v. Kentucky Land &c. Co.*, 146 Ky. 525, 142 S. W. 1038, Ann. Cas. 1913C, 332, and note in which the whole subject is elaborately treated. As to judicial notice, see 3 Elliott Ev. § 1929.

<sup>17</sup> A corporation is liable for the torts of its servants committed in the course of their employment. *Chestnut Hill T. Co. v. Rutter*, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675. See ante, §§ 250, 251. The corporation is liable, generally, to the same extent and in the same manner that a natural individual would be liable under like circumstances. *First Baptist Church v. Schenectady R. Co.*, 5 Barb. (N. Y.) 79. A corporation may be liable for malicious prosecution. *Springfield Engine &c. Co. v. Green*, 25 Ill. App. 106; *Gulf &c. R. Co. v. James*, 73 Tex. 12, 10 S. W. 744, 15 Am. St. 743. A corporation may become civilly responsible for libel. *Missouri Pac. R. Co. v. Richmond*, 73 Tex. 568, 11 S. W. 555, 4 L. R. A. 280, 15 Am. St. 794, 29 Cent. L. J. 69; *Fogg v. Boston &c. R. Co.*, 148 Mass. 513, 20 N. E. 109, 12 Am. St. 583.

<sup>18</sup> An action may be maintained jointly against two railroad companies for injuries received in a collision caused by the concurrent wrongful acts of negligence of both defendants. *Flaherty v. Minneapolis &c. R. Co.*, 39 Minn. 328, 40 N. W. 160, 1 L. R. A. 680, 12 Am. St. 654. One of them, however, in a proper case, may ask judgment over against its co-defendant, if judgment is rendered against it. *Gulf &c. R. Co. v. Hathaway*, 75 Tex. 557, 12 S. W. 999, 41 Am. & Eng. R. Cas. 219.

<sup>19</sup> *Exchange Nat. Bank v. Capps*, 32 Nebr. 242, 49 N. W. 223, 29 Am. St. 433; *Maxwell Code Pl.* 161. Designating the defendant by a name which imports a corporation is a sufficient allegation of its corporate existence. *Cincinnati &c. R. Co. v. McDougall*, 108 Ind. 179, 8 N. E. 571; *Adams Express Co. v. Harris*, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 217, 16 Am. St. 315, note in Ann. Cas. 1913C, 336, citing many additional cases. In an action on a note signed by a company in its corporate name, it is not necessary to aver its corporate existence, as it is estopped by such signature to deny it.

be contained in the complaint in such a suit.<sup>20</sup> Proof of the facts so averred, however, in most states, is not required unless they are denied under oath.<sup>21</sup> Where a corporation formed by the consolidation of several corporations is sued for the debt of one of the constituent companies, it has been held that the declaration should show against which company it arose, and the facts necessary to fix liability upon the new corporation.<sup>22</sup>

**§ 713 (618). Power of corporation over litigation—Power to compromise and arbitrate.**—The expediency or in expediency of litigation is a matter for the corporation, or the directors, acting in good faith within the scope of their powers, to determine, and their action in bringing and defending suits affecting the rights and obligations of the corporation is usually binding upon the stockholders.<sup>23</sup> A corporation may, therefore, compromise a pending lawsuit when the directors believe it to be to the best interests of the corporation to do so.<sup>24</sup> It may also refer mat-

*Griffin v. Asheville Light &c. Co.*, 111 N. Car. 434, 16 S. E. 423. It has been held that the corporation is the only proper party to defend and that a director can not intervene as defendant even though the corporation has failed to pay its franchise tax. *Rippstein v. Haynes &c. R. Co.* (Tex. Civ. App.), 85 S. W. 314.

<sup>20</sup> *People v. Central Pac. R. Co.*, 83 Cal. 393, 23 Pac. 303; *Miller v. Pin Mining Co.*, 2 Idaho 1206, 31 Pac. 803; *Rothschild v. Grand Trunk R. Co.*, 14 N. Y. S. 807; *State v. Chicago &c. R. Co.*, 4 S. Dak. 261, 56 N. W. 894, 46 Am. St. 783; *Saunders v. Sioux City &c. Co.*, 6 Utah 431, 24 Pac. 532. See ante, § 711.

<sup>21</sup> *Hummel v. First Nat. Bank*, 2 Colo. App. 571, 32 Pac. 72; *Calumet Paper Co. v. Knight &c. Co.*, 43 Ill. App. 566; *Dry Dock &c.*

*Co. v. North &c. R. Co.*, 3 Misc. 61, 22 N. Y. S. 556. But proof is required in some states of the due incorporation of a foreign corporation. *Bank of Jamaica v. Jefferson*, 92 Tenn. 537, 22 S. W. 211, 36 Am. St. 100. See *Hummel v. First Nat. Bank*, 2 Colo. App. 571, 32 Pac. 72.

<sup>22</sup> *Langhorne v. Richmond City R. Co.* (Va.), 19 S. E. 122.

<sup>23</sup> *Graham v. Boston &c. R. Co.*, 14 Fed. 753; note to *Bissitt v. Kentucky &c. Co.*, 15 Fed. 353, 361; *Farnum v. Ballard &c. Shop*, 12 Cush. (Mass.) 507; *MacDougall v. Gardiner*, L. R. 1 Ch. D. 13.

<sup>24</sup> *New Albany v. Burke*, 11 Wall. (U. S.) 96, 20 L. ed. 155; *Stewart v. Hoyt*, 111 U. S. 373, 4 Sup. Ct. 519, 28 L. ed. 461; *Donohoe v. Mariposa &c. Co.*, 66 Cal. 317, 5 Pac. 495.

ters to arbitration,<sup>25</sup> and has implied power to execute a bond in a judicial proceeding in which it is interested.<sup>26</sup> So, it may appeal or refuse to appeal a case, and not even a majority of the stockholders can have an appeal dismissed which the directors, acting in good faith, have ordered to be taken and prosecuted to final determination in the appellate court.<sup>27</sup>

**§ 714 (619). Estoppel to deny corporate existence.**—In suits against a body of persons as a corporation where they assume to act as a corporation under color of an apparent organization, in pursuance of a law authorizing it, they are generally estopped to set up the irregularity of the corporate organization as a defense to the corporate liability which would otherwise have attended their actions.<sup>28</sup> And a person who enters into a contract with such a de facto corporation is usually estopped to deny its corporate existence in a suit upon that contract.<sup>29</sup> Thus, while it is true that persons cannot dispute the corporate liability on such a contract because of the unauthorized or irregular organization of the company, on the other hand, those who deal

<sup>25</sup> Alexandria Canal Co. v. Swann, 5 How. (U. S.) 83, 12 L. ed. 60; Boston &c. R. Co. v. Nashua &c. R. Co., 139 Mass. 463, 31 N. E. 751.

<sup>26</sup> Collins v. Hammock, 59 Ala. 448.

<sup>27</sup> Railway Co. v. Alling, 99 U. S. 463, 25 L. ed. 438. See also Silk Mfg. Co. v. Campbell, 27 N. J. L. 539. Under the Ohio Statute stockholders may appeal in certain cases. Henry v. Jennes, 47 Ohio St. 116, 24 N. E. 1077.

<sup>28</sup> Blackburn v. Selma &c. R. Co., 2 Flip. (U. S.) 525, Fed. Cas. No. 1467; Georgia Ice Co. v. Porter, 70 Ga. 637; Pilliod v. Angola R. &c. Co., 46 Ind. App. 719, 91 N. E. 829; Kelley v. Newburyport Horse R. Co., 141 Mass. 496, 6 N.

E. 745; Empire Mfg. Co. v. Sturat, 46 Mich. 482, 9 N. W. 527; Niles v. Benton Harbor R. Co., 154 Mich. 378, 117 N. W. 937; Griffin v. Asheville &c. Co., 111 N. Car. 434, 16 S. E. 423. See ante, § 215, also 3 Elliott Ev., §§ 1932, 1940.

<sup>29</sup> Beekman v. Hudson River &c. Co., 35 Fed. 3; Cahall v. Citizens' &c. Assn., 61 Ala. 232; Imboden v. Etowah &c. Mfg. Co., 70 Ga. 86; Smelser v. Wayne &c. Tpk. Co., 82 Ind. 417; Cravens v. Eagle &c. Co., 120 Ind. 6, 21 N. E. 891, 16 Am. St. 298; Keene v. Van Reuth, 48 Md. 184; Butchers &c. Bank v. MacDonald, 130 Mass. 264; Swartout v. Michigan &c. R. Co., 24 Mich. 389; Lockwood v. Wynkoop, 178 Mich. 388, 144 N. W. 846; French v. Donohue, 29

with them as a corporation may be estopped from treating them as partners. If the corporation was organized under authority of law, persons seeking to enforce contracts into which they have entered with it cannot, as a rule, take advantage of any failure to observe the legal formalities necessary to a valid organization, in order to charge the shareholders as partners.<sup>30</sup> But where the organization was without any authority of law for its existence, the fact that the persons called themselves a corporation will not enable them to escape from personal liability for their acts.<sup>31</sup>

**§ 715 (620). When stockholders may sue.**—As already intimated, suits to enforce corporate rights or to avert threatened wrongs to the corporate interests should be brought by the officers of the corporation in its name, and a stockholder, as such, has generally no right to sue.<sup>32</sup> But where the directors refuse to enforce the corporate rights,<sup>33</sup> and are proceeding *ultra vires*,

Minn. 111; *Griffin v. Asheville & Co.*, 111 N. Car. 434, 16 S. E. 423; *McCord & Co. v. Glenn*, 6 Utah 139, 21 Pac. 500. One who deals with a corporation as existing in fact, is estopped to deny as against the corporation that it has been legally organized. *Close v. Glenwood Cemetery*, 107 U. S. 466, 2 Sup. Ct. 267, 27 L. ed. 408, per Mr. Justice Gray. See also *Kansas City & Co. R. Co. v. Mixon & Co.*, 107 Ark. 48, 154 S. W. 205, Ann. Cas. 1914C, 1247. Ante, § 215; also 3 *Elliott Ev.*, § 1940.

<sup>30</sup> *Humphreys v. Mooney*, 5 Colo. 282; *Planters' & Co. Bank v. Padgett*, 69 Ga. 159; *First Nat. Bank v. Almy*, 117 Mass. 476; *Stout v. Zulick*, 48 N. J. L. 599; *Second Nat. Bank v. Hall*, 35 Ohio St. 158. Ante, § 215. See note in 29 Am. St. 601.

<sup>31</sup> *Lewis v. Tilton*, 64 Iowa 220, 19 N. W. 911, 52 Am. Rep. 436; *Hill v. Beach*, 12 N. J. Eq. 31; *Methodist Episcopal Church v. Pickett*, 19 N. Y. 482. See also notes in 29 Am. St. 602 and 17 L. R. A. 550. But see *Winget v. Quincy & Assn.*, 128 Ill. 67, 21 N. E. 12.

<sup>32</sup> *Thomp. Corp.* (2nd ed.), § 4550; *Whites' Supp. Thomp. Corp.*, § 4550. See also *Wolf v. Pennsylvania R. Co.*, 195 Pa. St. 91, 45 Atl. 936; *McCloskey v. Snowden*, 212 Pa. 249, 61 Atl. 796, 108 Am. St. 867; *Johns v. McLester*, 137 Ala. 283, 34 So. 174, 97 Am. St. 29 and elaborate note.

<sup>33</sup> *Dodge v. Woolsey*, 18 How. (U. S.) 331, 15 L. ed. 401. *Detroit v. Dean*, 106 U. S. 537, 1 Sup. Ct. 560, 27 L. ed. 300; *Morgan v. Railroad Co.*, 1 Woods (U. S.) 15, Fed. Cas. No. 9806; *Shawhan v.*

or are fraudulently combining with others to despoil the corporation,<sup>34</sup> a stockholder may maintain a suit in his own name to enforce those rights,<sup>35</sup> especially if he can show that irremediable loss will accrue if he is not allowed to bring suit.<sup>36</sup> But it has been held that the corporation should, in such a case, be made

Zinn, 79 Ky. 300. It must appear that their refusal is a breach of trust on their part and not a mere error of judgment in a matter properly within their discretion. *Pacific R. Co. v. Missouri Pac. R. Co.*, 2 McCrary (U. S.) 227, 12 Fed. 641; *Dimpfell v. Ohio &c. R. Co.*, 110 U. S. 209, 3 Sup. Ct. 573, 28 L. ed. 121.

<sup>34</sup> Where such a state of facts is shown as to clearly indicate that the corporate management is adverse or indifferent to the interests of the corporation and that it would be useless to request the corporation to sue or in other exceptional cases where request would be futile, a stockholder may sue in the first instance. *Barr v. New York &c. R. Co.*, 96 N. Y. 444; *Barr v. Pittsburgh &c. Co.*, 40 Fed. 412; *Davis v. Gemmel*, 70 Md. 356, 17 Atl. 259; *Wilcox v. Bickel*, 11 Nebr. 154, 8 N. W. 436; *Crumlish v. Shenandoah Valley Railroad Co.*, 28 W. Va. 623; *Doud v. Wisconsin &c. R. Co.*, 65 Wis. 108, 56 Am. Rep. 620; *Fleming v. Black Warrior Copper Co.*, 15 Ariz. 1, 136 Pac. 273, 51 L. R. A. (N. S.) 99, and numerous cases there cited in note on page 103, et seq. See also *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 99 N. E. 138, 51 L. R. A. (N. S.) 112 and note, Ann. Cas. 1914A, 777n. But, un-

less this is true, a request should precede suit and an earnest effort should first be made to have the corporation sue. *Taylor v. Holmes*, 127 U. S. 489, 8 Sup. Ct. 1192, 32 L. ed. 179; *Dimpfell v. Ohio &c. R. Co.*, 110 U. S. 209, 3 Sup. Ct. 573, 28 L. ed. 121; *Foote v. Cunard &c. Co.*, 17 Fed. 46; *Chicago v. Cameron*, 120 Ill. 447; and numerous authorities cited in note 51 L. R. A. (N. S.) 100-102. *Kelly v. Thomas*, 234 Pa., 419, 83 Atl. 307, 51 L. R. A. (N. S.) 122 and note. See also ante, §§ 190, 192.

<sup>35</sup> *Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 827, where the court states in the form of distinct propositions what must be shown in order to enable a stockholder to sue.

<sup>36</sup> *Detroit v. Dean*, 106 U. S. 537, 542, 1 Sup. Ct. 650, 27 L. ed. 300. It is suggested that each probable loss from a failure to permit the bringing of a suit against an outsider, to recover damages for past injuries, would be very difficult to show in almost all cases. But see *Chicago v. Cameron*, 120 Ill. 447, 458, 11 N. E. 899, where the stockholders were permitted to sue to cancel bonds wrongfully issued twelve years before. See generally upon the subject, the elaborate note in 97 Am. St. 29, et seq. See as to right of transferee to have transfer of stocks and en-

a party defendant,<sup>37</sup> although the relief prayed is really in its favor.<sup>38</sup>

**§ 716 (621). Service of process.**—Process cannot, of course, be served upon a corporation aggregate directly. At common law service was required to be made upon some agent bearing the relation to the corporation of a head officer, whose knowledge would be that of the corporation.<sup>39</sup> The statutes of the various states prescribe the agents of the company upon whom service of process shall be made in order to be valid as service upon the company itself. The statutes resemble each other though they vary much in detail. Where the method of serving process upon a corporation is prescribed by statute that method is generally, but not always, held to be exclusive of any other.<sup>40</sup> The statute

force the right in the courts of another state than that creating the corporation, *Westminster Nat. Bank v. New England &c. Works*, 73 N. H. 465, 62 Atl. 971, 111 Am. St. 637.

<sup>37</sup> *Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 827; *Holton v. Wallace*, 77 Fed. 61; note in 97 Am. St. 45; *Morshead v. Southern Pac. R. Co.*, 123 Fed. 350; *Byers v. Rollins*, 13 Colo. 22; *Shawhan v. Zinn*, 79 Ky. 300; *Kennebec &c. R. Co. v. Portland &c. R. Co.*, 54 Maine 173; *Slattery v. St. Louis &c. Co.*, 91 Mo. 217, 4 S. W. 79, 60 Am. Rep. 245; *Mount v. Radford Trust Co.*, 93 Va. 427, 25 S. E. 244. See also generally as to rule that the corporation should be made a party defendant where the rights of the complaining stockholder are derivative. *Kelly v. Thomas*, 234 Pa. St. 419, 83 Atl. 307, 51 L. R. A. (N. S.) 122, and many other cases there cited in note.

<sup>38</sup> *Jones v. Bolles*, 9 Wall. (U.

S.) 364, 19 L. ed. 734. See also *Flynn v. Brooklyn City R. Co.*, 158 N. Y. 493, 53 N. E. 520. Relief can not be granted unless the corporation is brought before the court so that the decree may conclude it. *Shawhan v. Zinn*, 79 Ky. 300. But compare *Toledo Trac. &c. Co. v. Smith*, 205 Fed. 643.

<sup>39</sup> *Boyd v. Chesapeake &c. Canal Co.*, 17 Md. 195, 75 Am. Dec. 646; *Newell v. Great Western R. Co.*, 19 Mich. 336; *Heltzell v. Chicago &c. R. Co.*, 77 Mo. 315; *Glaize v. South Carolina R. Co.*, 1 Strobb. Law (S. Car.) 70; *Newby v. Van Oppen*, L. R. 7 Q. B. 293. Service on the officers of a domestic corporation was held to be service upon the corporation, but it seems that jurisdiction over a foreign corporation could not be this acquired under the early common law. 1 Elliott Gen. Prac. § 359.

<sup>40</sup> *Union Pac. R. Co. v. Pillsbury*, 29 Kans. 652; *Hartford Fire*

of Indiana provides that service may be made upon the president or other chief officers, or if its chief officer is not found in the county, then upon its cashier, treasurer, director, secretary, clerk, general or special agent. If none of these officers are to be found in the county, process may be served upon any person authorized to transact business in the name of such corporation.<sup>41</sup> Under this statute it is held that service upon the conductor of a passenger train,<sup>42</sup> or a freight train,<sup>43</sup> or upon a local freight agent,<sup>44</sup> is valid and effective as service upon the railroad company by which he is employed;<sup>45</sup> since the term "special agent" must be held to include persons holding such a special authority.<sup>46</sup> But it has been held by the Supreme Court of Michigan

*Ins. Co. v. Owen*, 30 Mich. 441; *Cosgrove v. Tebo &c. R. Co.*, 54 Mo. 495; *North v. Cleveland &c. R. Co.*, 10 Ohio St. 548; *Congar v. Galena &c. R. Co.*, 17 Wis. 477. And the method prescribed in a special statute is held to be exclusive of the methods prescribed in a prior general statute. *St. Paul &c. R. Co., In re*, 36 Minn. 85, 30 N. W. 432. *Contra*, *State v. Hannibal &c. R. Co.*, 51 Mo. 532; *Jeffersonville &c. R. Co. v. Dunlap*, 29 Ind. 426; *Fowler v. Detroit &c. R. Co.*, 7 Mich. 79.

<sup>41</sup> *Burns' R. S. Ind.* 1914, § 319.

<sup>42</sup> *New Albany &c. R. Co. v. Grooms*, 9 Ind. 243; *New Albany &c. R. Co. v. Tilton*, 12 Ind. 3, 74 Am. Dec. 195. So, service on conductor on electric interurban line is good under the Michigan statute. *Halladay v. Detroit &c. R.*, 155 Mich. 436, 119 N. W. 445.

<sup>43</sup> *Ohio &c. R. Co. v. Quier*, 16 Ind. 440.

<sup>44</sup> And this is true even though there be a superintendent and di-

rector of the company residing in the same county. *Toledo &c. R. Co. v. Owen*, 43 Ind. 405. For other cases holding service of process upon a local depot or station agent valid, see *St. Louis &c. R. Co., Ex parte*, 40 Ark. 141; *Smith v. Chicago &c. R. Co.*, 60 Iowa 512, 15 N. W. 303; *Hudson v. St. Louis &c. R. Co.*, 53 Mo. 525; *Missouri Pac. R. Co. v. Collier*, 62 Tex. 318; *Ruthe v. Green Bay &c. R. Co.*, 37 Wis. 344. In *St. Louis &c. R. Co. v. De Ford*, 38 Kans. 299, 16 Pac. 442, it was held that service of a summons upon a section foreman, as "a local superintendent of repairs" of a railroad company was a valid service upon the company. *Contra*, *Richardson v. Burlington &c. R. Co.*, 8 Iowa 260.

<sup>45</sup> The return must state the agency held by the person upon whom service was made or it will be held insufficient. *Dickerson v. Burlington &c. R. Co.*, 43 Kans. 702, 23 Pac. 936.

<sup>46</sup> *New Albany &c. R. Co. v. Grooms*, 9 Ind. 243. Local agent

that the "general or special agent" of a corporation upon whom a summons in garnishment may be served under a similar statute is an agent having a general or special controlling authority, either generally or in respect to some department of corporate business, and that a ticket agent is not such an agent.<sup>47</sup> So, it has been held that where the statute provides for service upon a "passenger or freight agent" of the company it refers to such a person in the service of the company and that in an action against the last of several connecting carriers service upon the agent of the first carrier is insufficient.<sup>48</sup> Service must usually be made upon the officers, or agents, or persons in possession of the offices under claim of rights, who, having control of the business and property of the company, are in a position to care for and protect its rights. Service upon persons claiming to be officers *de jure*, but not having possession of the offices they claim is not sufficient.<sup>49</sup> In the case of foreign corporations conducting business within the jurisdiction, the head officer or managing agent in charge of such business is the proper person

must be in employ of company at the time. *Douglas R. Co. v. Pennington & Evans*, 6 Ga. App. 854, 65 S. E. 1084. It is held, however, that service may be made on a local agent although the company is in the hands of a receiver. *Ennest v. Pere Marquette R. Co.*, 176 Mich. 398, 142 N. W. 567, 47 L. R. A. (N. S.) 179, Ann. Cas. 1915B, 594n. See also as to service upon local agents generally. *Cazort & Co. v. St. Louis & C. R. Co.*, 100 Ark. 395, 140 S. W. 277; *Dowell v. Chicago & C. R. Co.*, 83 Kans. 562, 112 Pac. 136; *Pecos & C. R. Co. v. Cox*, 105 Tex. 40, 143 S. W. 606, 157 S. W. 745.

<sup>47</sup>*Lake Shore & C. R. Co. v. Hunt*, 39 Mich. 469. See also *Abraham Bros. v. Southern R. Co.*, 149 Ala. 547, 42 So. 837.

<sup>48</sup>*Louisville & C. R. Co. v. Chest-*

*nut & Bro.*, 115 Ky. 43, 72 S. W. 351. See also *Slaughter v. Canadian Pac. R. Co.*, 106 Minn. 263, 119 N. W. 398. But, under the particular circumstances of the case, a construction company was held the agent of the railroad company so as to make the latter subject to suit and service upon the officers of the former good in a suit against the latter in *Buie v. Chicago & C. R. Co.*, 95 Tex. 51, 65 S. W. 27, 55 L. R. A. 861. See also *Lehigh Min. & C. Co. v. Kelly*, 160 U. S. 327, 16 Sup. Ct. 307, 40 L. ed. 444.

<sup>49</sup>*Berrian v. Methodist Soc. in New York*, 4 Abb. Prac. (N. Y.) 424. But it has been held that the corporation can not question that the service was on a proper agent where its general counsel had stated to plaintiff's counsel that such agent



upon whom to serve process, in the absence of any statutory provision designating the officer or agent upon whom service may be made.<sup>50</sup> But where there is a general statute providing for the service of process upon corporate agents, and there are no special provisions relative to service upon foreign corporations, such corporations are usually within the operation of the general statute.<sup>51</sup>

**§ 717 (621a). Resident agent—Rule in federal courts.**—Most of the states have statutes regulating the method of serving foreign corporations with process. These statutes usually require that foreign railroad or other corporations acting within their jurisdiction shall keep specified agents therein who are fully authorized to accept service of process.<sup>53</sup> Where such is the

was authorized to accept service. *Taylor & Co. v. Adams Express Co.*, 71 N. J. L. 523, 59 Atl. 10.

<sup>50</sup> *St. Clair v. Cox*, 106 U. S. 350, 355, 1 Sup. Ct. 354, 27 L. ed. 222; *Weight v. Liverpool & Co. Ins. Co.*, 30 La. Ann. 1186; *Newby v. Van Oppen*, L. R. 7 Q. B. 293; *New York & Co. v. Purdy*, 18 Barb. (N. Y.) 574. See generally *Whites' Supp.* (8 *Thomp. Corp.*), § 6759.

<sup>51</sup> *Midland Pac. R. Co. v. McDermid*, 91 Ill. 170; *Hannibal & Co. v. Crane*, 102 Ill. 249; *Chicago & Co. v. Manning*, 23 Nebr. 552, 37 N. W. 462. But a ticket agent of a local railway company, though he sells through tickets, also over a foreign line, is not necessarily a ticket agent of such foreign line under a statute authorizing service on a ticket agent of a foreign line in the county. *Slaughter v. Canadian Pac. R. Co.*, 106 Minn. 263, 119 N. W. 398. Compare *Hillary v. Great Northern R. Co.*, 64 Minn. 361, 67 N. W. 80, 32 L. R. A. 448.

<sup>53</sup> Such a regulation is within the constitutional power of a state. *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404, 15 L. ed. 451; *Hannibal & Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Gibson v. Manufacturers' & Co.*, 114 Mass. 81, 10 N. E. 729; 1 *Elliott Gen. Prac.*, § 359, and numerous authorities there cited. See also ante, § 33; *Brown-Ketcham Iron Works v. George B. Swift Co.*, 53 Ind. App. 630, 100 N. E. 584, 860; *Whitehurst v. Kerr*, 153 N. Car. 76, 68 S. E. 913. But it is held that the Idaho statute does not apply to railroad companies. *Boyer v. Northern Pac. R. Co.*, 8 Idaho 74, 66 Pac. 826, 70 L. R. A. 691, and note on the general subject. A corporation which does business in a state whose general laws prescribe a certain method of serving process upon foreign corporations will be held to have submitted to the provisions of the law. *Weymouth v. Washington & Co. R. Co.*, 1 *McArthur* (D. C.) 19. As to who is such an agent

case service upon such agent is sufficient to support jurisdiction in an action against a foreign corporation either in the state courts, or,<sup>54</sup> when not inconsistent with the acts of congress, in the federal court sitting in such state.<sup>55</sup> If no agent is designated to receive service of process, as required by law, service may be made upon a managing agent as at common law.<sup>56</sup> Where foreign corporations engaged in business in a state whose law provides that they may be summoned by process served upon an agent in charge of their business, it was held that they were "found" in the district in which such agent is doing business

within the meaning of such statutes, see *McSwain v. Adams Grain Co.*, 93 S. Car. 103, 76 S. E. 117, Ann. Cas. 1914D, 981, and cases there cited in note. Some cases hold that a mere solicitor of railroad business is not such an agent. *Booz v. Texas &c. R. Co.*, 250 Ill. 376, 95 N. E. 460; *Arrow Lumber &c. Co. v. Union Pac. R. Co.*, 53 Wash. 629, 102 Pac. 650. But other decisions are to the effect that he is. *Davis v. Jacksonville &c. R. Co.*, 126 Mo. 69, 28 S. W. 965; *Missouri &c. R. Co. v. Demere* (Tex. Civ. App.), 145 S. W. 623.

<sup>54</sup> *Reyer v. Odd Fellows &c. Assn.*, 157 Mass. 367, 32 N. E. 469, 34 Am. St. 288; *Chicago &c. R. Co. v. Walker*, 9 Lea (Tenn.) 475; *Shane v. Mexican Internat. R. Co.*, 8 Tex. Civ. App. 441, 28 S. W. 456. See also as to the effect that the company is estopped from setting up its failure to comply with the law, *Fisk v. Chicago &c. R. Co.*, 53 Barb. (N. Y.) 513; *Ehrman v. Teutonic &c. Co.*, 1 Fed. 471; *American &c. Co. v. Lea*, 56 Ark. 539, 20 S. W. 416. As to effect of failure of state agent to receive service, see Na-

tional Surety Co. v. State, 120 Fed. 593, 61 L. R. A. 394.

<sup>55</sup> *Schollenberger, Ex parte*, 96 U. S. 369, 24 L. ed. 853; *Barrow S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. ed. 964; *Van Dresser v. Oregon R. &c. Co.*, 48 Fed. 205.

<sup>56</sup> *State v. Pennsylvania R. Co.*, 42 N. J. L. 490; *New York &c. R. Co. v. Purdy*, 18 Barb. (N. Y.) 574; *Thomas v. Placerville &c. Mining Co.*, 65 Cal. 600. And a statute authorizing service on certain designated agents has been held not to be exclusive. *Holmes Church v. Metropolitan &c. Assn.*, 12 Cal. App. 445, 107 Pac. 633; *Sommerville Lumber Co. v. Mackres*, 86 Vt. 466, 85 Atl. 977; *Barrett Mfg. Co. v. Kennedy*, 73 Wash. 503, 131 Pac. 1161. The statutes of some of the states require service upon a "managing agent" within the jurisdiction. There is considerable conflict in the cases as to what constitutes a managing agent. The superintendent and general manager of a foreign corporation owning a road within the state are held to be such agents. *Bank of Commerce v. Rutland &c. R. Co.*,

within the meaning of a former act of congress, and that service of process upon such an agent would confer jurisdiction upon the United States courts, to the same extent that the state courts would acquire jurisdiction by a similar service of process.<sup>57</sup> But the act of August 13, 1888, has changed this rule by providing that "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits

10 How. Prac. (N. Y.) 1. So of the vice-president and general superintendent. *Norfolk &c. R. Co., v. Cottrell*, 83 Va. 512, 3 S. E. 123. Or, a general passenger agent or other person having general control of a particular department or branch of the business. *Tuchband v. Chicago &c. R. Co.*, 115 N. Y. 437, 22 N. E. 360. But see *Maxwell v. Atchison &c. R. Co.*, 34 Fed. 286. In Ohio it seems that a suit in personam can not be maintained against a foreign corporation unless it has a managing agent within the state. *Barney v. New Albany &c. R. Co.*, 1 Handy (Ohio) 571. Ticket sellers have been held not to be managing agents. *Doty v. Michigan Cent. R. Co.*, 8 Abb. Prac. (N. Y.) 427; *Mackereth v. Glasgow &c. R. Co.*, L. R. 8 Exch. 149. But see *Smith v. Chicago &c. R. Co.*, 60 Iowa 512, 15 N. W. 303; *Tuchband v. Chicago &c. R. Co.*, 115 N. Y. 440, 22 N. E. 360; *Flynn v. Hudson River R. Co.*, 6 How. Prac. (N. Y.) 308; *Brown v. Chicago &c. R. Co.*, 12 N. Dak. 61, 95 N. W. 153, 102 Am. St. 364 (station agent is); *Missouri Pac. R. Co. v. Collier*, 62 Tex. 318, and a baggage master is not. See further on this subject, 1 Elliott Gen. Prac., § 359, *Whites' Supp. Thomp Corp.*, § 6762, and note to *Hampson v.*

*Weare*, 66 Am. Dec. 116, 120. See also *New York &c. R. Co. v. Fremont &c. R. Co.*, 66 Nebr. 159, 92 N. W. 131, 59 L. R. A. 939, and note; *Brown v. Chicago &c. R. Co.*, 12 N. Dak. 61, 95 N. W. 153, 102 Am. St. 561, and note to *Abbeville &c. Power Co. v. Western &c. Co.*, 85 Am. St. 930-935.

<sup>57</sup> *Schollenberger, Ex parte*, 96 U. S. 369, 24 L. ed. 853; *McCoy v. Cincinnati &c. R. Co.*, 13 Fed. 3; *Lung Chung v. Northern Pac. R. Co.*, 19 Fed. 254; *Block v. Atchison &c. R. Co.*, 21 Fed. 529; *Van Dresser v. Oregon R. &c. Co.*, 48 Fed. 202. In this latter case it was held that a foreign railroad company which had formed a combination with other lines extending into the state of Oregon, and which, through its agents was engaged in making contracts in that state for the carriage of passengers and freight over such connecting lines and its own road was bound by a service of summons upon the agent through whom such contracts were made. But see *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. ed. 222. In *Globe Accident Ins. Co. v. Reid*, 19 Ind. App. 203, 49 N. E. 291, 292 (citing text) it is held that the corporation is "found" in the state where it has an agent and is doing business and

shall be brought only in the district of the residence of either the plaintiff or defendant.<sup>58</sup>

**§ 718 (621b).<sup>59</sup> Agent need not reside in state—Agent casually in state.**—It is not necessary that the officer or agent upon whom process is served shall reside within the jurisdiction, if he has the control of the business of the corporation at a particular place therein, at which his official residence as an officer of the corporation is established.<sup>60</sup> On the other hand, service upon an officer or agent casually within the state, when he is not there in the performance of the duties of his office, and is not authorized in any way to submit the corporation to the jurisdiction of the courts, is not such service as will bind a foreign corporation, which has no office and transacts no business within the state.<sup>61</sup> Thus, in a recent case, where a director was casu-

is sued. See *Eel River R. Co. v. State*, 143 Ind. 231, 42 N. E. 617. See also *Buie v. Chicago & C. R. Co.*, 95 Tex. 51, 65 S. W. 27, 55 L. R. A. 861.

<sup>58</sup> *McCormick & Co. v. Walthers*, 134 U. S. 41, 10 Sup. Ct. 485, 33 L. ed. 833; *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. ed. 768; *Construed in Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. ed. 942. See post, § 720. Also *Green v. Chicago & C. R. Co.*, 205 U. S. 530, 27 Sup. Ct. 595; *Great Southern & Co. v. Jones*, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. ed. 842; *Wells Co. v. Gastonia & C. Co.*, 198 U. S. 177, 25 Sup. Ct. 640, 49 L. ed. 1003; *St. Louis & C. R. Co. v. Alexander*, 227 U. S. 218, 57 L. ed. 486, 33 Sup. Ct. 245; *Hagstoz v. Mutual L. Ins. Co.*, 179 Fed. 569; *Twin Lakes Land & C. Co. v. Dohner*, 242 Fed. 399; *Albert v. Bascom*, 245 Fed. 149; *Rush v. Foos Mfg Co.*, 20 Ind. App. 515, 51

N. E. 143, 147. Privilege may be waived. *Horn v. Pere Marquette R. Co.*, 151 Fed. 627; *Pennsylvania R. Co. v. Swift & C. Co.*, 242 Fed. 92.

<sup>59</sup> Part of this section was part of § 621 in the first edition.

<sup>60</sup> *Porter v. Chicago & C. R. Co.*, 1 Nebr. 14; *Governor v. Raleigh & C. R. Co.*, 3 Ired. Eq. (N. Car.) 471. See also *Premo & C. Mfg. Co. v. Jersey & C. Co.*, 200 Fed. 352, 43 L. R. A. (N. S.) 1015 (or if he is in the state representing the corporation in regard to the particular contract on which the action is brought).

<sup>61</sup> *Fitzgerald & C. Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 39, 34 L. ed. 608; *Goldey v. Morning News*, 42 Fed. 112, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. ed. 517 (on appeal); *Ostrander v. Deerfield Lumber Co.*, 206 Fed. 540; *Dallas v. Atlantic & C. R. Co.*, 2 McArthur (D. C.) 146; *Midland Pac. R. Co. v. McDermid*, 91 Ill. 170; *Edwards v. Schillinger*, 245 Ill. 231,

ally within the state for a few days, but the corporation did no business there and had no property within the state, service on such director was held insufficient by the supreme court of the United States.<sup>62</sup>

91 N. E. 1048, 33 L. R. A. (N. S.) 895, 137 Am. St. 308; *Kendall v. Orange Judd Co.*, 118 Minn. 1, 136 N. W. 291; *Newell v. Great Western R. Co.*, 19 Mich. 336; *Latimer v. Union Pac. R. Co.*, 43 Mo. 105, 97 Am. Dec. 378; *Barnes v. Mobile & C. R. Co.*, 12 Hun (N. Y.) 126; *Phillips v. Burlington Library Co.*, 141 Pa. St. 462, 21 Atl. 640. But see *Schickle & Co. v. Wiley & Co.*, 61 Mich. 226, 1 Am. St. 571; *Klopp v. Creston & Co.*, 34 Nebr. 808, 52 N. W. 819, 33 Am. St. 666; *Pope v. Terre Haute & Co.*, 87 N. Y. 137; *Smith v. Western Pac. R. Co.*, 154 App. Div. 130, 139 N. Y. S. 129; *American Food & Co. v. American Milling Co.*, 151 Wis. 385, 138 N. W. 1123. See note in 70 L. R. A. 513, 532. In *Chicago & C. R. Co. v. Walker*, 9 Lea (Tenn.) 475, it was held that service upon the "Southern passenger agent" of defendant company in an action for breach of a contract entered into with him, was invalid because of his lack of authority to receive service of process. The agent had no authority to sell tickets for his principal, and had no regular place of business. His business was to travel over the territory south of the Ohio river, and over Virginia, Arkansas and Texas, and induce travelers to take a route which led over his road, to assist them in checking their baggage and to conduct them to the nearest ticket office where a ticket over his road

could be purchased. But see *Van Dresser v. Oregon R. & C. Co.*, 48 Fed. 202. In *United States Graphite Co. v. Pacific & C. Co.*, 68 Fed. 442, the rule stated in the text was held applicable although the officer served was in the state on business of the corporation, which, however, had no office or agency there. See also *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. ed. 517; *Clews v. Woodstock & C. Co.*, 44 Fed. 31; *Fidelity Trust & C. Co. v. Mobile St. R. Co.*, 53 Fed. 850; *Eirich v. Donnelly & Co.*, 104 Fed. 1; *Contra, Gravely v. Southern & C. Co.*, 47 La. Ann. 389, 16 So. 866; *Schickle & Co. v. Wiley Const. Co.*, 61 Mich. 226, 28 N. W. 77, 1 Am. St. 571; *Pope v. Terre Haute & Co.*, 87 N. Y. 137. And see *Houston v. Filer & Co.*, 85 Fed. 757, and *Brush Creek Coal & C. Co. v. Morgan & Co.*, 136 Fed. 505.

<sup>62</sup> *Remington v. Central Pac. R. Co.*, 198 U. S. 95, 49 L. ed. 959, 25 Sup. Ct. 577. Citing *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. ed. 1113; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. ed. 1122. But in another recent case it is held that service on a general officer who voluntarily comes into the state to adjust a difference between the corporation and the plaintiff with reference to the subject-matter of the suit, is sufficient. *Brush Creek Coal & C. Co. v. Mor-*

§ 719 (622). **Return of service.**—The return of service upon an officer of a corporation should show his official position in such a manner as to make it clear that the service was upon the officer or agent designated by the statute, and that he was served in his official or representative character.<sup>63</sup> So, where the statute permits service upon a subordinate officer only when the president or highest officer is absent or a non-resident, the return of service upon the subordinate should show the absence or non-residence of the president or chief officer.<sup>64</sup> A return that the summons was served on the "general manager" of the defendant corporation, naming him, was held insufficient where the statute required that the service should be upon its "president or other principal officer."<sup>65</sup> And a return of service "personally on S. C. Hoge, agent in charge of the Central of Georgia Railway Company," has been held not sufficient to show service upon the company.<sup>66</sup> But a service may be good when the return shows that the proper officer was served, although the writ merely names the defendant company without designating the officer upon whom it should be served.<sup>67</sup>

gan &c. Co., 136 Fed. 505. But see Buffalo &c. Brick Co. v. American &c. Co., 141 Fed. 211.

<sup>63</sup> Oxford Iron Co. v. Spradley, 42 Ala. 24; O'Brien v. Shaw's Flat &c. Co., 10 Cal. 343; Jones v. Hartford Ins. Co., 88 N. Car. 499; Powder Co. v. Oakdale &c. Co., 14 Phila. (Pa.) 166; 1 Elliott Gen. Prac. § 359. See also Schlesinger v. Modern Samaritan, 121 Minn. 145, 140 N. W. 1027.

<sup>64</sup> Miller v. Norfolk &c. R. Co., 41 Fed. 431; St. Louis &c. R. Co. v. Dorsey, 47 Ill. 288; Toledo &c. R. Co. v. Owen, 43 Ind. 405; Hoen v. Atlantic &c. R. Co., 64 Mo. 561. See also Seacoast Lumber Co. v. R. J. Camp Lumber Co., 63 Fla. 604, 59 So. 13. But compare Kansas City &c. R. Co. v. Daughtry, 138 U. S.

298, 11 Sup. Ct. 306, 34 L. ed. 963. As to what is sufficient in this regard, see Colorado &c. Co. v. Lombard Investment Co., 66 Kans. 251, 71 Pac. 584, 97 Am. St. 373; Chicago &c. Elec. Co. v. Congdon &c. Co., 111 Ill. 309; Western U. Tel. Co. v. Lindley, 62 Ind. 371; Cincinnati Hotel Co. v. Central Trust &c. Co., 11 Ohio Dec. (reprint) 255. See generally El Paso &c. R. Co. v. Kelly, 99 Tex. 87, 87 S. W. 660.

<sup>65</sup> Dale v. Blue Mountain &c. Co., 15 Pa. Co. Ct. 513.

<sup>66</sup> Burnett v. Central &c. R. Co., 117 Ga. 521, 43 S. E. 854, 97 Am. St. 175. The court regarded it as service upon Hoge in his individual capacity rather than upon the corporation. But see Keener v. Eagle Lake &c. Co., 110 Cal. 627, 43 Pac. 14.

<sup>67</sup> Illinois Steel Co. v. San An-

**§ 720 (623). Venue of actions against corporations.**—An action against a corporation for personal injuries or other trespass of a personal nature,<sup>68</sup> being of a transitory character, may usually be brought in any county in which service upon the corporation can be obtained.<sup>69</sup> But a statute which provides that an action shall be brought and tried in the county in which the defendant resides or is found applies to corporations

tonio &c. R. Co., 67 Fed. 561. See also for other returns held sufficient. *Kinsey v. Macon Lumber Co.*, 136 Ga. 369, 71 S. E. 675; *Stout v. Baltimore &c. R. Co.*, 64 W. Va. 502, 63 S. E. 317, 131 Am. St. 940; *Minneapolis Threshing Mach. Co. v. Ashauer*, 142 Wis. 646, 126 N. W. 113. It may be amended as a proper case. *Seaboard Air Line R. Co. v. Davis*, 13 Ga. App. 14, 78 S. E. 687; *Delaware Ins. Co. v. Hutto* (Tex. Civ. App.), 159 S. W. 73.

<sup>68</sup> *South Florida R. Co. v. Weese*, 32 Fla. 212; *Williams v. East Tennessee &c. R. Co.*, 90 Ga. 519, 16 S. E. 303; *Dave v. Morgan's Louisiana &c. R. Co.*, 46 La. Ann. 273, 14 So. 911; *Heiter v. East St. Louis Connecting R. Co.*, 53 Mo. App. 331; *Atchison &c. R. Co. v. Worley* (Tex. Civ. App.), 25 S. W. 478.

<sup>69</sup> The statutes of several of the states expressly provide that railroads may be sued in ordinary actions in any county of the state through which the road runs. *Williams v. East Tennessee &c. R. Co.*, 90 Ga. 519, 16 S. E. 303; *Georgia &c. R. Co. v. Bermefield*, 138 Ga. 670, 75 S. E. 981; *South Florida R. Co. v. Weese*, 32 Fla. 212, 13 So. 436; *Fisher v. Cleveland &c. R. Co.*, 169 Fed. 956 (if there is an agent

who can be served there). Wherever the company has an agent. *Schoch v. Winona &c. R. Co.*, 55 Minn. 479, 57 N. W. 208; *Atchison &c. R. Co. v. Worley* (Tex.), 25 S. W. 478; *Red River &c. R. Co. v. Blount*, 3 Tex. Civ. App. 282, 22 S. W. 930. See also note in 70 L. R. A. 691, et seq. It may usually be brought in the county in which the cause of action arose even though that may not be the principal place of business. *Cook v. W. S. Ray &c. Co.*, 159 Cal. 694, 115 Pac. 318; *Cunningham v. Klamath &c. R. Co.*, 54 Ore. 13, 101 Pac. 213. See also *Alabama Western R. Co. v. Wilson*, 1 Ala. App. 306, 55 So. 932; *Southern R. Co. v. Harrington*, 166 Ala. 630, 52 So. 57, 139 Am. St. 59; *Pietrarora v. New Jersey &c. R. Co.*, 197 N. Y. 434, 91 N. E. 120. A declaration against a railroad company which alleges that the defendant damaged plaintiffs by constructing a railroad upon their land in the county in which suit is brought, sufficiently shows that the railroad lies wholly or partly in that county to withstand a general demurrer for want of facts to constitute a cause of action. *East Georgia &c. R. Co. v. King*, 91 Ga. 519, 17 S. E. 939. As to what actions are transitory, see also *Hanna v. Grand Trunk R. Co.*,

as well as to natural persons.<sup>70</sup> As elsewhere shown, railroad companies are usually required to have an agent upon whom process can be served in each state, and are sometimes made, in effect, residents of each county through which their line runs and in which they have an agent for the purpose of suing or being sued,<sup>71</sup> although, when citizens of a foreign state and not of that where sued they cannot be prohibited from removing a cause to the federal courts under proper circumstances. But it has been held that such a company, incorporated in one state only, although it has a place of business in another state, cannot be sued in a United States circuit court of the latter state, which is in a different district from that in which the company is incorporated by a citizen of a third state,<sup>72</sup> although a suit between corporations organized in different states may be

41 Ill. App. 116; *Nonce v. Richmond &c. R. Co.*, 33 Fed. 429; *Heiter v. East St. Louis &c. R. Co.*, 53 Mo. App. 331; 1 Elliott Gen. Prac. § 253. As to mandamus see *Loraine v. Pittsburgh &c. R. Co.*, 205 Pa. St. 132, 54 Atl. 580, 61 L. R. A. 502 (holding that it will be in the county where the track in question is).

<sup>70</sup> *Holgate v. Oregon Pac. R. Co.*, 16 Ore. 123, 17 Pac. 859. See also *Sherrill v. Chesapeake &c. R. Co.*, 89 Ky. 302, 12 S. W. 465; *Boyer v. Northern Pac. R. Co.*, 8 Idaho 74, 166 Pac. 826, 70 L. R. A. 691, and note.

<sup>71</sup> See ante, § 33; *Bristol v. Chicago &c. R. Co.*, 15 Ill. 436; *Newberry v. Arkansas &c. R. Co.*, 52 Kans. 613, 35 Pac. 210; *Schoch v. Winona &c. R. Co.*, 55 Minn. 479, 57 N. W. 208; *Louisville &c. R. Co. v. Saucier (Miss.)*, 1 So. 511; *Slavens v. South Pac. R. Co.*, 51 Mo. 308, 310; *St. Louis &c. R. Co. v. Traweck*, 84 Tex. 65, 19 S. W. 370.

See also *Alabama &c. R. Co. v. Fulghum*, 87 Ga. 263, 13 S. E. 649.

<sup>72</sup> *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 36 L. ed. 768, 6 Lewis Am. R. & Corp. 357; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. ed. 943; *Campbell v. Duluth &c. R. Co.*, 50 Fed. 241. There are cases in the federal circuit courts to the contrary, but the first decision of the Supreme Court, *supra*, has settled the law upon the subject, except as changed, if at all, by later Acts of Congress or war orders. But see *Hohorst, In re*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. ed. 1211, holding that a foreign corporation might be sued by a citizen of a state in any district thereof in which valid service could be had. See also *Barrow &c. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. ed. 964. And see as to waiver, *Interior, &c., Constr. Co. v. Gibney*, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. ed. 401; *Citizens' &c. Co. v. Union &c. Co.*, 106 Fed. 97. As



brought in the district in which the plaintiff is incorporated as well as that in which the defendant is incorporated, when the jurisdiction is founded solely on diverse citizenship under the act of congress of August 13, 1888.<sup>73</sup> A state statute which provides that suits against a railroad company may be brought in any county into which its line extends is subordinate, in so far as the federal courts are concerned, to the act of congress above referred to, and where another statute of the state declares that "the public office of a railroad corporation shall be considered the domicile of such corporation," a domestic railroad company of such state is an "inhabitant" of the district in which such public office is located, and cannot be sued in a circuit court of the United States in another district through which its road extends.<sup>74</sup> In some jurisdictions, where the statute does not, in effect, make railroad companies residents of the different counties through which their lines run and in which they have agents, it is held that the residence of a railroad company will be presumed to be in the county in which its principal office is located, and that the venue should be laid in that county.<sup>75</sup>

to right of non-resident to sue non-resident corporation in state court, where cause of action is transitory, see *Reeves v. Southern R. Co.*, 121 Ga. 561, 49 S. E. 674, 70 L. R. A. 513, and note. See also *Western v. Cassin Co.*, 206 N. Y. 506, 100 N. E. 488, Ann. Cas. 1914B, 377, and note.

<sup>73</sup> *N. K. Fairbank & Co. v. Cincinnati &c. R. Co.*, 54 Fed. 420; *St. Louis &c. R. Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. ed. 659, holding also that the objection to jurisdiction on this ground may be waived. See also *Pennsylvania R. Co. v. Swift &c. Co.*, 242 Fed. 92; *Twin Lakes Land &c. Co., v. Dohner*, 242 Fed. 399. See as to right of non-resident stockholder to sue in district where corporation was created, *Jellenik v. Huron &c. Co.*,

177 U. S. 1, 20 Sup. Ct. 559, 44 L. ed. 647.

<sup>74</sup> *Galveston &c. R. Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. ed. 248, 57 Am. & Eng. R. Cas. 71. See generally as to district in which suits must now be brought in federal court. *Western Union Tel. Co. v. Louisville & N. R. Co.*, 229 Fed. 234; *Rakauskas v. Erie R. Co.*, 237 Fed. 495. A suit against a carrier under federal control as a war measure, brought after promulgation of General Orders 18 and 18a, of the Director General, other than in a county or district in which the cause of action arose, or where plaintiff resided when it accrued, will be dismissed. *Cocker v. New York &c. R. Co.*, 253 Fed. 676.

<sup>75</sup> *Jenkins v. Stage Co.*, 22 Cal. 537; *Thorn v. Railroad Co.*, 26 N.

It was also held, in a recent case, that an action for personal injuries might be brought in the county in which the company had its principal office, although the injury was inflicted in another county in the same state, and although the statute provided that the company might be sued in the county in which the injury was inflicted.<sup>76</sup> And it has been held in Texas that a railroad company whose road extends into and is operated by it in Texas, may be there sued and served with process notwithstanding the cause of action arose in another state of which the plaintiff is a citizen.<sup>77</sup> Local actions, such as those involving the title or possession of land, or for injuries thereto must generally be brought in the county or district in which the land is situated,<sup>78</sup> but this subject is largely regulated by legislative enactments. Other questions as to the venue in actions against

J. L. 121; *Transportation Co. v. Scheu*, 19 N. Y. 408; *Pelton v. Transportation Co.*, 37 Ohio St. 450; *Railroad Co. v. Cooper*, 30 Vt. 476, 73 Am. Dec. 319. But, as a general rule, a transitory action against a non-resident may be brought in any county in which process can be served upon him. 1 Elliott Gen. Prac. § 254, and authorities there cited, in note 3, p. 313.

<sup>76</sup> The court regarded the statute as permissive and cumulative and not exclusive. *Williams v. East Tennessee &c. R. Co.*, 90 Ga. 519, 16 S. E. 303.

<sup>77</sup> *Missouri &c. R. Co. v. Kellerman* 39 Tex. Civ. App. 274, 87 S. W. 401. A general provision as to venue of actions against foreign corporations is held to relate to public service corporations as well as strictly private corporations. *Atchison &c. R. Co. v. Lambert*, 32 Okla. 665, 123 Pac. 428.

<sup>78</sup> See 1 Elliott Gen. Prac. § 252, and authorities there cited. Unless

otherwise provided by statute, the general rule is that an action is transitory "when the transaction out of which it grows, or the occurrence upon which it is founded, is one that might have taken place anywhere." 1 Elliott Gen. Prac. § 253, citing *Mostyn v. Fabrigas*, 1 Cowp. 161, 1 Smith Lead. Cases, 652. "Actions are deemed transitory when the transactions on which they are founded might have taken place anywhere, but are local where their cause is in its nature necessarily local." *Nonce v. Richmond &c. R. Co.*, 33 Fed. 429, 433, 434. For actions held local, see *East Tennessee &c. R. Co. v. Atlantic &c. R. Co.*, 49 Fed. 608 (bill for appointment of receiver held of a "local nature" within meaning of U. S. Rev. Stat. §§ 740, 742); *Cox v. St. Louis &c. R. Co.*, 55 Ark. 454, 18 S. W. 630 (suit to restrain company from removing earth from plaintiff's land); *Morris v. Missouri Pac. R. Co.*, 78 Tex. 17, 14 S. W. 228, 9 L.

consolidated corporations and in different kinds of suits and actions are discussed elsewhere, in connection with the particular cases in which they arise.<sup>79</sup> It may be well, however, in this connection, to call attention to a recent case decided by the supreme court of Indiana. A domestic railroad company had surrendered its property and franchise and ceased to do business, but, on quo warranto proceedings, the court held that its legal residence was in the county where its principal office was located when it ceased to do business; that the suit was properly instituted in that county but service might be had, under the statute, upon its agent in another county appointed to receive service, it having no office and no agent in the state except such agent who had been appointed by it for the purpose of receiving and accepting service.<sup>80</sup>

§ 721 (624). **Attachment.**—Jurisdiction over a corporation, to a limited extent at least, may sometimes be obtained by attachment or garnishment. These remedies or proceedings, however, are creatures of statute, and, as the statutory provisions vary in different states, we shall not attempt to treat the subject in detail, but it may be well to call attention to some rules of a general nature that are peculiarly applicable to railroad companies. Attachment and garnishment are usually auxiliary or provisional remedies and can only be pursued when authorized by statute and in conformity with the statutory provisions as to the procedure.<sup>81</sup> If personal service upon the company is

R. A. 349, 22 Am. St. 17 (action for flooding land, but the contrary is held in *Archibald v. Mississippi & C. R. Co.*, 66 Miss. 424, 6 So. 238); *Mississippi & C. R. Co. v. Ward*, 2 Black (U. S.) 485, 17 L. ed. 311; *Atkins v. Wabash & C. R. Co.*, 29 Fed. 161 (suit to foreclose mortgage); *Drinkhouse v. Spring Valley & C. Co.*, 80 Cal. 308, 22 Pac. 252; *Indiana & C. R. Co. v. Foster*, 107 Ind. 430, 8 N. E. 264 (action for damages to land by fire from locomotive);

*Du Breuil v. Pennsylvania Co.*, 130 Ind. 137, 29 N. E. 909; *Postal & C. Co. v. Norfolk & C. Co.*, 88 Va. 920, 14 S. E. 803.

<sup>79</sup> See generally Chapter III, Legal Status.

<sup>80</sup> *Eel River R. Co. v. State*, 155 Ind. 433, 58 N. E. 388.

<sup>81</sup> See generally *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178, and authorities cited in notes and briefs; also notes in 19 L. R. A. 577, 67

properly obtained in the main action a personal judgment may be rendered against it in a proper case,<sup>82</sup> but if it is a non-resident and does not appear or otherwise waive service, no personal judgment can be rendered against it.<sup>83</sup> So far as the property itself is concerned, however, jurisdiction is generally obtained, in case of a non-resident, by its seizure and by giving notice by publication in compliance with the statute.<sup>84</sup> But if no property is found and no personal service is had, no judgment can be rendered against a non-resident defendant who does not appear or waive service.<sup>85</sup> As a general rule any property subject to execution may be attached, and engines and cars not in actual use are usually regarded as personal property liable

L. R. A. 209, and 94 Am. St. 552. For instances in which attachment was held to lie against railroad companies, see *Seeley v. Missouri &c. R. Co.*, 39 Fed. 252; *Breed v. Mitchell*, 48 Ga. 533; *South Carolina R. Co. v. People's Sav. Inst.*, 64 Ga. 18, 12 Am. & Eng. R. Cas. 432; *Fithian v. New York &c. R. Co.*, 31 Pa. St. 114; *Curtis v. Bradford*, 33 Wis. 190; *Kitchen v. Chatham &c. R. Co.*, 17 New Bruns. 215. For instances in which it was held that attachment would not lie, see *Central R. &c. Co. v. Georgia &c. Co.*, 32 S. Car. 319, 11 S. E. 192; *Martin v. Mobile &c. R. Co.*, 7 Bush (Ky.) 116; *Farnsworth v. Terre Haute &c. R. Co.*, 29 Mo. 75; *Phillipsburgh Bank v. Lackawanna R. Co.*, 27 N. J. L. 206.

<sup>82</sup> *Mahany v. Kephart*, 15 W. Va. 609.

<sup>83</sup> 1 Elliott Gen. Prac. §§ 243, 378; *Cooper v. Reynolds*, 10 Wall. (U. S.) 308, 19 L. ed. 931; *Eastman v. Wadleigh*, 65 Maine 251, 20 Am. Rep. 695; *Eliot v. McCormick*, 144 Mass. 10, 10 N. E. 705. In Michigan it is held that a resident injured outside

the state while a passenger on the train of a foreign railroad may bring an action and attach property of such railroad in Michigan. *Daniels v. Detroit &c. R. Co.*, 163 Mich. 468, 128 N. W. 797.

<sup>84</sup> *Cooper v. Reynolds*, 10 Wall. (U. S.) 308, 19 L. ed. 931; *King v. Vance*, 46 Ind. 246; *Neufelder v. German American Ins. Co.*, 6 Wash. 336, 33 Pac. 870, 22 L. R. A. 287, 290, 36 Am. St. 166; 1 Elliott Gen. Prac. §§ 243, 378.

<sup>85</sup> *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Clymore v. Williams*, 77 Ill. 618; *Cooper v. Smith*, 25 Iowa 269; *Bruce v. Cloutman*, 45 N. H. 37, 84 Am. Dec. 111. See also *Kirk v. United States*, 137 Fed. 753, 755; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 194, 209, 13 Sup. Ct. 859, 37 L. ed. 699; *New Mexico v. Baker*, 196 U. S. 432, 25 Sup. Ct. 375, 49 L. ed. 540; see generally note in 67 L. R. A. 209, and note in 69 Am. St. 115, et seq. A debt, at least when payable in such state, may be considered property or its equivalent. See also *De Field v.*

to attachment.<sup>86</sup> But it has been held by some of the courts that a railroad car of a foreign company sent into a state with freight to be delivered in such state and reloaded and sent back to the foreign state from which it came in the customary and usual manner of transacting interstate commerce cannot be attached in the state to which it so came to be unloaded and reloaded.<sup>87</sup> There are decisions of state courts to the contrary, however, and the Supreme Court of the United States has recently settled the question by holding that such cars are subject to attachment and are not immune from judicial process by reason of the interstate commerce law or the Act of Congress securing continuity of transportation.<sup>88</sup>

Harding Dredge Co., 180 Mo. App. 563, 167 S. W. 593.

<sup>86</sup> Hall v. Carney, 140 Mass. 131, 3 N. E. 14; Boston &c. R. Co. v. Gilmore R. Co., 37 N. H. 410, 72 Am. Dec. 336; De Rochemont v. New York Cent. &c. R. Co., 75 N. H. 158, 71 Atl. 868, 139 Am. St. 673, 29 L. R. A. (N. S.) 529; Dinsmore v. Racine &c. R. Co., 12 Wis. 725. See also brief in Wall v. Norfolk &c. R. Co., 52 W. Va. 485, 44 S. E. 294, 64 L. R. A. 501, 504, 94 Am. St. 948.

<sup>87</sup> Connery v. Quincy &c. R. Co., 92 Minn. 20, 99 N. W. 365, 64 L. R. A. 624, 104 Am. St. 659; Wall v. Norfolk &c. R. Co., 52 W. Va. 485, 44 S. E. 294, 64 L. R. A. 501, 94 Am. St. 948. The latter case also holds that another company having such car in its possession and so carrying on interstate commerce is not liable to garnishment by reason of its possession received against the company against which an attachment was issued. See also Michigan Cent. R. Co. v. Chicago &c. R. Co., 1 Ill. App. 399; Seibels v. Northern &c. R. Co., 80 S. Car. 133, 61 S. E. 435, 16 L. R.

A. (N. S.) 1026, Chicago &c. R. Co. v. Forest County, 95 Wis. 80, 70 N. W. 77. These are important decisions and are based largely upon public policy and the commerce clause in the federal constitution in connection with the interstate commerce law. But the question now seems to be settled by the decision of the Supreme Court of the United States cited in the next following note.

<sup>88</sup> Davis v. Cleveland &c. R. Co., 217 U. S. 157, 54 L. ed. 708, 27 L. R. A. (N. S.) 823; De Rochemont v. New York &c. R. Co., 75 N. H. 158, 71 Atl. 868, 139 Am. St. 673, 29 L. R. A. (N. S.) 529; Southern Flour &c. Co. v. Northern Pac. R. Co., 127 Ga. 626, 56 S. E. 742, 9 L. R. A. (N. S.) 853, 119 Am. St. 356; Southern R. Co. v. Brown, 131 Ga. 245, 62 S. E. 177. See also Humphreys v. Hopkins, 81 Cal. 551, 22 Pac. 892, 6 L. R. A. 792, 15 Am. St. 76. Compare Koontz v. Baltimore &c. R. Co., 220 Mass. 285, 107 N. E. 973 (apparently approving this doctrine, but holding attachment not permissible in that case under the par-

§ 722 (624). **Garnishment.**—A railroad company may be subject to garnishment the same as a natural person, although not specially mentioned in the statute,<sup>89</sup> but it has been held in Michigan that a statutory provision for the service of process in suits against foreign corporations does not apply to the service of a writ of garnishment.<sup>90</sup> One or two courts have held that the same consideration of public policy which exempt public officers in the discharge of their duties from garnishment apply to common carriers,<sup>91</sup> and there may be cases in which the garnishment would so interfere with the duties of the company to the public that the courts should refuse to permit the garnishment to be enforced, as in the cases cited, but ordinarily, if the statute authorizing the garnishment applies to the case, it would seem to be the duty of the courts to enforce it. Many authorities hold, however, that a non-resident corporation cannot, ordinarily, be held accountable as garnishee unless it has property of the

ticular arrangement between the companies). Goods in transit in the hands of a carrier may be attached in a proper case. *Clifford v. Brockton &c. Co.*, 214 Mass. 466, 101 N. E. 1092, Ann. Cas. 1914B, 908, and other cases cited in note. See also *Cavanaugh v. Chicago &c. R. Co.*, 75 N. H. 243, 72 Atl. 694. See also as to right to attach shares of a non-resident at location of corporation. *Barber v. Morgan*, 84 Conn. 618, 80 Atl. 191, Ann. Cas. 1914D, 951, and cases there cited in note. Cars in interstate commerce may be attached under a state law and a state law prohibiting foreign attachment of goods shipped under a negotiable bill of lading does not interfere with interstate commerce. *Stanford Rolling Mills Co. v. Erie R. Co.*, 257 Pa. 507, 101 Atl. 823.

<sup>89</sup> *Hannibal &c. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Taylor v. Burlington &c. R. Co.*, 5 Iowa 114;

*Pennsylvania R. Co. v. Peoples*, 31 Ohio St. 537; *Hughes v. Oregonian R. Co.*, 11 Ore. 158, 2 Pac. 94; *Baltimore &c. R. Co. v. Gallahue*, 12 Grat. (Va.) 655, 65 Am. Dec. 254. A foreign corporation doing business in the state was held subject to garnishment in the first case above cited. So in *Weed Sewing Machine Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821; *Fairbank v. Cincinnati &c. R. Co.*, 54 Fed. 420; *Burlington &c. R. Co. v. Thompson*, 31 Kans. 180, 1 Pac. 622, 47 Am. Rep. 497, 16 Am. & Eng. R. Cas. 480; *Barr v. King*, 96 Pa. St. 485; *Carson v. Memphis &c. R. Co.*, 88 Tenn. 646, 13 S. W. 588, 17 Am. St. 921.

<sup>90</sup> *Milwaukee &c. R. Co. v. Brevoort*, 73 Mich. 155, 41 N. W. 215; *First Nat. Bank v. Burch*, 76 Mich. 608, 43 N. W. 453.

<sup>91</sup> *Michigan Cent. R. Co. v. Chicago &c. R. Co.*, 1 Ill. App. 399. See also *Holland v. Leslie*, 2 Harr.

defendant within the state in which the proceedings are had, or is bound to pay him money or deliver him goods in that state.<sup>92</sup> Thus, it has been held that a company of one state operating a road running into another state as lessee cannot be charged as garnishee in the latter state in an action for a debt payable in the former state, in which the plaintiff and defendant both reside.<sup>93</sup> But there is sharp conflict among the authorities and we shall not attempt to reconcile or review the conflicting authorities upon this general subject as to the situs of the debt or the jurisdiction of the court.<sup>94</sup> It is held in Illinois that a railroad company doing business in that and another state may be garnished in Illinois by a resident in the other state for a debt owing by the company to another resident of that state,

(Del.) 306, and authorities cited in note 87, *supra*.

<sup>92</sup> *Louisville &c. R. Co. v. Dooley*, 78 Ala. 524; *Schmidlapp v. La-Confiance Ins. Co.*, 71 Ga. 246; *Missouri Pac. R. Co. v. Sharitt*, 43 Kans. 375, 23 Pac. 430, 8 L. R. A. 385, 19 Am. St. 143, 44 Am. & Eng. R. Cas. 657; *Todd v. Missouri Pac. R. Co.*, 33 Mo. App. 110; *Wright v. Chicago &c. R. Co.*, 19 Nebr. 175, 27 N. W. 90, 56 Am. Rep. 747; and authorities cited by Valentine, J.; *Young v. Ross*, 31 N. H. 201; *Buchanan v. Hunt*, 98 N. E. 560; *Cronin v. Foster*, 13 R. I. 196. See generally *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209, 33 N. E. 938, 20 L. R. A. 118, 34 Am. St. 448; *Pennsylvania R. Co. v. Pennock*, 51 Pa. St. 244; *Bates v. Chicago &c. R. Co.*, 60 Wis. 296, 19 N. W. 72, 50 Am. Rep. 369. See also note to *Illinois Cent. R. Co. v. Smith*, 70 Miss. 344, 12 So. 461, 19 L. R. A. 577, 35 Am. St. 651; *Central Trust Co. v. Chattanooga &c. R. Co.*, 68 Fed. 685.

<sup>93</sup> *Gold v. Housatonic R. Co.*, 1 Gray (Mass.) 424; *Towle v. Wilder*,

57 Vt. 622. But see *supra*, note 1; and see *Georgia &c. R. Co. v. Stollenwerck*, 122 Ala. 539, 25 So. 258.

<sup>94</sup> To the effect that it is upon the control and jurisdiction of the debtor rather than the situs of the debt, see *Chicago &c. R. Co. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. ed. 1144; *King v. Cross*, 175 U. S. 396, 20 Sup. Ct. 131, 44 L. ed. 211; *Mooney v. Buford &c. Co.*, 72 Fed. 32; *Tootle v. Coleman*, 107 Fed. 41, 57 L. R. A. 120; *Rothschild v. Knight*, 176 Mass. 48, 57 N. E. 337; *Wyeth v. Hardware &c. Co.*, 127 Mo. 242, 29 S. W. 1010, 27 L. R. A. 651, 48 Am. St. 626. But compare *Louisville &c. R. Co. v. Nash*, 118 Ala. 477, 23 So. 825, 41 L. R. A. 331, 72 Am. St. 181; *Central R. Co. v. Brinson*, 109 Ga. 354, 34 S. E. 597, 77 Am. St. 382; *Bullard v. Chaffee*, 61 Nebr. 83, 84 N. W. 604, 51 L. R. A. 715, holding otherwise if the debt is not payable in such jurisdiction. The court also seems to have laid some stress upon this alleged distinction in the case first cited from the reports of the Su-

and that the motives of the plaintiff are immaterial.<sup>95</sup> In Tennessee it has been held that a company which owns and operates a continuous line through that and several other states, having a separate charter from each of them, is a resident and domestic corporation of Tennessee, and subject as such to garnishment therein, by a citizen thereof, although the claim sought to be reached was contracted in one of the other states and is due to a non-resident.<sup>96</sup>

**§ 723 (625). Duty and liability of garnishee.**—If the corporation is properly served as garnishee it must appear and answer, disclosing the facts. It answers, ordinarily, under its corporate seal, by its proper officer or agent.<sup>97</sup> If the principal defendant

preme Court of the United States. But the later cases of *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. ed. 1023, and *Louisville &c. R. Co. v. Deer*, 200 U. S. 176, 26 Sup. Ct. 207, 50 L. ed. 426, seem to settle the rule that this makes no difference. The Supreme Court of Mississippi, in *Southern Pac. R. Co. v. A. J. Lyon Co.*, 99 Miss. 186, 54 So. 728, Ann. Cas. 1913D, 800, has recently followed the decisions of the Supreme Court of the United States and overruled *Illinois Cent. R. Co. v. Smith*, 70 Miss. 344, 12 So. 461, 19 L. R. A. 577, 35 Am. St. 651. See generally *Goodwin v. Clayter*, 137 N. Car. 224, 49 S. E. 173, 67 L. R. A. 209 and note, 107 Am. St. 479, and *National Bank v. Furtick*, 2 Marv. (Del.) 35, 42 Atl. 479, 44 L. R. A. 115, 69 Am. St. 99 and note. The authorities are so fully reviewed and the question is so carefully considered in the notes referred to that it is unnecessary to discuss it at length here. Compare also *St. Louis &c. R. Co. v. Vanderberg*, 91 Ark. 252, 120 S. W. 993.

<sup>95</sup> *Wabash R. Co. v. Dougan*, 142 Ill. 248, 31 N. E. 594, 34 Am. St. 74. See also *Drake v. Lake Shore &c. R. Co.*, 69 Mich. 168, 37 N. W. 70, 13 Am. St. 382; *Pomeroy v. Rand &c. Co.*, 157 Ill. 176, 41 N. E. 636; *Lancashire Ins. Co. v. Corbett*, 165 Ill. 592, 46 N. E. 631, 36 L. R. A. 640, 56 Am. St. 275; *Stevens v. Brown*, 20 W. Va. 450. But see post, § 725.

<sup>96</sup> *Mobile &c. R. Co. v. Barnhill*, 91 Tenn. 395, 19 S. W. 21, 50 Am. & Eng. R. Cas. 646. Compare also *St. Louis &c. R. Co. v. Vanderberg*, 91 Ark. 252, 120 S. W. 993. But see *Wells v. East Tenn. &c. R. Co.*, 74 Ga. 548.

<sup>97</sup> *Oliver v. Chicago &c. R. Co.*, 17 Ill. 587; *Baltimore &c. R. Co. v. Gallahue*, 12 Grat. (Va.) 655, 65 Am. Dec. 254. See also *International Seal Co. v. Beyer*, 33 App. D. C. 172. The answer must usually be verified by the proper officer. *Chicago R. I. &c. R. Co. v. Mason*, 11 Ill. App. 525; *Memphis &c. R. Co. v. Whorley*, 74 Ala. 264. But the affidavit need not be made by the same



has not been personally served and does not appear it is generally the duty of the garnishee, which it owes to the defendant, to question the jurisdiction of the court, if it has none and this it should always do in case of doubt, for its own protection.<sup>98</sup> It has also been held that the garnishee must present the question of the defendant's right to exemption,<sup>99</sup> and this we think, is the true rule where wages are garnished, which are expressly exempted therefrom by statute, and, possibly, in all cases where the garnishee has knowledge of the right of the defendant to exemption, but, in the absence of knowledge, where such a statute does not exist or does not apply, we think the garnishee is not necessarily bound to raise the question. Indeed as the right to exemption is generally considered a mere personal privilege, it would seem that, upon principle, the garnishee can neither insist upon such a defense, where the principal defendant waives it, nor be held liable for not making it, in the absence of a special statute.<sup>1</sup> The garnishment usually binds the garnishee, as to the debt or property in his hands, from the date of the service of the writ,<sup>2</sup> and his liability is ordinarily determined by his

officer upon whom the writ was served, and it has been held that it may be made by any officer having knowledge of the facts. *Duke v. Rhode Island &c. Works*, 11 R. I. 599; *Whitworth v. Pelton*, 81 Mich. 98, 45 N. W. 500 (affidavit by assistant treasurer). See also *Hutson v. Illinois Cent. R. Co.*, 186 Ala. 436, 65 So. 62. It has also been held that the court may permit the garnishee to file an amended answer in furtherance of justice. *Crerar v. Milwaukee &c. R. Co.*, 35 Wis. 67.

<sup>98</sup> *Pierce v. Carleton*, 12 Ill. 358, 54 Am. Dec. 405; *Emery v. Royal*, 117 Ind. 299, 20 N. E. 150; *Debs v. Dalton*, 7 Ind. App. 84, 34 N. E. 236; *Laidlaw v. Morrow*, 44 Mich. 547, 7 N. W. 191; *Thayer v. Tyler*, 10 Gray (Mass.) 164; *Kellogg v. Freeman*, 50 Miss. 127. It is held in

*Atwood v. Tucker*, 26 N. Dak. 622, 145 N. W. 587, 51 L. R. A. (N. S.) 597, that the garnishee may do this, even after default, by motion to vacate the judgment for want of jurisdiction.

<sup>99</sup> *Mineral Point R. Co. v. Barron*, 83 Ill. 365; *Terre Haute &c. R. Co. v. Baker*, 122 Ind. 433, 24 N. E. 83; *Smith v. Dickson*, 58 Iowa 444, 10 N. W. 850; *Mull v. Jones*, 33 Kans. 112, 5 Pac. 388; *Davis v. Meredith*, 48 Mo. 263; *Clark v. Averill*, 31 Vt. 512, 76 Am. Dec. 131.

<sup>1</sup> See 1 Elliott Gen. Prac. § 388, and notes, where the subject is fully considered. Compare also *Chicago &c. R. Co. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. ed. 1144.

<sup>2</sup> *Brashear v. West*, 7 Pet. (U. S.) 608, 8 L. ed. 801; *First Nat. Bank v. Armstrong*, 101 Ind. 244; *Eman-*

accountability to the defendant at that time.<sup>3</sup> But where the writ is served on one agent of a corporation while the property is in the actual possession of another agent, and the latter delivers it to the owner before the first agent can, in the exercise of reasonable diligence, notify the other, it has been held that the corporation is not liable.<sup>4</sup> The garnishee may, in general, set up any defense that he would have had if sued by the defendant,<sup>5</sup> and if he has been garnished in a prior proceeding for the same matter he may set up that fact.<sup>6</sup>

§ 724 (626). **What may be reached in garnishment.**—Real estate is not subject to garnishment unless the statute so provides,<sup>7</sup> nor, it seems, is money set apart for the payment of interest on railroad mortgage bonds,<sup>8</sup> nor are funds in the hands of

uel v. Bridger, L. R. 9 Q. B. 286; Holmes v. Tutton, 5 El. & B. 65. But in Smith v. Boston &c. R. Co., 33 N. H. 337, it is said that his liability is determined by the state of facts existing at the time of his disclosure and set forth therein.

<sup>3</sup> Cleanay v. Junction R. Co., 26 Ind. 375; Huntington v. Rison, 43 Iowa 517; Getchell v. Chase, 124 Mass. 366; Baltimore &c R. Co. v. Wheeler, 18 Md. 372; Reagan v. Pacific R. Co., 21 Mo. 30; Lieberman v. Hoffman, 102 Pa. St. 590.

<sup>4</sup> Bates v. Chicago &c. R. Co., 60 Wis. 296, 19 N. W. 72, 50 Am. Rep. 369. This seems to us a just decision.

<sup>5</sup> 1 Elliott Gen. Prac., § 388; Cox v. Russell, 44 Iowa 556, 562; Hazen v. Emerson, 9 Pick. (Mass.) 144 (statute of limitations); Benton v. Lindell, 10 Mo. 557; Wheeler v. Emerson, 45 N. H. 526; Pennell v. Grubb, 13 Pa. St. 552 (set-off). See generally Center v. McQuestion, 24 Kans. 480; Schuler v. Israel, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. ed.

707; North Chicago &c. Co. v. St. Louis &c. Co., 152 U. S. 596, 14 Sup. Ct. 710, 38 L. ed. 565; Sauer v. Nevadaville, 14 Colo. 54, 23 Pac. 87. But see, as to property fraudulently transferred, Lamb v. Stone, 11 Pick. (Mass.) 527; Cummings v. Fearey, 44 Mich. 39, 6 N. W. 98. See generally as to garnishee's defenses, notes in 13 Am. Dec. 341 and 100 Am. Dec. 511.

<sup>6</sup> Houston v. Walcott, 7 Iowa 173; Royer v. Fleming, 58 Mo. 438; Dealing v. New York &c. R. Co., 8 N. Y. St. 386; Robarge v. Central Vt. R. Co., 18 Abb. N. Cas. (N. Y.) 363; Everdell v. Sheboygan &c. Co., 41 Wis. 395. But see Alabama &c. R. Co. v. Chumley, 92 Ala. 317, 9 So. 286.

<sup>7</sup> Risley v. Welles, 5 Conn. 431; Stedman v. Vickery, 42 Maine 132; How v. Field, 5 Mass. 390; Hunter v. Case, 20 Vt. 195; National &c. Bank v. Brainerd, 65 Vt. 291, 26 Atl. 723.

<sup>8</sup> Galena &c. R. Co. v. Menzies, 26 Ill. 122. But see Smith v. Eastern

an officer or agent of the company garnishable in an ordinary action against the company itself,<sup>9</sup> for the possession by an agent of money collected for his principal is usually deemed to be the possession of the principal.<sup>10</sup> It is said with what appears to be good reason, that stock cannot be garnished in the hands of a railroad company for the debts of the stockholders, as the corporation, while a "going concern," is not required to pay the stockholders anything but proper dividends and they are not its creditors.<sup>11</sup> But provision is usually made for reaching shares of stock, or the stockholder's interest, by attachment,<sup>12</sup> and an unpaid subscription for which a call has been made is subject to garnishment at the instance of the corporate creditors,<sup>13</sup> although it is held otherwise where no call has been made.<sup>14</sup> It has been held that property in transit, in another county, in the hands of a railroad company, cannot be garnished,<sup>15</sup> but that

R. Co., 124 Mass. 154; Mississippi &c. R. Co. v. United States Exp. Co., 81 Ill. 534.

<sup>9</sup>First Nat. Bank v. Davenport &c. R. Co., 45 Iowa 120; Wilder v. Shea, 13 Bush (Ky.) 128 Pettigill v. Androscoggin R. Co., 51 Maine 370; Fowler v. Pittsburgh &c. R. Co., 35 Pa. St. 22; McGraw v. Memphis &c. R. Co., 5 Coldw. (Tenn.) 434. Contra, Littleton Nat. Bank v. Portland &c. Co., 58 N. H. 104; Everdell v. Sheboygan &c. R. Co., 41 Wis. 395. Other authorities on both sides are cited in 3 Thomp. Corp. (2d ed.) § 3370.

<sup>10</sup>Neuer v. O'Fallon, 18 Mo. 277, 59 Am. Dec. 313; Hall v. Filter Mfg. Co., 10 Phila. (Pa.) 370; Flanagan v. Wood, 33 Vt. 332.

<sup>11</sup>Younkin v. Collier, 47 Fed. 571; Planters' &c. Bank v. Leavens, 4 Ala. 753; Ross v. Ross, 25 Ga. 297; Moor v. Walker, 46 Iowa 164. See also Smith v. Downey, 8 Ind. App. 175, 34 N. E. 823; Ashley v. Quintard, 90 Fed. 84. But see Harrell

v. Mexico &c. Co., 73 Tex. 612, 11 S. W. 863; Baker v. Wasson, 53 Tex. 150. See generally Simpson v. Jersey City &c. Co., 165 N. Y. 193, 58 N. E. 896, 55 L. R. A. 796, and note.

<sup>12</sup>Chesapeake &c. R. Co. v. Paine, 29 Grat. (Va.) 502; Shenandoah Valley R. Co. v. Griffith, 76 Va. 913, 13 Am. & Eng. R. Cas. 120, and note. But only, as a rule, in the state in which the company is incorporated. Winslow v. Fletcher, 53 Conn. 390, 55 Am. Rep. 122, 13 Am. & Eng. Corp. Cas. 39.

<sup>13</sup>Joseph v. Davis (Ala.), 10 So. 830; Kern v. Chicago &c. Assn., 140 Ill. 371, 29 N. E. 1035; Hannah v. Moberly Bank, 67 Mo. 678.

<sup>14</sup>Teague v. Le Grand, 85 Ala. 493, 5 So. 287, 7 Am. St. 64; Brown v. Union Ins. Co., 3 La. Ann. 177; McKelvey v. Crockett, 18 Nev. 238, 2 Pac. 386; Bunn Appeal, 105 Pa. St. 49, 51 Am. Rep. 166.

<sup>15</sup>Western R. Co. v. Thornton, 60 Ga. 300; Illinois C. R. Co. v. Cobb,

property may be garnished, after it has reached its destination, while held by the company as a warehouseman.<sup>16</sup> And so property in possession of the carrier awaiting shipment has been held subject to garnishment at any time before its transit has commenced.<sup>17</sup> Property in custodia legis is, as a general rule, exempt from attachment or garnishment in the hands of the officer,<sup>18</sup> but there are some cases in which the earnings or other property of a railroad company have been permitted by the courts

48 Ill. 402; *Bingham v. Lamping*, 26 Pa. St. 240; *Pennsylvania R. Co. v. Pennock*, 51 Pa. St. 244, 254; *Bates v. Chicago &c. R. Co.*, 60 Wis. 296, 19 N. W. 72, 50 Am. Rep. 369. See also *Chicago &c. R. Co. v. Painter*, 15 Nebr. 394; *Montrose Pickle Co. v. Dodsen &c. Co.*, 76 Iowa 172, 40 N. W. 705, 14 Am. St. 213; *Stevenot v. Eastern R. Co.*, 61 Minn. 104, 63 N. W. 256, 28 L. R. A. 600. Contra, *Adams v. Scott*, 104 Mass. 164, and compare *Walker v. Detroit &c. R. Co.*, 49 Mich. 446, 13 N. W. 812. In several of the cases first cited there were peculiar circumstances, and in none of them, perhaps, was it necessary to decide that this is an invariable rule. There are forcible reasons, however, for affirming that this is the general rule where the property is actually in transit at a distant point. As to when goods in transitu may be attached, see note in 14 Am. & Eng. R. Cas. 700, 709; *Locke Foreign Attachment* 32. If it is within the jurisdiction of the court there seems to be no good reason why it may not be garnished in a proper case. *Rosenbush v. Bernheimer*, 211 Mass. 146, 97 N. E. 984, Ann. Cas. 1913A, 1317; *Landa v. Holck &c. Co.*, 129 Mo. 663, 31 S. W. 900, 50 Am. St.

459n. But where it is in actual transit at a distant point not within the jurisdiction of the court it ought not to be subject to garnishment in such court. See authorities first cited in this note; also *Pittsburgh &c. R. Co. v. Cox*, 36 Ind. App. 291, 297, 73 N. E. 120, 114 Am. St. 377, and authorities there cited.

<sup>16</sup> *Cooley v. Minnesota &c. Co.*, 53 Minn. 327, 55 N. W. 141, 39 Am. St. 609, 55 Am. & Eng. R. Cas. 616. But compare *Madden v. Union Pac. R. Co.*, 89 Kans. 282, 131 Pac. 552, Ann. Cas. 1914D, 78 (holding that the process was abused and that an execution instead of a garnishment summons should have been sent to the defendant's warehouse).

<sup>17</sup> *Landa v. Holck*, 129 Mo. 663, 31 S. W. 500, 50 Am. St. 459, and note. See also *Malott v. Johnson*, 37 Ind. App. 678, 77 N. E. 866; *Rosenbush v. Bernheimer*, 211 Mass. 146, 97 N. E. 984, Ann. Cas. 1913A, 1317. But see post, §§ 2314, 2553.

<sup>18</sup> *Averill v. Tucker*, 2 Cranch. (U. S.) 544, Fed. Cas. No. 670; *Field v. Jones*, 11 Ga. 413; *People v. Brooks*, 40 Mich. 333, 29 Am. Rep. 534; *Taylor v. Carryl*, 24 Pa. St. 259; *Hill v. La Crosse &c. Railroad Co.*, 14 Wis. 291, 80 Am. Dec. 783.

to be attached or garnished in the hands of a receiver,<sup>19</sup> and such earnings, although subject to a mortgage, are generally liable to garnishment until a foreclosure is had or possession is taken by the trustee.<sup>20</sup> Bonds of a foreign corporation in the hands of an agent for sale have been held in New York not to be liable to attachment against the company.<sup>21</sup> And it has been held in Massachusetts that a railroad company, which has an arrangement with other companies having lines that form a continuous connection, to make monthly settlements with the company whose road joins its own, including therein amounts due the other connecting roads beyond, is not liable, as trustee in foreign attachment, to the first connecting carrier for money due the other companies under the agreement.<sup>22</sup>

See also as to judgment of foreign court, *Wabash R. Co. v. Tourville*, 179 U. S. 322, 21 Sup. Ct. 113, 45 L. ed. 210; *Boyle v. Musser & Co.*, 88 Minn. 456, 93 N. W. 520, 97 Am. St. 538.

<sup>19</sup> *Phelan v. Ganabin*, 5 Colo. 14; *First Nat. Bank v. Portland & C. R. Co.*, 2 Fed. 831; *Humphreys v. Hopkins*, 81 Cal. 551, 22 Pac. 892, 6 L. R. A. 792, 51 Am. St. 76. And see *Conover v. Ruckman*, 33 N. J. Eq. 303; *Gaither v. Ballew*, 4 Jones L. (N. Car.) 488, 69 Am. Dec. 763; *Hurlburt v. Hicks*, 17 Vt. 193, 44 Am. Dec. 329; *Wehle v. Conner*, 83 N. Y. 231; *Warren v. Booth*, 51 Iowa 215, 1 N. W. 502; *Robertson v. Detroit & C. Works*, 152 Mich. 612, 116 N. W. 196.

<sup>20</sup> *Smith v. Eastern & C. R. Co.*, 124 Mass. 154; *Mississippi & C. R. Co. v. United States Express Co.*, 81 Ill. 534; *De Graff v. Thompson*, 24 Minn. 452; *Galveston & C. R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459, 20 L. ed. 199; *Gilman v. Illinois & C. Co.*, 91 U. S. 603, 23 L. ed. 405;

*Noyes v. Rich*, 52 Maine 115. But see *Dunham v. Isett*, 15 Iowa 284. In *Milwaukee & C. R. Co. v. Brooks & C. Works*, 121 U. S. 430, 7 Sup. Ct. 1094, 30 L. ed. 996, 30 Am. & Eng. R. Cas. 499, it was held that funds belonging to a leased road operated temporarily by the mortgage trustee of the lessor road could be garnished in his hands by a creditor of the lessee company. See also *Root & C. v. Davis*, 51 Ohio St. 29, 36 N. E. 669, 23 L. R. A. 445.

<sup>21</sup> *Coddington v. Gilbert*, 17 N. Y. 489. See also as to bonds pledged as collateral or in the hands of third persons. *Tweedy v. Bogart*, 56 Conn. 419, 15 Atl. 374; *Galena & C. R. Co. v. Stahl*, 103 Ill. 67, with which compare *Warren v. Booth*, 53 Iowa 742, 5 N. W. 598.

<sup>22</sup> *Chapin v. Connecticut & C. R. Co.*, 16 Gray (Mass.) 69. So, where goods are shipped over several roads it is held that the consignee is not liable as garnishee to the road delivering the goods for freight due the others. *Gould v. Newburyport*

**§ 725 (627). Garnishment of employes' wages.**—Railroad companies are frequently garnished in actions against their employes, but in most of the states there are statutes providing that the wages of employes for a specified period, or to a specified amount, shall be exempt. It has been held that a foreign railroad company, doing business in another state, may be garnished in the latter state for the debt of a non-resident employe contracted out of such state,<sup>23</sup> and that a corporation organized under the laws of the United States, where the wages are earned in a state in which both the employe and the creditor reside, may be garnished in another state in which the company is personally served.<sup>24</sup> But, on the other hand, it has been held by another court that wages due from a company incorporated in one state to an employe in that state cannot be reached by a creditor in another state by attachment against the debtor and garnishment of the corporation.<sup>25</sup> In any event, the garnishee proceedings

R. Co., 14 Gray (Mass.) 472. See, however, as to consolidated company, *Wabash &c. R. Co. v. Dougan*, 142 Ill. 248, 31 N. E. 594, 34 Am. St. 74. Compare *Johnson v. Union Pac. R. Co.*, 145 Fed. 249.

<sup>23</sup> *Burlington &c. R. Co. v. Thompson*, 31 Kans. 180, 1 Pac. 622, 47 Am. Rep. 497; *Carson v. Memphis &c. R. Co.*, 88 Tenn. 646, 13 S. W. 388, 17 Am. St. 921. See also *Chicago &c. R. Co. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. ed. 1144; *King v. Cross*, 175 U. S. 396, 20 Sup. Ct. 131, 44 L. ed. 211; *Howland v. Chicago &c. R. Co.*, 134 Mo. 474, 36 S. W. 29; *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. ed. 1023; *Bolton v. Pennsylvania R. Co.*, 88 Pa. St. 261; *Neufelder v. German American Ins. Co.*, 6 Wash. 336, 33 Pac. 870, 22 L. R. A. 287, 36 Am. St. 166; note to *Goodwin v. Claytor*, 67 L. R. A. 209, ante, § 721. But compare *Central*

*Trust Co. v. Chattanooga &c. R. Co.*, 68 Fed. 685, and authorities there cited.

<sup>24</sup> *Mooney v. Union Pac. R. Co.*, 60 Iowa 346, 14 N. W. 343. Followed in *Oberfelder v. Union Pac. R. Co.*, 60 Iowa 755, 14 N. W. 255, and approved in *Carson v. Memphis &c. R. Co.*, 88 Tenn. 646, 13 S. W. 588, 17 Am. St. 921. See also note to *Goodwin v. Claytor*, 67 L. R. A. 209, and ante, § 721.

<sup>25</sup> *Louisville &c. R. Co. v. Dooley*, 78 Ala. 524. See also *Drake v. Lake Shore &c. R. Co.*, 69 Mich. 168, 37 N. W. 70, 13 Am. St. 382; *Louisville &c. R. Co. v. Nash*, 118 Ala. 477, 23 So. 825, 41 L. R. A. 331, 72 Am. St. 181; *Atchison &c. R. Co. v. Maggard*, 6 Colo. App. 85, 39 Pac. 985. But it will generally be found in these cases that the garnishee had no property of the defendant, or did not owe him a debt in the state in which the suit was brought. The

bind only the amount due at the date of the service of the writ and do not reach wages subsequently earned.<sup>26</sup> So, under statutes providing that the debt must be due "absolutely and without contingency," it is held that where the contract of employment provides that the amount of work done during one month and the wages to be paid therefor shall be estimated and determined after the end of the month, such earnings cannot be garnished in the hands of the company before the end of the month.<sup>27</sup> Exemption laws have no extraterritorial effect,<sup>28</sup> and, as a general rule, neither a debtor nor his garnishee can obtain the benefit of the exemption laws of the state in which they reside when sued in another state;<sup>29</sup> but, where wages are exempt in both states, it has been held that the debtor will be entitled to the exemption, and that it is the duty of the garnishee to claim it for him.<sup>30</sup> The law upon this subject, however, is

general subject is considered and other authorities on both sides are reviewed in the note to *Goodwin v. Claytor*, 67 L. R. A. 209, et seq; and in the note to *National Bank v. Furtick*, 69 Am. St. 99, 112, 115.

<sup>26</sup> *Burlington &c. R. Co. v. Thompson*, 31 Kans. 180, 1 Pac. 622, 47 Am. Rep. 497.

<sup>27</sup> *Williams v. Androscoggin &c. R. Co.*, 36 Maine 201, 58 Am. Dec. 742; *Fellows v. Smith*, 131 Mass. 363. See also *Dawson v. Iron Range &c. R. Co.*, 97 Mich. 33, 56 N. W. 106. But compare *Ware v. Gowen*, 65 Maine 534.

<sup>28</sup> See *Central Trust Co. v. Chattanooga &c. R. Co.*, 68 Fed. 685; *Chicago &c. R. Co. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. ed. 1144; *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178. But see *Drake v. Lake Shore &c. R. Co.*, 69 Mich. 168, 37 N. W. 70, 13 Am. St. 382; *Missouri Pac. R. Co. v. Sharitt*, 43

*Kans.* 375, 23 Pac. 430, 8 L. R. A. 385, 19 Am. St. 143, and authorities there cited in opinion and in note.

<sup>29</sup> The garnishee is not bound therefore, to claim any exemption for the debtor. *East Tennessee &c. R. Co. v. Kennedy*, 83 Ala. 462, 3 So. 852, 3 Am. St. 755; *Lieber v. Union Pac. R. Co.*, 49 Iowa 688, 22 N. W. 919; *Mooney v. Union Pac. R. Co.*, 60 Iowa 346, 14 N. W. 343, 9 Am. & Eng. R. Cas. 131; *Broadstreet v. Clark*, 65 Iowa 670, 22 N. W. 919; *Burlington &c. R. Co. v. Thompson*, 31 Kans. 180, 1 Pac. 622, 47 Am. Rep. 497; *Morgan v. Neville*, 74 Pa. St. 52; *Carson v. Memphis &c. R. Co.*, 88 Tenn. 646, 13 S. W. 588, 17 Am. St. 921; *Eichelburger v. Pittsburgh &c. R. Co. (Ohio)*, 9 Am. & Eng. R. Cas. 158; But see *Pierce v. Chicago &c. R. Co.*, 36 Wis. 283.

<sup>30</sup> *Mineral Point R. Co. v. Barron*, 83 Ill. 365; *Chicago &c. R. Co. v.*

not well settled, and the question is not entirely free from doubt.<sup>31</sup> Indeed, it has been held that a resident of a state, in which the debt is contracted and payable, is not subject to attachment or garnishment in another state.<sup>32</sup> Thus, where the statute made it a criminal offense for any person to send a claim against a resident debtor out of the state for collection, in order to evade the exemption laws, it was held that injunction would lie to restrain a resident of the state from sending the claim to another state and there prosecuting attachment proceedings for the purpose of evading the exemption law.<sup>33</sup> In another case it was held that a railroad company was liable to an employe for wages earned and due in the state in which suit was brought and in which all parties resided, notwithstanding the pendency of garnishment proceedings against the company in another state to reach the same wages.<sup>34</sup> The court took the ground that it had

Ragland, 84 Ill. 375; Wabash R. Co. v. Dougan, 142 Ill. 248, 31 N. E. 594, 34 Am. St. 74; Terre Haute &c. R. Co. v. Baker, 122 Ind. 433, 24 N. E. 83; Missouri Pac. R. Co. v. Maltby, 34 Kans. 125, 8 Pac. 235; Wright v. Chicago &c. R. Co., 19 Nebr. 175, 27 N. W. 90, 56 Am. Rep. 747; Missouri Pac. R. Co. v. Whip-sker, 77 Tex. 14, 13 S. W. 639, 8 L. R. A. 321, 19 Am. St. 734; Kansas City &c. R. Co. v. Gough, 35 Kans. 1, 10 Pac. 89. In several of these cases, however, the statute of the state in which the suit was brought was construed as exempting wages attached or garnished in the state, no matter whether the employe is a resident or a non-resident.

<sup>31</sup> See Moore v. Chicago &c. R. Co., 43 Iowa 385; Carson v. Memphis &c. R. Co., 88 Tenn. 646, 13 S. W. 588, 17 Am. St. 921; Chicago &c. R. Co. v. Meyer, 117 Ind. 563, 19 N. E. 320; Baltimore &c. R. Co.

v. May, 25 Ohio St. 347; note in 67 L. R. A. 222; and ante, § 721.

<sup>32</sup> Bush v. Nance, 61 Miss. 237; Wilson v. Joseph, 107 Ind. 490, 8 N. E. 616; Kestler v. Kern, 2 Ind. App. 488, 28 N. E. 726; Illinois Cent. R. Co. v. Smith, 70 Miss. 344, 12 So. 461, 19 L. R. A. 577, 35 Am. St. 651. But see ante, § 723, notes 94, 95.

<sup>33</sup> Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. ed. 538; Mason v. Beebee, 44 Fed. 556; Engel v. Scheuerman, 40 Ga. 206, 2 Am. Rep. 573; Wilson v. Joseph, 107 Ind. 490, 8 N. E. 616; Murr-per v. Wilson, 72 Iowa 163, 33 N. W. 449, 2 Am. St. 238; Missouri Pac. R. Co. v. Maltby, 34 Kans. 125, 8 Pac. 235; Zimmerman v. Franke, 34 Kans. 650, 9 Pac. 747; Keyser v. Rice, 47 Md. 203, 28 Am. Rep. 448; Snook v. Snetzer, 25 Ohio St. 516; Dehon v. Foster, 4 Allen (Mass.) 545.

<sup>34</sup> Illinois Cent. R. Co. v. Smith,



sole jurisdiction; that it would not presume that the foreign court, upon being duly advised, would proceed to judgment against the garnishee, and that, in any event, it would protect and enforce the exemption laws of its own state.

§ 726 (628). **Injunction—Generally.**—A railroad company is subject in general in a court of equity to the same remedies as an individual.<sup>35</sup> In other words, the jurisdiction of equity is the same in its general nature over corporations as it is over natural persons. As a general rule any wrongful invasion by it of the rights of others may be prevented by injunction,<sup>36</sup> provided a complete remedy at law is not available.<sup>37</sup> Equity may refuse to interfere, however, where an injunction would work great in-

70 Miss. 344, 12 So. 461, 19 L. R. A. 577, 35 Am. St. 651 (overruled, however, in *Southern Pac. R. Co. v. J. A. Lyon & Co.*, 99 Miss. 186, 54 So. 728, Ann. Cas. 1913D, 800). See also *Missouri Pac. R. Co. v. Sharritt*, 43 Kans. 375, 23 Pac. 430, 8 L. R. A. 385, 19 Am. St. 143, 44 Am. & Eng. R. Cas. 657. For a review of the conflicting decisions upon the general subject, see note to the first case above cited in 19 L. R. A. 577; and elaborate note in 67 L. R. A. 209, where nearly all the most recent authorities are reviewed.

<sup>35</sup> In *Stockton v. Central R. Co.*, 50 N. J. 52, 24 Atl. 964, 17 L. R. A. 97, an injunction was granted at the suit of the attorney-general to restrain a railroad company from carrying out a lease in excess of corporate power which tended to the public injury and to defeat public policy by creating or fostering a monopoly.

<sup>36</sup> Wrongs of a repeated and continuous character which occasion damages estimate only by conjec-

ture and not by any accurate standard may be enjoined. Such damages are irreparable within the meaning of the United States statute providing for an injunction where the party does not have a plain, adequate and complete remedy at law. *Payne v. Kansas & C. R. Co.*, 46 Fed. 546. The prosecution of an action at law may be enjoined in a proper case. *Chicago & C. R. Co. v. Pullman Palace Car Co.*, 49 Fed. 409.

<sup>37</sup> *Planet & C. Co. v. St. Louis & C. R. Co.*, 115 Mo. 613, 22 S. W. 616. Condemnation proceedings will not be enjoined on the ground that there has been a previous condemnation of the same land for the same purpose, resulting in a verdict assessing compensation, since that fact is in itself an adequate legal defense, which can be pursued by motion in the second condemnation suit. *Chicago & C. R. Co. v. Chicago*, 143 Ill. 641, 32 N. E. 178; *Northern Pac. R. Co. v. Cannon*, 49 Fed. 517. Where the plaintiffs all have different interests, the fact that a number of

jury to the defendant<sup>38</sup> and the plaintiff will suffer but a slight injury for which he can readily be compensated by damages.<sup>39</sup> The court may, it seems, take into consideration the fact that companies are common carriers and quasi public in their nature, and refuse to grant an injunction for slight cause where it would prevent or obstruct the operation of the road and not only cause great injury to it, but also inconvenience the public.<sup>40</sup> This is

actions at law arise out of the same transaction and depend upon the same matters of fact and law is not sufficient warrant for enjoining the prosecution of such actions, and the joinder of the different parties interested in a single suit in chancery as defendants to prevent a multiplicity of suits. *Tribbette v. Illinois Central R. Co.*, 70 Miss. 182, 12 So. 32, 19 L. R. A. 660, 35 Am. St. 642. Where proceedings by a city to open a boulevard across a railway company's tracks are pending on appeal, a bill to enjoin the city from such proceedings, on the ground that irreparable injury will be done to the company, will not lie, as the question is a legal one, which will be disposed of in the condemnation proceedings. *Detroit &c. R. Co. v. Detroit*, 91 Mich. 444, 52 N. W. 52. One holding land under a judgment of condemnation may maintain suit to restrain ejectment proceedings and to quiet title, although such judgment is a perfect defense to the action of ejectment. *Foltz v. St. Louis &c. R. Co.*, 60 Fed. 316. An action of ejectment to recover land upon which it has, with the consent of plaintiff and his grantor, built its tracks, cattle sheds, and warehouse, may be enjoined at the suit of a railroad company, although it has no title. *South &c. R.*

*Co. v. Alabama &c. R. Co.*, 102 Ala. 236, 14 So. 747.

<sup>38</sup> *Scranton v. Delaware &c. Canal Co.*, 12 Pa. Co. Ct. 283. See also *Levi v. Worcester &c. St. R. Co.* (Mass.), 78 N. E. 853; *Stock v. Hillsdale*, 155 Mich. 375, 119 N. W. 435. A preliminary injunction will not be granted to restrain a company "from the further operation and management" of a leased railroad on the allegation, among others, that the roads are "parallel and competing," and the lease ultra vires, and contrary to the provision of the constitution where all the grounds for equitable relief are denied; since it would involve difficult questions of law and fact, and would, if granted, work incalculable injury to defendant and the public. *Gummere v. Lehigh Val. R. Co.*, 12 Pa. Co. Ct. 106. See *New York &c. R. Co. v. O'Brien*, 100 N. Y. S. 316, note in Ann. Cas. 1913A, 248.

<sup>39</sup> *Savannah &c. Canal Co. v. Suburban &c. R. Co.*, 93 Ga. 240, 18 S. E. 824; *Abraham v. Myers*, 29 Abb. N. C. (N. Y.) 384, 23 N. Y. 225, 228. See also *Chicago &c. R. Co. v. McKeigue*, 126 Wis. 574, 105 N. W. 1030.

<sup>40</sup> *Torrey v. Camden &c. R. Co.*, 3 C. E. Green Ch. (N. J.) 293; *Cook v. North &c. R. Co.*, 46 Ga. 618; *Gammage v. Georgia &c. R. Co.*, 65

particularly true in regard to preliminary injunctions before the case can be heard upon its merits. With this possible exception, however, the rules governing injunctions generally are applicable, in the main, at least, where an injunction is sought against a railroad company. We need not, therefore, further consider the elementary rules, but will refer to the specific classes of cases in which injunctions are usually sought against railroad companies.

**§ 727 (629). Injunction where the company seeks to take or condemn lands.**—Where a railroad company that is so imperfectly incorporated as not to possess the power of eminent domain, is seeking to condemn property of another corporation necessary for its use in carrying on its business, it has been held that such condemnation proceedings may be enjoined.<sup>41</sup> But it is the general rule that the existence of a corporation, acting as such under a law authorizing it and with which it has attempted to comply, cannot be collaterally attacked, and the mere fact that there may be cause for forfeiting its charter will not support ejectment or an injunction at the suit of a landowner whose property it has condemned or is about to condemn.<sup>42</sup> A railroad company may be enjoined at the suit of a party injured

Ga. 614; *Johnson v. United R. Co.*, 227 Mo. 423, 127 S. W. 63; *Griffin v. Southern R. Co.*, 150 N. Car. 312, 64 S. E. 16. See also *Indiana & R. Co. v. Allen*, 113 Ind. 581, 15 N. E. 446; *Gray v. Manhattan & R. Co.*, 128 N. Y. 499, 28 N. E. 498; *Schwanzenbach v. Oneonta & C. Co.*, 144 App. Div. 884, 129 N. Y. S. 384; *Montgomery & C. Co. v. Montgomery & C. Co.*, 139 Fed. 353; *McCarthy v. Bunker Hill Min. & C. Co.*, 164 Fed. 927.

<sup>41</sup> *Hoke v. Georgia R. & C. Co.*, 89 Ga. 215, 15 S. E. 124. And the abuse of its eminent domain powers by a railroad corporation may always be enjoined, in a proper case, without reference to insufficiency of legal

remedies or irreparable damages. *Western R. & C. v. Alabama & C. R. Co.*, 96 Ala. 272, 11 So. 483, 17 L. R. A. 474. See also *Hruska v. Minneapolis & C. R. Co.*, 107 Minn. 98, 119 N. W. 491; *Lundberg v. Eastern R. Co.*, 139 Wis. 161, 120 N. W. 822. But compare *Manigault v. Springs*, 199 U. S. 473, 26 Sup. Ct. 127, 50 L. ed. 274.

<sup>42</sup> *Brooklyn & C. R. Co.*, In re, 125 N. Y. 434; *Cincinnati & C. R. Co. v. Clifford*, 113 Ind. 460. *Bravard v. Cincinnati & C. R. Co.*, 115 Ind. 1, 17 N. E. 183; *New York & C. R. Co. v. New York & C. R. Co.*, 52 Conn. 274; *Briggs v. Cape Cod Canal*, 137 Mass. 71. See also *Rafferty v. Central Traction Co.*, 147 Pa. St.

thereby from appropriating land for which it has failed to make compensation as required by law,<sup>43</sup> but an injunction will not be granted against the use of land by a railroad company which has taken without right, where the owner has acquiesced in the appropriation until the company has expended money thereon, and the public interest has become involved.<sup>44</sup> Where the corporation is given power to take lands for the use of its road, it may usually, within the statutory limits, exercise its discretion as

579, 23 Atl. 884, 30 Am. St. 763. See also post, § 1201.

<sup>43</sup> *Chattanooga &c. R. Co. v. Jones*, 80 Ga. 264, 9 S. E. 1081; *Lake Erie &c. R. Co. v. Michener*, 117 Ind. 465, 20 N. E. 254; *Kansas City &c. R. Co. v. St. Joseph &c. R. Co.*, 97 Mo. 457, 10 S. W. 826, 3 L. R. A. 240; *Ray v. Atchison &c. R. Co.*, 4 Nebr. 439; *McCammon &c. Lumber Co. v. Trinity &c. R. Co.*, 104 Tex. 8, 133 S. W. 247, Ann. Cas. 1913E, 870, and note; *Spencer v. Point Pleasant &c. R. Co.*, 23 W. Va. 406, 20 Am. & Eng. R. Cas. 125; *Lundberg v. Eastern R. Co.*, 139 Wis. 161, 120 N. W. 822; *Elliott Roads & Streets* (3d ed.), § 272, and numerous authorities there cited. See also post, §§ 1351, 1447. But it has been held that an injunction will not be granted where the land has been condemned in a court of competent jurisdiction, but the landowner has appealed therefrom, and the case is pending on appeal. *Traverse City &c. R. Co. v. Seymour*, 81 Mich. 378, 45 N. W. 826. See *Dillon v. Kansas City &c. R. Co.*, 43 Fed. 109. And there are other cases in which the construction of a public work on condemned ground will not be enjoined merely because compensation is not paid in advance. Over-

*holser v. Oklahoma Interurban Trac. Co.*, 29 Okla. 571, 119 Pac. 127; *Whites' Supp. Thomp. Corp.*, § 5677. The construction of a railroad over condemned land will not be restrained for errors of law in the condemnation proceedings. *Cooper v. Anniston &c. R. Co.*, 85 Ala. 106, 4 So. 689. The fact that the right to immediate possession is in another who has purchased the right to use and occupy the land for a term of twenty years at a sale thereof for non-payment of taxes, does not deprive the landowner of the right to an injunction to prevent a railroad from occupying the land until compensation is made. *Pratt v. Roseland R. Co.*, 50 N. J. Eq. 150, 24 Atl. 1027. Even in states where an injunction is only granted to restrain irreparable injuries, a railroad company may be enjoined from making excavations upon land which they have not condemned. *Baltimore &c. R. Co. v. Lee*, 75 Md. 596, 23 Atl. 901.

<sup>44</sup> *Roberts v. Northern Pacific R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756; 39 L. ed. 873; *Osborne v. Missouri Pac. R. Co.*, 35 Fed. 84, 37 Fed. 830; *Organ v. Memphis &c. R. Co.*, 51 Ark. 235, 11 S. W. 96; *Denver &c.*

to what shall be taken; and the fact that it owns<sup>45</sup> or could acquire by purchase<sup>46</sup> adjoining lands which would answer its purpose will not entitle the landowners to an injunction where the company acts in good faith. Where the company is acting in bad faith with the purpose of securing lands which it is not empowered to hold, equity may interfere.<sup>47</sup> In the case of a suit for an injunction by one having only a remote or indirect interest in lands, which are subject to condemnation, and in which all other interests have been secured by the company, it has been held that the court may dissolve the injunction upon a bond being filed by the company to pay all damages awarded to the complainant in an action at law.<sup>48</sup> A railroad company has been enjoined from shutting up a private right of way which furnished the only convenient egress from the plaintiff's land to the public highway, even after the acts complained of had actually been committed.<sup>49</sup> Where the railroad company has obtained possession of land for its right of way under contract to

R. Co. v. Domke, 11 Colo. 247, 17 Pac. 777; Chicago &c. R. Co. v. Goodwin, 111 Ill. 273, 53 Am. Rep. 622; Midland &c. R. Co. v. Smith, 113 Ind. 233; Indiana &c. R. Co. v. Allen, 113 Ind. 581, 15 N. E. 446, and authorities there cited; Lexington &c. R. Co. v. Ormsby, 7 Dana (Ky.) 276; Harlow v. Marquette &c. R. Co., 41 Mich. 336, 2 N. W. 48; Western &c. R. Co. v. Johnston, 59 Pa. St. 290; Chambers v. Baltimore &c. R. Co., 139 Pa. St. 347, 21 Atl. 2; Pettibone v. Railroad Co., 14 Wis. 479. Contra, Louisville &c. R. Co. v. Liebfried, 92 Ky. 407, 17 S. W. 870.

<sup>45</sup> Stark v. Sioux City &c. R. Co., 43 Iowa 501; Dougherty v. Wabash &c. R. Co., 19 Mo. App. 419.

<sup>46</sup> Lodge v. Philadelphia &c. R. Co., 8 Phila. (Pa.) 345; Ford v. Chicago &c. R. Co., 14 Wis. 609, 80 Am. Dec. 791; New York &c. R.

Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385; Eldridge v. Smith, 34 Vt. 484.

<sup>47</sup> Flower v. London &c. R. Co., 2 Dr. & Sm. 330; Great Western R. Co. v. May, L. R. 7 H. L. 283; Eversfield v. Mid Sussex R. Co., 3 De G. & J. 286.

<sup>48</sup> Columbus &c. R. Co. v. Witherow, 82 Ala. 190, 3 So. 23.

<sup>49</sup> Lakeman v. Hannibal &c. R. Co., 36 Mo. App. 363. And an injunction will be granted to prevent the closing of a private right of way under the railroad track reserved by the landowner at the time of the conveyance of the railroad right of way, by which communication between two parts of the same farm are established. Rock Island &c. R. Co. v. Dimick, 55 Am. & Eng. R. Cas. 65. See also Lake Erie &c. R. Co. v. Young, 135 Ind. 426, 35 N. E. 177, 41 Am. St. 430, 58 Am. & Eng. R. Cas. 655.

construct its road in a particular manner, it has been held that it may be enjoined from violating the contract. Thus a contract by a railroad company to maintain and keep open two existing passage ways for stock under its road through a certain farm is sufficiently certain to entitle the owner of the farm to an injunction against its violation, although the size, nature, and location of the ways are not stated in the contract.<sup>50</sup>

**§ 728 (630). Injunction where railroad is laid in a street.—**An abutting owner may enjoin it from occupying a street or other public highway, and operating its road therein without authority, upon proof of special damage,<sup>51</sup> at least where he owns the fee

<sup>50</sup>*Rock Island &c. R. Co. v. Dimick*, 144 Ill. 628, 32 N. E. 291, 19 L. R. A. 105. But compare *Sen'nev v. Hutchinson Interurban R. Co.*, 90 Kans. 610, 135 Pac. 678.

<sup>51</sup>*Hart v. Buckner*, 54 Fed. 925; *Columbus &c. R. Co. v. Witherow*, 82 Ala. 190, 3 So. 23; *Kavanagh v. Mobile &c. R. Co.*, 78 Ga. 271, 2 S. E. 636; *Georgia &c. R. Co. v. Ray*, 84 Ga. 376, 43 Am. & Eng. R. Cas. 95; *Metropolitan City R. Co. v. City of Chicago*, 96 Ill. 620; *Cornwall v. Louisville &c. R. Co.*, 87 Ky. 72, 7 S. W. 553; *Conner v. Covington &c. R. Co.*, 14 Ky. L. 135, 19 S. W. 597; *Bell v. Edwards*, 37 La. Ann. 475; *Riedinger v. Marquette &c. R. Co.*, 62 Mich. 29; *Charles H. Heer &c. Co. v. Citizens' R. Co.*, 41 Mo. App. 63; *Story v. New York El. R. Co.*, 90 N. Y. 122, 48 Am. Rep. 146; *State v. Dayton &c. R. Co.*, 36 Ohio St. 434; *Barker v. Hartman Steel Co.*, 129 Pa. St. 551, 18 Atl. 553; *Ward v. Ohio River R. Co.*, 35 W. Va. 481. See also post, § 1447. And see generally for conflicting cases and distinctions, note to *Roach v. Nassau Elec. R. Co.*, 36 L. R. A.

(N. S.) 808, et seq. Where a railroad has been laid in a street by authority of the legislature, an injured party who has a complete remedy by way of damages for any direct injury will not be granted an injunction. *Hyland v. Short Route R. Transfer Co.*, 10 Ky. L. 900, 11 S. W. 79. But see *Georgia &c. R. Co. v. Ray*, 84 Ga. 376, 11 S. E. 352, 43 Am. & Eng. R. Cas. 95. Where a company is authorized to construct and operate a railroad track in a street, a court cannot restrict the number of trains to be operated as a condition precedent to the construction of the road. *Kentucky &c. Bridge Co. v. Krieger*, 93 Ky. 243, 19 S. W. 738. In Colorado, an abutter whose fee is not sought to be taken can not enjoin the construction and operation of a railroad merely because he does not receive in advance compensation for the damage suffered or to be suffered by him. *Denver &c. R. Co. v. Domke*, 11 Colo. 247, 17 Pac. 777. In West Virginia the abutting owners on a street, part of which is occupied by a railroad, whether

of the land to the center of the street.<sup>52</sup> Indeed, where his easement of access will be destroyed, we think he is entitled to pursue this remedy whether he owns the fee or not.<sup>53</sup> The fact that the time allowed by the charter in which to build the road has expired has been held sufficient to show that the building of the road is illegal and unauthorized.<sup>54</sup> It is held in some states that even where the consent of the legislature and of the municipal authorities has been obtained the abutting owner may enjoin the

they own the fee in the land covered by the street or not, are not entitled to enjoin excavation and construction along the street in a careful and proper manner, unless the consequent injury to them will be such as will destroy the value of their property, and therefore be equivalent to a virtual taking of it by the railroad company. *Arbenz v. Wheeling &c. R. Co.*, 33 W. Va. 1, 10 S. E. 14, 40 Am. & Eng. R. Cas. 284. See *Paquet v. Mt. Tabor St. R. Co.*, 18 Ore. 233, 29 Pac. 906; *Van Horn v. Newark &c. R. Co.*, 48 N. J. Eq. 332, 21 Atl. 1034.

<sup>52</sup> Where the fee is in the municipality some authorities hold that an abutting owner has only an action at law for his damages. *Mills v. Parlin*, 106 Ill. 60; *Osborne v. Missouri Pac. R. Co.*, 147 U. S. 248, 13 Sup. Ct. 299, 37 L. ed. 155. See also *Smith v. Point Pleasant &c. R. Co.*, 23 W. Va. 451; *Heath v. Des Moines &c. R. Co.*, 61 Iowa 11; *Seaboard Air Line Ry. v. Southern Invest. Co.*, 53 Fla. 832, 43 So. 235, 13 Ann. Cas. 18, and note. It has also been held that the fact that the street has been declared vacated by an invalid ordinance gives an abutting owner no right to an injunction, since the ordinance, being invalid, does not operate to revest the title

to the street in the abutting owners. *Corcoran v. Chicago &c. R. Co.*, 149 Ill. 291, 37 N. E. 68.

<sup>53</sup> See *Elliott Roads & Streets* (3d ed.), §§ 850, 637-643, 651; *Railroads as Additional Servitude to Streets*, 1 Am. & Eng. R. Cas. (N. S.) 1; *Field v. Barling*, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. 311, and note; *Adams v. Chicago &c. R. Co.*, 39 Minn. 286, 39 N. W. 629, 1 L. R. A. 493, 12 Am. St. 644; *Hruska v. Minneapolis &c. R. Co.*, 107 Minn. 98, 119 N. W. 491; *Theobald v. Louisville &c. R. Co.*, 66 Miss. 279, 6 So. 230, 4 L. R. A. 735, 14 Am. St. 564; *Lockwood v. Wabash R. Co.*, 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516, 43 Am. St. 547, 1 Am. & Eng. R. Cas. (N. S.) 16, and note; *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1, 25 N. E. 496, 11 L. R. A. 634, 19 Am. St. 461; *White v. Northwestern &c. R. Co.*, 113 N. Car. 610, 18 S. E. 330, 22 L. R. A. 627; *Hall v. Pittsburgh &c. R. Co.*, 85 Ohio St. 148, 97 N. E. 381; *Dooly Block v. Salt Lake &c. Co.*, 9 Utah 31, 33 Pac. 229, 24 L. R. A. 610. See also note in 35 L. R. A. (N. S.) 193.

<sup>54</sup> *Bonaparte v. Baltimore &c. R. Co.*, 75 Md. 340, 23 Atl. 784, 49 Am. & Eng. R. Cas. 198.

construction or operation of the railroad until his damages are assessed and paid.<sup>55</sup> Where the right to lay a railroad track in a street is prohibited, until the damage is ascertained and paid to abutting owners, it has been held that the company may be enjoined from operation of the road until payment of the damages, although a prior judgment for the damages has been obtained in an action at law, but remains unpaid.<sup>56</sup> But the right to an injunction for this cause may be lost by the abutting owner's acquiescence in the construction of the road,<sup>57</sup> or in its use for a length of time after construction.<sup>58</sup> The public may enjoin an unauthorized use of a public street or other highway by an action on behalf of the state in the name or on relation of the attorney-general or other proper officer,<sup>59</sup> or the suit for an injunc-

<sup>55</sup> *Imlay v. Union Branch R. Co.*, 26 Conn. 249, 68 Am. Dec. 392; *Georgia &c. R. Co. v. Ray*, 84 Ga. 376, 11 S. E. 352; *Cox v. Louisville &c. R. Co.*, 48 Ind. 178; *Barber v. Saginaw Union R. Co.*, 83 Mich. 299, 47 N. W. 219; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 4 Atl. 432, 36 Am. Rep. 1; *Wager v. Troy &c. R. Co.*, 25 N. Y. 526; *Stroub v. Manhattan R. Co.*, 15 N. Y. S. 135, 39 N. Y. St. 378. See *Kemble*, Appeal of, 140 Pa. 14, 21 Atl. 225. *Contra*, *Paquet v. Mt. Tabor St. R. Co.*, 18 Ore. 233, 22 Pac. 906; *Ohio River R. Co. v. Gibbens*, 35 W. Va. 57, 12 S. E. 1093; *O'Brien v. Baltimore Belt R. Co.*, 74 Md. 363, 22 Atl. 141, 13 L. R. A. 126; *Randall v. Jacksonville St. R. Co.*, 19 Fla. 409. See *Western R. Co. v. Alabama &c. R. Co.*, 96 Ala. 272, 11 So. 483, 17 L. R. A. 474. Abutting owners will not be granted an injunction against a railroad company to prevent its entering into a contract with the county commissioners whereby it is permitted to maintain its tracks in a street at a

grade alleged to be illegal; the proper remedy is mandamus requiring the county commissioners to perform their duties under the law. *Dyer v. Cincinnati &c. R. Co.*, 7 Ohio Cir. Ct. 255.

<sup>56</sup> *Harbach v. Des Moines &c. R. Co.*, 80 Iowa 593, 44 N. W. 348, 11 L. R. A. 113.

<sup>57</sup> *Merchants' &c. Co. v. Chicago &c. R. Co.*, 79 Iowa 613, 44 N. W. 900; *Burkam v. Ohio &c. R. Co.*, 122 Ind. 344, 23 N. E. 799. See also notes in 7 L. R. A. (N. S.) 991, and 23 L. R. A. (N. S.) 433.

<sup>58</sup> *Merchants' &c. Co. v. Chicago &c. R. Co.*, 79 Iowa 613, 44 N. W. 348. See also *Sunderland v. Martin*, 113 Ind. 411, 15 N. E. 689; *Stanton v. Atlantic Coast Line R. Co.*, 147 N. Car. 428, 61 S. E. 455, 17 L. R. A. (N. S.) 949.

<sup>59</sup> *Attorney-General v. Delaware &c. R. Co.*, 27 N. J. Eq. 631; *Attorney-General v. Metropolitan R. Co.*, 125 Mass. 515, 28 Am. Rep. 264; *Commonwealth v. Pittsburgh &c. R. Co.*, 24 Pa. St. 159, 62 Am. Dec. 372. See also *Alabama &c. R. Co. v.*



tion may be maintained in the name of the town or city,<sup>60</sup> or other municipality to which the state, has confided the care, management and control of the highway involved.<sup>61</sup>

§ 729 (631). **Enjoining a nuisance.**—An injunction may generally be had at the suit of the state to restrain unauthorized acts by which the public has been or will be injured.<sup>62</sup> As a public nuisance is a criminal offense which may be reached by indictment or information in the ordinary course of a prosecution for crime, it has been doubted whether an injunction will lie to restrain it at the suit of the state, or its proper representative. But the jurisdiction of equity in such cases is well established in England, as is shown by the authorities already cited, and we think the authorities, both in that country and in this, justify us in stating that the proper public officer may, in a proper case, by a suit in the name of the state, enjoin a railroad company from maintaining a public nuisance.<sup>63</sup> This is certainly true

State, 155 Ala. 491, 46 So. 468, 19 L. R. A. (N. S.) 1173.

<sup>60</sup> Rio Grande R. Co. v. Brownsville, 45 Tex. 88; Philadelphia v. Friday, 6 Phila. 275; Philadelphia v. Railway Co., 8 Phila. 648; Greenwich v. Easton &c. R. Co., 24 N. J. Eq. 217; Springfield v. Connecticut River R. Co., 4 Cush. (Mass.) 63. See also note in 44 L. R. A. 565. And a removal of tracks already laid may be compelled by a company which afterward obtains authority to lay its tracks in the street, although the first company improved and reclaimed the street. Galveston Wharf Co. v. Gulf &c. R. Co., 81 Tex. 494, 17 S. W. 57. Unless expressly authorized a railroad company is not presumed to have the right to condemn and appropriate to its use land already dedicated to the public for streets; and either the municipal corporation or the owner of the fee may enjoin

such use. Cornwall v. Louisville &c. R. Co., 87 Ky. 72, 7 S. W. 553.

<sup>61</sup> Commissioners v. Long, 1 Pars. Eq. Cas. (Pa.) 143; Township of North Manheim, Appeal of (Pa.), 14 Atl. 137, 36 Am. & Eng. R. Cas. 194.

<sup>62</sup> Attorney-General v. Chicago &c. R. Co., 35 Wis. 425; Stockton v. Central &c. Co., 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97; Ware v. Regent's Canal Co., 3 De Gex & J. 212; Attorney-General v. Great Northern R. Co., 4 De Gex & S. 75; Taylor v. Salmon, 4 Mylne & C. 134, 141. See United States v Union Pac. R. Co., 98 U. S. 569, 25 L. ed. 143.

<sup>63</sup> Georgetown v. Alexandria Canal Co., 12 Pet. (U. S.) 91, 9 L. ed. 1012; Mayor v. Jacques, 30 Ga. 505; People v. St. Louis, 10 Ill. 351, 357, 48 Am. Dec. 339; People's Gas Co. v. Tyner, 131 Ind. 277, 283, 31 N.

where the relief sought is not merely to prevent the commission of a crime, but to prevent the abuse of corporate powers and privileges to the injury of the public. A prosecution for the crime or a suit to dissolve the corporation or forfeit its charter will not afford adequate relief in such a case, because, in the meantime, the corporation, unless restrained by the courts, may persist in its course of crime and its abuse of corporate privileges. An injunction is therefore, necessary to accomplish complete justice and prevent continued injury to the public. So, of course, injunction will lie, in a proper case, at the suit of an individual who is specially injured by a public nuisance.<sup>64</sup> But where no nuisance yet exists and it is merely claimed that injury will arise from the use to which property is proposed to be devoted, and not from the character of the property or structure, an injunction will not be awarded if the structure and the use to which it is to be put are authorized and lawful in themselves and the apprehended injury is merely contingent or uncertain.<sup>65</sup> Indeed, we think it may be

E. 59, 16 L. R. A. 443, 31 Am. St. 433; *Littleton v. Fritz*, 65 Iowa 488, 22 N. W. 641, 54 Am. Rep. 19; *State v. Crawford*, 28 Kans. 726, 42 Am. Rep. 182; *Carleton v. Rugg*, 149 Mass. 550, 22 N. E. 55, 5 L. R. A. 193, 14 Am. St. 446; *District Attorney v. Lynn &c. R. Co.*, 16 Gray (Mass.) 242; *State v. Saline Co.*, 51 Mo. 350, 11 Am. Rep. 454; *State v. Saunders*, 66 N. H. 39, 25 Atl. 588, 18 L. R. A. 646; *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536; *Attorney-General v. Hunter*, 1 Dev. Eq. (N. Car.) 12; *Attorney-General v. Chicago &c. R. Co.*, 35 Wis. 425; *Columbian Athletic Club v. State*, 143 Ind. 98, 40 N. E. 914, 28 L. R. A. 727, 52 Am. St. 407. In the last case just cited it was held, after a careful review of many of the authorities, that injunction would lie and that a receiver might also be appointed in aid of the injunction. See also notes

in 15 L. R. A. (N. S.) 747, 23 L. R. A. (N. S.) 691, and 33 L. R. A. (N. S.) 325; *State v. Marshall*, 100 Miss. 626, 56 So. 792, Ann. Cas. 1914A, 434, and note.

<sup>64</sup> *Wylie v. Elwood*, 134 Ill. 281, 25 N. E. 570, 9 L. R. A. 726, 23 Am. St. 673; and note *Field v. Barling*, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. 311; *Innis v. Cedar Rapids &c. R. Co.*, 76 Iowa 165, 40 N. W. 701, 2 L. R. A. 282; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1; *Cogswell v. New York &c. R. Co.*, 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; *Gold v. Philadelphia*, 115 Pa. St. 184, 8 Atl. 386; note to *South Carolina &c. Co. v. South Carolina R. Co.*, 4 L. R. A. 209; *Elliott Roads & Streets*, 496 (3d ed.), § 850.

<sup>65</sup> *Rouse v. Martin*, 75 Ala. 510, 51 Am. Rep. 463; *Powell v. Macon &c. R. Co.*, 92 Ga. 209, 17 S. E. 1027;

safely affirmed that where a structure such as a coal chute, a water tank, or the like, essential to the operation of the railroad, is properly constructed, the remedy of an individual inconvenienced by its use, if any he has, must, ordinarily, be an action for damages.<sup>66</sup> And even this remedy is not, ordinarily open to him where the structure is properly constructed in a proper place and the inconvenience is such only as necessarily results from its authorized use.<sup>67</sup>

**§ 730 (632). Injunction at suit of the company.**—A railroad company may have an injunction, in a proper case, to protect its rights from a threatened invasion. It may enjoin an interference with its roadbed by piling obstructions thereon,<sup>68</sup> or by tearing

*Keiser v. Lovett*, 85 Ind. 240, 44 Am. Rep. 10; *Pfingst v. Senn*, 94 Ky. 556, 23 S. W. 358, 21 L. R. A. 569; *Dumesnil v. Dupont*, 18 B. Mon. (Ky.) 800, 68 Am. Dec. 750; *Duncan v. Hayes*, 22 N. J. Eq. 25; *Rhodes v. Dunbar*, 57 Pa. St. 274, 98 Am. Dec. 221; *Earl of Ripon v. Hobart*, 1 Cooper (Temp. Brougham) 333. See also *Dalton v. Cleveland &c. R. Co.*, 144 Ind. 121, 43 N. E. 130.

<sup>66</sup> *Owen v. Phillips*, 73 Ind. 284; *Barnard v. Sherley*, 135 Ind. 547, 558, 34 N. E. 600, 35 N. E. 117, 24 L. R. A. 568, 41 Am. St. 454, and authorities there cited. See *Gilbert v. Showerman*, 23 Mich. 448; *Goodall v. Crofton*, 33 Ohio St. 271, 31 Am. Rep. 535; *Huckenstine's Appeal*, 70 Pa. St. 102, 10 Am. Rep. 669; *Robb v. Carnegie Bros. & Co.*, 145 Pa. St. 324, 22 Atl. 649, 14 L. R. A. 329, 27 Am. St. 694. Of course we do not mean to say that an individual who is specially injured may not have an injunction, in a proper case, where this remedy at law is inadequate, against a

nuisance caused by the use of a thing as well as against the thing itself.

<sup>67</sup> *Barnard v. Sherley*, 135 Ind. 547, 553, 34 N. E. 600, 24 L. R. A. 568, 41 Am. St. 454; *Dunsmore v. Central &c. R. Co.*, 72 Iowa 182, 33 N. W. 456; *Cosby v. Owensboro &c. R. Co.*, 10 Bush (Ky.) 288; *Booth v. Rome &c. R. Co.*, 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. 552 (railroad company held not liable for incidental injury caused by blasting on its own land a place to lay its tracks); *Randle v. Pacific &c. Co.*, 65 Mo. 325; *Parrott v. Cincinnati &c. R. Co.*, 10 Ohio St. 624; *Pennsylvania Co. v. Lippincott*, 116 Pa. St. 472, 9 Atl. 871, 2 Am. St. 618; *Pennsylvania R. Co. v. Marchant*, 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. 659.

<sup>68</sup> *Henderson v. Ogden City R. Co.*, 7 Utah 199, 26 Pac. 286. But it has been held that a preliminary injunction will not be granted to restrain the erection of buildings on land claimed by the railroad company as its right of way, where it

up its tracks or placing obstacles in the way of constructing its road upon a proposed route which it has located according to law.<sup>69</sup> So, it has been held that it may enjoin a constant or continuous use of its track by a trespasser.<sup>70</sup> If the former owner wrongfully threatens to resist the occupancy by the railroad company of lands which it has acquired by regular condemnation proceedings, he may be restrained by injunction.<sup>71</sup> So, where a riparian proprietor had conveyed to a railroad company a right of way, with "such exclusive interest and estate in said strip of land" as the company could have acquired by condemnation under the statute, it was held that a subsequent grantee of the fee from such original proprietor had no right to construct along the river bank, and upon such right of way, a levee which would raise the water flowing in the stream at time of ordinary flood, although in some places beyond the low-water banks, so as to endanger the bridge, trestlework and track of the railroad, and that the company was entitled to have the same enjoined.<sup>72</sup> While there is conflict among the decisions upon the question as to what constitutes surface water, the authorities cited by the

appears that the defendant also claims title to the land. *Delaware &c. R. Co. v. Newton &c. Co.*, 137 Pa. St. 314, 21 Atl. 171.

<sup>69</sup> *Rochester &c. R. Co. v. New York &c. R. Co.*, 110 N. Y. 128, 17 N. E. 680; *Easton &c. R. Co. v. Easton*, 133 Pa. St. 505, 19 Atl. 486, 19 Am. St. 658 (city enjoined); *Asheville St. R. Co. v. Asheville*, 109 N. Car. 688, 14 S. E. 316 (chief of police enjoined from tearing up track). See also *Millville &c. Co. v. Goodwin* (N. J.), 32 Atl. 263; *Northern Pac. R. Co. v. Wadekamper*, 70 Wash. 392, 126 Pac. 909; *Bellington &c. R. Co. v. Alston*, 54 W. Va. 597, 46 S. E. 612, 613, citing text; *Seaboard Air Line R. Co. v. Olive* (N. Car.), 55 S. E. 263.

<sup>70</sup> *Atchison &c. R. Co. v. Spaulding*, 69 Kans. 431, 77 Pac. 106, 66 L.

R. A. 587, 105 Am. St. 175. See generally as to enjoining trespasses, note in 99 Am. St. 731-753.

<sup>71</sup> *Montgomery R. Co. v. Walton*, 14 Ala. 207. Any interference with the easement of the company by the owner of the fee may be enjoined. *Chance v. East Texas R. Co.*, 63 Tex. 152.

<sup>72</sup> *Cario &c. R. Co. v. Brevort*, 62 Fed. 129. The river referred to in this case is a navigable river forming the boundary between two states, and the court also held that the question involved was not, therefore, a local question, but was one depending on the general principles of law, so that the decisions of the courts of one of the states were not binding on the federal court.

court fully sustain the ruling upon that branch of the case, and, as the railroad company had not only a dominant estate, to which that of the defendant was servient,<sup>73</sup> but also had the right, at least as against the defendant, to the exclusive possession and control of the land within its right of way or location, for railroad purposes,<sup>74</sup> it seems clear that the construction of the levee, as proposed would have been a very material invasion of the plaintiff's rights, and that the decision of the court was undoubtedly sound. The grantees of land who purchased it with knowledge that a railroad company had laid pipes across it from a certain spring to a tank, under a contract with a former owner of the land, may be enjoined from interfering with such pipes; and the fact that the tank is not located in the exact place specified in the contract is immaterial where the change does not affect the position of the pipes, which, owing to the topography of the country, are necessarily laid just where they are.<sup>75</sup> A railroad company may enjoin another company having a right of way across its land from interfering with its use of its own property as a freight yard as permitted by the contract granting the easement, even though some uncertain damages would result to the grantee company from such use because of its interference with the grantee's use of its tracks.<sup>76</sup> So, a street railway company which has laid its tracks in a street under a grant from a city may enjoin another company, to which the city afterward grants similar rights, from tearing up the plaintiff's track or placing its own track over that of the plaintiff in derogation of

<sup>73</sup> Davidson v. Nicholson, 59 Ind. 411; Robinson v. Thrailkill, 110 Ind. 117, 10 N. E. 647; Herman v. Roberts, 119 N. Y. 37, 23 N. E. 442, 7 L. R. A. 226, 16 Am. St. 801; Hayden v. Skillings, 78 Maine 413, 6 Atl. 830.

<sup>74</sup> Atlantic &c. Tel. Co. v. Chicago &c. R. Co., 6 Biss. (U. S.) 158, Fed. Cas. No. 632; Shelby v. Chicago &c. R. Co., 143 Ill. 385, 32 N. E. 438; Hayden v. Skillings, 78 Maine 413, 6 Atl. 830; Brainard v. Clapp, 64

Mass. 6, 57 Am. Dec. 74; Proprietors &c. v. Nashua &c. R. Co., 104 Mass. 1, 6 Am. Rep. 181; Chicago &c. R. Co. v. McGrew, 104 Mo. 282, 297, 15 S. W. 931; St. Louis &c. R. Co. v. Clark, 119 Mo. 357, 25 S. W. 192; Jackson v. Rutland &c. R. Co., 25 Vt. 150, 60 Am. Dec. 246.

<sup>75</sup> Diffendal v. Virginia Midland R. Co., 86 Va. 459, 10 S. E. 536.

<sup>76</sup> Chicago &c. R. Co. v. Lake Shore &c. R. Co., 30 Ill. App. 129.

the latter's rights.<sup>77</sup> A threatened invasion of an exclusive right granted to a street railway company to build a road over the lands of a railroad company to its depot may also be enjoined.<sup>78</sup> Where a shipper threatened to bring a great number of separate actions for damages against a railroad company for the separate cars as to which he alleged he was entitled to recover under the state law prohibiting a charge for carriage above a certain rate it was held that he could be enjoined from suing separately for the overcharge on each car.<sup>79</sup> An injunction may also be granted to prevent a railroad company from violating its contract by which it has agreed to stop trains within a certain distance of the other

<sup>77</sup> See *Hamilton St. R. & Co. v. Hamilton & Co.*, 5 Ohio Cir. Ct. 319; *Kansas City & Co. v. Kansas City & Co.*, 129 Mo. 62, 31 S. W. 451; *Indianapolis Cable St. R. Co. v. Citizens' St. R. Co.*, 127 Ind. 369, 24 N. E. 1054, and 26 N. E. 893; *Citizens' Coach Co. v. Camden & Co.*, 33 N. J. Eq. 267, 36 Am. Rep. 542. See also *Donora Southern R. Co. v. Pennsylvania R. Co.*, 213 Pa. St. 119, 62 Atl. 367. See generally as to joint use of streets and tracks, *Elliott Roads & Streets*, (3d ed.), § 965, et seq. Where the grant to use a street is not exclusive—and the rule against monopolies will generally prevent an exclusive grant—the company can not enjoin another company from using another portion of the street under a subsequent grant. *Pennsylvania & Co. v. Philadelphia & Co.*, 157 Pa. St. 42, 27 Atl. 683, 56 Am. & Eng. R. Cas. 610. See also *West Jersey R. Co. v. Camden & Co.*, 52 N. J. Eq. 31, 29 Atl. 423, 2 Am. L. Reg. & Rev. (N. S.) 38, and note; *Chicago & Co. v. Whiting & Co.*, 139 Ind. 297, 38 N. E. 604, 26 L. R. A. 337, 47 Am. St.

264 (holding that injunction would not lie to restrain a street railway company from crossing a steam railroad company's tracks in a street).

<sup>78</sup> *Fort Worth St. R. Co. v. Queen City R. Co.*, 71 Tex. 165, 9 S. W. 94.

<sup>79</sup> *Texas & Co. v. Kuteman*, 54 Fed. 547. As to when an injunction may be granted to restrain the bringing of a multiplicity of suits, and the plaintiffs compelled to submit to the jurisdiction of a court of equity, see *Tribette v. Illinois Central R. Co.*, 70 Miss. 182, 12 So. 32, 19 L. R. A. 660, 35 Am. St. 642; *Western Union Tel. Co. v. Poe*, 61 Fed. 449; *Lake Erie & Co. v. Young*, 135 Ind. 426, 35 N. E. 177, 41 Am. St. 430; *Carney v. Hadley*, 32 Fla. 344, 14 So. 4, 22 L. R. A. 233, 37 Am. St. 101. But compare *Chicago v. Chicago City R. Co.*, 222 Ill. 560, 78 N. E. 890. It has been held that the federal courts have no jurisdiction to restrain by injunction a criminal prosecution by a state under an unconstitutional law of such state. *Minneapolis & Co. v. Milner*, 57 Fed. 276.

company's road, and not to cross until signaled to do so by the flagman.<sup>80</sup> Where it is shown that the extension of a city street so as to cross the tracks and yards or depot grounds of a railroad company would render them useless to the railroad company, or, in other words, where the two public uses cannot co-exist, the city may be enjoined, in the absence of an express statute conferring the right, from so extending the street.<sup>81</sup> Until a railroad company has complied with the requirements of the statute giving it authority to cross another railroad, it has no right to enter upon that company's premises to build its road,<sup>82</sup> and an injunction may be granted to restrain it from so doing.<sup>83</sup> An injunction will not lie, however, for a naked trespass without irreparable injury, and upon this ground it has been held that it will not lie where one railroad company enters upon the road-bed of another and constructs its tracks without first making

<sup>80</sup> *Cornwall &c. R. Co.'s Appeal*, 125 Pa. St. 232, 17 Atl. 427, 11 Am. St. 889. As to when a private individual may and may not enjoin change of station or location of road, see *Horton v. Southern R. Co.*, 173 Ala. 231, 55 So. 531, Ann. Cas. 1914A, 685, and note; *Day v. Tacona*, 80 Wash. 161, 141 Pac. 347, L. R. A. 1915B, 547.

<sup>81</sup> *Baltimore &c. R. Co. v. North*, 103 Ind. 486; *Fort Wayne v. Lake Shore &c. R. Co.*, 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367, 32 Am. St. 277; *Cincinnati &c. R. Co. v. City of Anderson*, 139 Ind. 490, 38 N. E. 167, 47 Am. St. 285; *Housatonic R. Co. v. Lee &c. R. Co.*, 118 Mass. 391; *Milwaukee &c. R. Co. v. Faribault*, 23 Minn. 167; *New Jersey &c. R. Co. v. Long Branch*, 39 N. J. L. 28; *Prospect Park &c. Co. v. Williamson*, 91 N. Y. 552; *Winona &c. R. Co. v. Watertown*, 4 S. Dak. 323, 56 N. W. 1077; *Elliott Roads & Streets* 167, 168 (3d ed.), § 359,

et seq. But see *Illinois Cent. R. Co. v. Chicago*, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530; *Little Miami &c. R. Co. v. Dayton*, 23 Ohio St. 510; *Detroit &c. R. Co. v. Detroit*, 91 Mich. 444, 52 N. W. 52.

<sup>82</sup> *Lake Shore &c. R. Co. v. Cincinnati &c. R. Co.*, 116 Ind. 578, 19 N. E. 440.

<sup>83</sup> *Northern Pac. R. Co. v. St. Paul &c. R. Co.*, 1 McCrary (U. S.) 302, 3 Fed. 702; *Pennsylvania R. Co. v. Consolidation Coal Co.*, 55 Md. 158. In *Pennsylvania Co. v. Lake Erie &c. R. Co.*, 146 Fed. 446, it is held that a lessee of a railroad has such an interest as will entitle it to maintain an injunction against another company illegally interfering with the enjoyment of the leased property by an unauthorized crossing. But in cases where the interests of the public demand it the injunction may be dissolved upon the filing of a bond to pay damages and costs adjudged against

compensation as required by law,<sup>84</sup> and the same court has held that where two street railway companies are operating their respective roads under legal authority, their roads crossing each other at the intersection of two streets, the mere fact that one of them is proceeding to lay a double track at the crossing will not entitle the other to an injunction, where no irreparable injury is shown and the company is solvent and able to respond in damages.<sup>85</sup> But the general rule is that injunction will lie where compensation is not paid or tendered,<sup>86</sup> and it seems to us that an entry under claim and color of right, which may ripen into a title, is not a mere fugitive trespass that can cause no irreparable injury.<sup>87</sup>

§ 731 (633). **Enjoining "strikers."**—The great strike of the members of the American Railway Union in 1894, and other strikes about the same time, gave rise to a number of decisions in which old principles were applied to a comparatively new state of facts by the courts of equity, thus illustrating the rule that equity will keep pace with the needs of society and accommodate its methods of procedure to the development of the public interests by applying its remedies to the varying demands for equitable relief.<sup>88</sup> It has been said that there is no such thing as

it in the condemnation proceedings by which it is authorized to acquire title. *Northern Pac. R. Co. v. St. Paul & C. R. Co.*, 2 *McCrary* (U. S.) 260, 4 *Fed.* 688.

<sup>84</sup> *Mobile & C. R. Co. v. Alabama & C. R. Co.*, 87 *Ala.* 520, 6 *So.* 407, and cases cited.

<sup>85</sup> *Highland Ave. & C. R. Co. v. Birmingham Union R. Co.*, 93 *Ala.* 505, 9 *So.* 568. See also *Chicago & C. R. Co. v. Illinois & C. R. Co.*, 113 *Ill.* 156; *Pennsylvania R. Co. v. National Docks & C. R. Co.*, 56 *Fed.* 697.

<sup>86</sup> *Evans v. Missouri & C. R. Co.*, 64 *Mo.* 453; *Gardner v. Newburgh*, 2 *Johns Ch.* (N. Y.) 162; *Georgia Midland & C. R. Co. v. Columbus &*

*R. Co.*, 89 *Ga.* 205, 15 *S. E.* 305, 51 *Am. & Eng. R. Cas.* 538; *Elliot Roads & Streets*, (3d ed.), § 272; ante, § 727.

<sup>87</sup> See *Webb v. Portland & C. Co.*, 3 *Sumner* (U. S.) 189, *Fed. Cas.* No. 17322.

<sup>88</sup> See *Toledo & C. R. Co. v. Pennsylvania Co.*, 54 *Fed.* 746; *Southern Cal. R. Co. v. Rutherford*, 62 *Fed.* 796; *Joy v. St. Louis*, 138 *U. S.* 1, 50, 11 *Sup. Ct.* 243, 34 *L. ed.* 843. See also *O'Neil v. Behanna*, 182 *Pa. St.* 236, 37 *Atl.* 843, 38 *L. R. A.* 382, 61 *Am. St.* 702, and note; *Gray v. Building Trades Council*, 91 *Minn.* 171, 97 *N. W.* 663, 63 *L. R. A.* 753, 103 *Am. St.* 477, and note.



a peaceable and lawful strike,<sup>89</sup> but this seems to be an extreme statement, and a United States court of appeals has taken a different view, holding that a strike is not unlawful if it is merely a combination of employes to withdraw from the service of their employer for the purpose of accomplishing some lawful purpose.<sup>90</sup> Combinations of workmen for their common benefit, to develop skill in their trade, to prevent the overcrowding thereof, to obtain better wages than they might be able to obtain individually, and to accumulate a fund for these purposes, are not necessarily unlawful. Nor, as a general rule, is it unlawful—except in so far as it involves a breach of contract for which an injunction will seldom, if ever, be granted—for a man to quit the service of his employer and bestow his labor where he will.<sup>91</sup> But where employes endeavor to enforce their demands by forcibly preventing others from working in their places, or by destroying property or preventing its use, a court of equity has power to enjoin them and may enforce its order by punishing the violators for contempt. Conspiracies to obstruct or interfere with the business and management of railroad companies, especially when the carriage of mail is obstructed, by threats, intimidation and violence, have often been enjoined as a violation of the interstate commerce law,<sup>92</sup> and also as constituting an obstruction of

<sup>89</sup> See *Farmers' &c. Co. v. Northern Pac. R. Co.*, 60 Fed. 803. *The Legal Side of the Strike Question*, 33 Am. L. Reg. (N. S. 1894) 609, 614.

<sup>90</sup> *Arthur v. Oakes*, 63 Fed. 310, 25 L. R. A. 414. See also *Longshore &c. Co. v. Howell*, 26 Ore. 527, 38 Pac. 547, 28 L. R. A. 464, and note, 46 Am. St. 640; *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, and note 116 Am. St. 272, 3 Elliott Cont., § 2700.

<sup>91</sup> See *Arthur v. Oakes*, 63 Fed. 310; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W.

1119, 21 L. R. A. 337, 40 Am. St. 319; *Reynolds v. Everett*, 144 N. Y. 189, 39 N. E. 72 (not unlawful to use persuasion to induce others to leave); *Longshore &c. Co. v. Howell*, 26 Ore. 527, 38 Pac. 547, 28 L. R. A. 464, 46 Am. St. 640, 8 *Thomp. Corp.*, § 5689.

<sup>92</sup> *United States v. Debs*, 64 Fed. 724; *Toledo &c. R. Co. v. Pennsylvania Co.*, 54 Fed. 746, 19 L. R. A. 395; *Southern Cal. R. Co. v. Rutherford*, 62 Fed. 796; *United States v. Agler*, 62 Fed. 824; *United States v. Elliott*, 62 Fed. 801; *United States v. Workingmen's Amalgamated Council*, 54 Fed. 994, affirmed in *Workingmen's &c. Council v.*

the highways of interstate commerce.<sup>93</sup> But these are not the only grounds upon which strikers may be enjoined. An injunction may be granted at the suit of a railroad company in a proper case, upon the ground of irreparable injury and in order to prevent a multiplicity of actions.<sup>94</sup> So, in a proper case, the court may even grant a mandatory injunction. Thus, where the chief officer of the Brotherhood of Locomotive Engineers had issued an order requiring the members thereof who were in the employ of certain railroad companies to refuse to handle and deliver cars or freight in course of transportation from one state to another, the court granted a mandatory injunction compelling him to rescind it.<sup>95</sup> As we have already stated, and as most of the authorities we have cited hold, the violation of an injunction against strikers may be punished as a contempt. It has been held that an injunction against strikers who are named as defendants and all others who aid and abet them is binding not only upon all who are served although they are not made parties to the suit,<sup>96</sup> but also upon others of the class designated who have notice of the injunction, although they are not served with a copy of the order.<sup>97</sup> It is also well settled that any unlawful interference

United States, 57 Fed. 85; *Waterhouse v. Comer*, 55 Fed. 149, 19 L. R. A. 403. See also *Southern R. Co. v. Machinists &c. Union*, 111 Fed. 49; *Illinois Cent. R. Co. v. International Assn.*, 190 Fed. 910; *Barnes &c. Co. v. Typographical Union*, 232 Ill. 424, 83 N. E. 940, 14 L. R. A. (N. S.) 1018.

<sup>93</sup> *Debs, In re*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. ed. 1092.

<sup>94</sup> "The Legal Side of the Strike Question," 33 Am. L. Reg. (N. S. 1894) 609; *Blindell v. Hagan*, 54 Fed. 40, affirmed in *Hagan v. Blindell*, 56 Fed. 696; *Cœur D'Alene &c. Co. v. Miners' Union*, 51 Fed. 260; *Lake Erie &c. R. Co. v. Bailey*, 61 Fed. 494; *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307, 9 Am. St. 689; *Murdock v. Walker*, 152 Pa. St.

595, 25 Atl. 492, 34 Am. St. 678; *Wick China Co. v. Brown*, 164 Pa. St. 449, 30 Atl. 261.

<sup>95</sup> *Toledo &c. R. Co. v. Pennsylvania Co.*, 54 Fed. 730, 19 L. R. A. 387. See also *Chicago &c. R. Co. v. Burlington &c. R. Co.*, 34 Fed. 481; *Coe v. Louisville &c. R. Co.*, 3 Fed. 775; *Toledo &c. R. Co. v. Pennsylvania Co.*, 54 Fed. 746, 19 L. R. A. 395; *Broome v. New York &c. Co.*, 42 N. J. Eq. 141, 7 Atl. 851; *Beadel v. Perry*, L. R. 3 Eq. 465.

<sup>96</sup> *Toledo &c. R. Co. v. Pennsylvania Co.*, 54 Fed. 746; *United States v. Agler*, 62 Fed. 824. See also *United States v. Elliott*, 64 Fed. 27.

<sup>97</sup> *Lennon, Ex parte*, 64 Fed. 320, affirmed in *Lennon, In re*, 150 U. S. 393, 14 Sup. Ct. 123, 37 L. ed. 1120;

with a railroad in the hands of a receiver is punishable as a contempt,<sup>98</sup> and "picketing" has been held to constitute a violation of an injunction.<sup>99</sup>

§ 732 (634). **Injunction at suit of stockholder.**—A stockholder, in a proper case, may enjoin the corporation and those in control of it from acts by which a forfeiture of the charter will be incurred, or from other acts amounting to a breach of the trust reposed in them by the stockholders.<sup>1</sup> He may enjoin the making of material and fundamental changes in the original contract of association,<sup>2</sup> the diversion of corporate funds to purposes not authorized by the charter and outside of the objects for which the corporation was organized,<sup>3</sup> and ultra vires acts gen-

Rapalje Contempt, 46; Ewing v. Johnson, 34 How. Prac. (N. Y.) 202; Waffle v. Vanderheyden, 8 Paige (N. Y.) 45. See also United States v. Debs, 64 Fed. 724.

<sup>98</sup> Thomas v. Cincinnati &c. R. Co., 62 Fed. 803; United States v. Debs, 64 Fed. 724; Secor v. Toledo &c. R. Co., 7 Biss. (U. S.) 513, Fed. Cas. No. 12605; Higgins, In re, 27 Fed. 443; United States v. Kane, 23 Fed. 748; Frank v. Denver &c. R. Co., 23 Fed. 757. See also Arthur v. Oakes, 63 Fed. 310; Acker, In re, 66 Fed. 290.

<sup>99</sup> Atchison &c. R. Co. v. Gee, 139 Fed. 582; Allis-Chalmers Co. v. Iron Molders' Union, 150 Fed. 155. In some jurisdictions peaceful picketing will not be enjoined, but in others all picketing, especially if accompanied with violence or even threats and a display of force, is considered as unlawful intimidation. See 3 Elliott Cont., § 2700, citing cases on both sides. See also Whites' Supp. Thomp. Corp., §§ 5695-5697.

<sup>1</sup> Pond v. Vermont Valley R. Co., 12 Blatchf. (U. S.) 280, Fed. Cas. No. 11265; Wilcox v. Bickel, 11 Nebr. 154, 8 N. W. 436; March v. Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732; Gamble v. Queens County &c. Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527; Bagshaw v. Eastern &c. R. Co., 7 Hare 114. But in order to warrant such interference there must be a gross abuse of its powers, which will result in injury to the complainant, or the acts complained of must be clearly in excess thereof. Union Pac. &c. R. Co. v. Lincoln County, 3 Dill. (U. S.) 300, Fed. Cas. No. 14380; Jones v. Little Rock, 25 Ark. 301. See also Forrest v. Nebraska &c. Co., 91 Nebr. 735, 137 N. W. 839.

<sup>2</sup> Zabriskie v. Hackensack &c. R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617; Stevens v. Rutland &c. R. Co., 29 Va. 545, 4 Thomp. Corp., § 4517.

<sup>3</sup> Marseilles Land Co. v. Aldrich, 86 Ill. 504; Dodge v. Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401; Central R. Co. v. Collins, 40 Ga.

erally, such as unauthorized consolidations, leases, or the like.<sup>4</sup> He may prevent the payment of dividends where no money has in fact been earned from which to pay them,<sup>5</sup> and so, it has been held, where losses have consumed the surplus earnings set apart to pay them,<sup>6</sup> or where the stock upon which dividends are claimed is spurious.<sup>7</sup> He may also restrain the holding of a corporate election, in a proper case, if great and irreparable injury to him would result therefrom,<sup>8</sup> and the illegal voting of shares in furtherance of a conspiracy to get control of the corporation,<sup>9</sup> or the illegal forfeiture of his own shares.<sup>10</sup> So, a stockholder of a railroad company which has located and partially constructed its lines may maintain a bill to enjoin a rival company from appropriating the partially completed work to its own use, through the collusion of the directors of his own company.<sup>11</sup> But a court of equity will not interfere by injunction to control the discretion of the officers in matters which come fairly within their powers, where the contemplated acts do not amount to a breach of trust, but it appears that the real ground

582; *Cherokee &c. Co. v. Jones*, 52 Ga. 276; *Kean v. Johnson*, 9 N. J. Eq. 401; *Baltimore &c. R. Co. v. Wheeling*, 13 Grat. (Va.) 40;

<sup>4</sup>*Young v. Rountout &c. Co.*, 61 Hun 619, 15 N. Y. S. 443; *Byrne v. Schuyler &c. Co.*, 65 Conn. 336, 31 Atl. 833, 28 L. R. A. 304; *Botts v. Simpsonville &c. Co.*, 88 Ky. 54, 10 S. W. 134, 2 L. R. A. 594; *Small v. Minneapolis &c. Co.*, 45 Minn. 264, 47 N. W. 797. See ante, § 431, 437, 467, 479, 558, also *Union Sav. &c. Co. v. District Court*, 44 Utah 397, 140 Pac. 221.

<sup>5</sup>*Painesville &c. R. Co. v. King*, 17 Ohio St. 534; *Carpenter v. New York &c. R. Co.*, 5 Abb. Prac. (N. Y.) 277; *Burnes v. Pennell*, 2 H. L. Cas. 497; ante, § 363.

<sup>6</sup>*Fawcett v. Laurie*, 1 Dr. & Sm. 192. Where a specific fund has been set apart to pay dividends, and

money belonging to other funds is lost, the dividends must be paid. *LeRoy v. Globe Ins. Co.*, 2 Edw. Ch. (N. Y.) 657.

<sup>7</sup>*Underwood v. New York &c. R. Co.*, 17 How. Prac. (N. Y.) 537.

<sup>8</sup>*Walker v. Devereaux*, 4 Paige (N. Y.) 229; *Wright v. Bundy*, 11 Ind. 404; *Webb v. Ridgely*, 38 Md. 364; *Hilles v. Parish*, 14 N. J. Eq. 380. See also ante, § 199.

<sup>9</sup>*Moses v. Tompkins*, 84 Ala. 613, 4 So. 763; *Memphis &c. R. Co. v. Woods*, 88 Ala. 630, 7 So. 108, 7 L. R. A. 605, 16 Am. St. 81.

<sup>10</sup>*Moore v. New Jersey &c. Co.*, 23 N. Y. St. 213, 5 N. Y. S. 192; *Moses v. Tompkins*, 84 Ala. 613, 4 So. 763.

<sup>11</sup>*Weidenfeld v. Sugar Run R. Co.*, 48 Fed. 615, 51 Am. & Eng. R. Cas. 505.

of complaint is a difference of opinion as to what the interests of the corporation require.<sup>12</sup> And the alleged invalidity of their title has been held not to be sufficient ground for restraining de facto directors from acting as such.<sup>13</sup> The interest of the stockholder does not, ordinarily, extend to the acts of third persons with reference to corporate property, and a stockholder is not entitled to an injunction to restrain slander of the title of property belonging to the corporation.<sup>14</sup> And even where a stockholder might have been entitled to an injunction if he had acted in time or if he had not taken part or acquiesced in the act of which he complains, his acquiescence or laches may estop him from afterwards maintaining the suit.<sup>15</sup>

§ 733 (635). **Mandatory injunctions—English cases.**—Where the prevention of threatened acts by injunction is sought, together with the continuance of certain other acts, a court of equity, having acquired jurisdiction for one purpose, will retain the suit for all purposes of relief, and, in a proper case, may compel by mandatory injunction the permanent or continuous performance of affirmative acts, notwithstanding there might be no right to a mandamus.<sup>16</sup> In suits against railroad companies the English courts of equity have not only enjoined the further commission of acts complained of in the several cases, but have also required the company to do many affirmative acts, such as to construct and maintain at a specific point a first-class depot

<sup>12</sup> *Ellerman v. Chicago Junction R. &c. Co.*, 49 N. J. Eq. 217, 23 Atl. 287; *Hunter v. Roberts &c. Co.*, 83 Mich. 63, 47 N. W. 131; *McWhorter v. Pensacola*, 24 Fla. 417, 5 So. 129, 2 L. R. A. 504, 12 Am. St. 220. See also *Converse v. Hood*, 149 Mass. 471, 21 N. E. 878, 4 L. R. A. 521; *Woodruff v. Dubuque &c. R. Co.*, 30 Fed. 91; note in 97 Am. St. 43, *Whites' Supp. Thomp. Corp.* §§ 5666, 5667.

<sup>13</sup> *Mozley v. Alston*, 1 Phill. 790.

<sup>14</sup> *Langdon v. Hillside &c. Co.*, 41 Fed. 609.

<sup>15</sup> See note in 97 Am. St. 49, 50. And see generally ante, §§ 192, 378.

<sup>16</sup> *Wheeling v. Mayor*, 1 Hughes (U. S.) 90. See also *Central Trust Co. v. Moran*, 56 Minn. 188, 57 N. W. 471, 29 L. R. A. 212; *Pennsylvania R. Co. v. Kelley*, 77 N. J. Eq. 129, 75 Atl. 758, 140 Am. St. 541; *Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161, and note.

building,<sup>17</sup> to stop all trains at a certain station,<sup>18</sup> to build a side-track,<sup>19</sup> and to so run its trains as to furnish convenient facilities for passengers and shippers of goods,<sup>20</sup> all this upon the ground that these were common-law duties of the railroad company as a common carrier. It is doubtful if the courts of this country would go so far in this direction as some of the English courts,<sup>21</sup> but mandatory injunctions have been awarded in proper cases.<sup>22</sup>

**§ 734 (636). Rule in the United States—Illustrative cases.—**

All the authorities agree, that where a specific duty is prescribed by statute and the railroad company not only threatens to perpetrate wrongs for which it may be enjoined, but also at the same time neglects such duty, it may be compelled to perform its duty by mandatory injunction. Acting under the authority of particular statutes, courts of equity have by injunction compelled the defendant railroad company to deliver cattle at the plaintiff's stock-yards,<sup>23</sup> to deliver carloads of grain consigned to him upon his private side track without extra charge,<sup>24</sup> to carry for plaintiff on equal terms with others,<sup>25</sup> to restore a stream of water to its natural channel,<sup>26</sup> and to remove a wall which it had unlawfully

<sup>17</sup> *Hood v. Northeastern Co.*, L. R. 8 Eq. 666. See also *Railroad Comrs. v. Portland &c. R. Co.*, 63 Maine 269, 18 Am. Rep. 208.

<sup>18</sup> *Earl of Lindsey v. Great Northern R. Co.*, 10 Hare 664.

<sup>19</sup> *Greene v. West C. Co.*, L. R. 13 Eq. 44.

<sup>20</sup> *Great Northern R. Co. v. Manchester R. Co.*, 5 DeG. & S. 138. But a mandatory injunction to compel operation of an unprofitable branch was refused in *Vicksburg Trac. Co. v. Warren County*, 100 Miss. 442, 56 So. 607.

<sup>21</sup> The weight of authority in America is against extending the powers of a court of equity to enforce many duties which are not imposed by the charter or by statute or by necessary implication there-

from upon a railroad company. *Northern Pac. R. Co. v. Washington*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. ed. 1092. But see as to enforcement of public duties, *Rogers &c. Co. v. Erie &c. Co.*, 20 N. J. Eq. 379; *American &c. Co. v. Consolidation Co.*, 46 Md. 15.

<sup>22</sup> See authorities last cited in last preceding note; also post, §§ 734, 1574, and see §§ 1442, 2366.

<sup>23</sup> *McCoy v. Cincinnati &c. Railroad*, 22 Am. Law Reg. (N. S.) 725.

<sup>24</sup> *Vincent v. Chicago &c. R. Co.*, 49 Ill. 33.

<sup>25</sup> *Harris &c. R. Co., In re*, 3 C. B. N. S. 693. But see *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. ed. 791.

<sup>26</sup> *Corning v. Troy &c. Factory*, 40 N. Y. 191.

erected.<sup>27</sup> A railroad company may also be compelled to receive and handle freight delivered to it by a connecting carrier as required by the interstate commerce act,<sup>28</sup> and such an injunction will bind the agents and employes of the company, and takes effect as to them as soon as they are notified thereof without the necessity of making them parties.<sup>29</sup> A railroad company may also seek relief by a mandatory injunction, and where persons were engaged in laying a railroad track upon the line of plaintiff's road so as to obstruct and prevent the operation thereof, an injunction was awarded not only forbidding the further obstruction of plaintiff's track, but also commanding the removal of the track, already laid.<sup>30</sup> So, in many other cases parties have been compelled not only to cease unlawful acts, but also to undo what they had already wrongfully done, or to restore the plaintiff to his original situation or condition.<sup>31</sup> Mandatory injunctions as we have already seen,<sup>32</sup> have likewise been issue against "strikers." An injunction which is preventive in form is frequently mandatory in effect and it is common practice to so draw

<sup>27</sup> *Great North &c. R. Co. v. Clarence R. Co.*, 1 Collyer 507. See also *Pennsylvania R. Co. v. Kelley*, 77 N. J. Eq. 129, 75 Atl. 758, 140 Am. St. 541.

<sup>28</sup> *Toledo &c. R. Co. v. Pennsylvania Co.*, 54 Fed. 730, 746, 53 Am. & Eng. R. Cas. 293. See also *Interstate &c. Com. v. Lehigh Valley R. Co.*, 49 Fed. 177; *Chicago &c. Co. v. Burlington &c. Co.*, 34 Fed. 481; *Chicago &c. R. Co. v. New York &c. Co.*, 24 Fed. 516. But see *Atchison &c. R. Co. v. Denver &c. R. Co.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. ed. 291.

<sup>29</sup> *Toledo &c. R. Co. v. Pennsylvania Co.*, 53 Am. & Eng. R. Cas. 293.

<sup>30</sup> *Henderson v. Ogden City R. Co.*, 7 Utah 199, 26 Pac. 286, 46

Am. & Eng. R. Cas. 95. See also *Ocala v. Anderson*, 58 Fla. 415, 50 So. 572; *Pennsylvania R. Co. v. Kelley*, 77 N. J. Eq. 129; 75 Atl. 758, 140 Am. St. 541.

<sup>31</sup> *Chamberlain, Ex parte*, 55 Fed. 704; *Toledo &c. R. Co. v. Pennsylvania Co.*, 54 Fed. 730; *Chattanooga &c. R. Co. v. Felton*, 69 Fed. 273; *Atchison &c. R. Co. v. Long*, 46 Kans. 701, 27 Pac. 182, 26 Am. St. 167; *Tucker v. Howard*, 128 Mass. 361; *White v. Tidewater &c. Co.*, 50 N. J. Eq. 1, 25 Atl. 199; *Jamestown v. Chicago &c. R. Co.*, 69 Wis. 648, 34 N. W. 728. See also notes in 7 L. R. A. (N. S.) 49, and 36 L. R. A. (N. S.) 402; *Love v. Atchison &c. R. Co.*, 185 Fed. 321.

<sup>32</sup> *Ante*, § 731. So, in *California R. Co. v. Rutherford*, 62 Fed. 796.

the order and thus to compel an act to be done by enjoining the defendant from refusing to do it.<sup>33</sup>

**§ 735 (637). Mandamus—Generally.**—A writ of mandamus to compel a railroad corporation to do a particular act in constructing its road or buildings or in running its trains can be issued when there is a specific legal duty on its part to do that act, and clear proof of a failure to perform that duty by the corporation,<sup>34</sup> but not otherwise.<sup>35</sup> Mandamus is an extraordinary remedy and

<sup>33</sup> See *Delaware &c. R. Co. v. Central &c. Co.*, 43 N. J. Eq. 71; *Lane v. Newdigate*, 10 Ves. 192 (in which the practice is said to have originated); *Rogers Locomotive &c. Works v. Erie R. Co.*, 20 N. J. Eq. 379.

<sup>34</sup> *State v. Minneapolis &c. R. Co.*, 39 Minn. 219, 39 N. W. 153; *Chicago &c. R. Co. v. Suffern*, 129 Ill. 274, 21 N. E. 824; *Cummins v. Evansville &c. R. Co.*, 115 Ind. 417, 18 N. E. 6; *State v. New Orleans &c. R. Co.*, 42 La. Ann. 138, 7 So. 226, 43 Am. & Eng. R. Cas. 258; *State v. Chicago &c. R. Co.*, 29 Nebr. 412, 54 N. W. 469; *Oshkosh v. Milwaukee &c. R. Co.*, 74 Wis. 534, 43 N. W. 489, 17 Am. St. 175. See also *State v. Atlantic Coast Line R. Co.*, 60 Fla. 465, 54 So. 394; *State v. Atlantic Coast Line R. Co.*, 53 Fla. 650, 44 So. 213, 13 L. R. A. (N. S.) 320 (provided there is no other adequate or specific remedy); *Wabash R. Co. v. Railroad Com.*, 176 Ind. 428, 95 N. E. 673; *Seward v. Denver &c. R. Co.*, 17 N. Mex. 557, 131 Pac. 980, 46 L. R. A. (N. S.) 242. It is irregular to proceed by rule to compel a legal organization to perform a duty, however clearly imposed upon it. Such a proceed-

ing ought to be by mandamus. *Oliver v. Board of Liquidation*, 40 La. Ann. 321, 40 So. 166. Where a clear legal right to a writ of mandamus is shown the court has no discretion to refuse the writ. *Illinois Central R. Co. v. People*, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119.

<sup>35</sup> *Northern Pac. R. Co. v. Washington Territory*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. ed. 1092; *Crane v. Chicago &c. R. Co.*, 74 Iowa 330, 37 N. W. 397, 7 Am. St. 479; *State v. Pensacola &c. R. Co.*, 27 Fla. 403, 9 So. 89. See also *Chicago &c. R. Co. v. People*, 152 Ill. 230, 38 N. E. 562, 26 L. R. A. 224; *Chicago v. Chicago Tel. Co.*, 230 Ill. 157, 82 N. E. 607, 13 L. R. A. (N. S.) 1084 and note. In absence of a written assignment mandamus cannot be employed to compel a corporation to transfer shares of stock to a person to whom they have been delivered by the former owner. *Burnsville Turnp. Co. v. State*, 119 Ind. 382, 20 N. E. 421, 3 L. R. A. 265. The right of a writ of mandamus to compel a corporation to allow stockholders to inspect its books is in the discretion of the court. *Lyon v. American Screw Co.*, 16 R. I. 472, 17 Atl. 61.



is resorted to, as a general rule, only where there is no ordinary remedy which will afford adequate relief. It has therefore been held that laws extending its operation should be strictly construed,<sup>36</sup> although the general rule is that remedial statutes should receive a liberal construction so as to "advance the remedy."<sup>37</sup> Mandamus is frequently resorted to as against corporations, and is a peculiarly apt remedy in case of railroad companies on account of their public or quasi public character. Indeed, it is a general rule that when a corporation devotes its property to a public use, and for that reason obtains unusual rights and powers, it, in effect, grants to the public an interest in that use and must submit, so far at least, to the control of the public for the common good.<sup>38</sup>

**§ 736 (638). Mandamus to compel completion and operation of road.**—The writ of mandamus has been awarded to compel a company to operate its road as one continuous line,<sup>39</sup> to compel the completion of the road which the corporation was chartered to build,<sup>40</sup> to prevent the abandonment of a part of its road after

Two things must concur, a specific legal right, and the absence of an effectual legal remedy, to warrant the issuance of a mandamus on the relation of any private person. *State v. Patterson &c. R. Co.*, 43 N. J. L. 505. Mandamus will not lie to enforce the performance of private contracts. *Florida Cent. &c. R. Co. v. State*, 31 Fla. 482, 31 So. 103, 20 L. R. A. 419, 34 Am. St. 30.

<sup>36</sup> *Stata v. New Orleans &c. R. Co.*, 42 La. Ann. 138, 7 So. 226.

<sup>37</sup> *Tousey v. Bell*, 23 Ind. 423; *Smith v. Wilcox*, 24 N. Y. 353, 82 Am. Dec. 302; *Haydon's Case*, 3 Rep. (Coke) 7; *Broom Leg. Max.* 59. For this reason we incline to the opinion that where there is a clear legal right and no means of enforcing it except by mandamus, a statute providing for that remedy should be liberally construed.

<sup>38</sup> *Chicago &c. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Peik v. Chicago &c. R. Co.*, 94 U. S. 164, 24 L. ed. 97; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. ed. 708; *Chicago &c. R. Co. v. People*, 56 Ill. 365, 8 Am. Rep. 690; *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; *Nash v. Page*, 80 Ky. 539, 44 Am. Rep. 490; *Chesapeake &c. Co. v. Baltimore &c. Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; *People v. Rome &c. R. Co.*, 103 N. Y. 95, 8 N. E. 369; *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. 460. See post, §§ 824, 1330, 2366, 2701; also ante, §§ 520, 521, 661.

<sup>39</sup> *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 23 L. ed. 428.

<sup>40</sup> *Farmer's Loan &c. Co. v. Henning*, 17 Am. L. Reg. (N. S.) 266;

its completion,<sup>41</sup> to compel the company to run daily trains,<sup>42</sup> to stop all regular trains at county towns as required by statute,<sup>43</sup> to run passenger trains to the terminus of the road,<sup>44</sup> to compel the

*People v. Rome &c. R. Co.*, 103 N. Y. 95, 8 N. E. 369. But see *Bentler v. Cincinnati &c. Ry. Co.*, 180 Ky. 497, 203 S. W. 199, and note.

<sup>41</sup> Where a railroad company has abandoned a portion of its line which it is under a duty to maintain, mandamus will lie to compel the maintenance and operation of such portion of its road. *Chicago, &c. R. Co. v. Crane*, 113 U. S. 424, 5 Sup. Ct. 578, 28 L. ed. 1064; *Talcott v. Pine Grove*, 1 Flip. (U. S.) 120, Fed. Cas. No. 13735; *State v. Sugarland R. Co.* (Tex. Civ. App.). 163 S. W. 1047. But where a railroad company, by consolidation with another company, became the owner of two lines of road between certain points, it was held that it could not be compelled by mandamus to maintain and operate both lines if it appears that all public needs are served by the operation of a single line. *People v. Rome &c. R. Co.*, 103 N. Y. 95, 8 N. E. 369. See also *Chicago &c. R. Co. v. State*, 74 Nebr. 77, 103 N. W. 1087. Where the company, owning a short line of railroad, is wholly insolvent, has neither rolling stock nor funds with which to operate its road, the use of which has been abandoned for several months, and cannot be resumed, except at a great loss, the company will not be compelled by mandamus to replace or repair its track, a part of which has been torn up, as such an order would be of no public benefit. *State v. Dodge City & Co. R. Co.*, 53 Kans.

329, 36 Pac. 755, 24 L. R. A. 564. See also *Wright v. Edwards &c. R. Co.*, 101 Miss. 470, 58 So. 332; *Vicksburg Trac. Co. v. Warren County*, 100 Miss. 442, 56 So. 607.

<sup>42</sup> *New Brunswick &c. R. Co.*, In re, 17 New Brunswick (1 P. & B.) 667. But compare *People v. Brooklyn Heights R. Co.*, 172 N. Y. 90, 64 N. E. 788.

<sup>43</sup> *Illinois Central R. Co. v. People*, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119. But this statute was held invalid as an interference with the interstate commerce and the United States mail in *Illinois Cent. R. Co. v. Illinois*, 163 U. S. 142, 16 Sup. Ct. 1096, 41 L. ed. 107. Compare however *Lake Shore &c. R. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. ed. 702.

<sup>44</sup> *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 23 L. ed. 428. *State v. Hartford &c. R. Co.*, 29 Conn. 538. See also *Litchfield &c. R. Co. v. People*, 222 Ill. 242, 78 N. E. 589; *People v. St. Louis &c. R. Co.*, 176 Ill. 512, 45 N. E. 824, 52 N. E. 292, 35 L. R. A. 656; *Kansas City &c. R. Co. v. State (Tex.)*, 163 S. W. 582. But where the state charters a parallel line for some distance from one terminus for the carriage of passengers exclusively, and such company absorbs the business along that part of the route so that the receipts from passenger traffic over that part of the road will not pay expenses of operation, the railroad company is under no obligation to run passen-

erection of a bridge,<sup>45</sup> and the building of fences and cattle-guards where required by law,<sup>46</sup> and to compel the construction of the road across streams so as not to interfere with navigation.<sup>47</sup> It has also been granted to compel a railroad company to finish its track to the terminus specified in the charter and run cars thereon,<sup>48</sup> notwithstanding it had agreed with another common carrier not to do so,<sup>49</sup> to compel a street railway company to operate its road in accordance with the provisions of the ordinance under which it was constructed,<sup>50</sup> to compel a railroad company to deliver grain to all elevators alike on its road where it was in the habit of delivering grain to some of them and there was no reason why it should not treat all alike,<sup>51</sup> and, in general,

ger trains thereon. *Commonwealth v. Fitchburg R. Co.*, 12 Gray (Mass.) 180.

<sup>45</sup> *People v. Boston &c. R. Co.*, 70 N. Y. 569; *New Orleans &c. R. Co. v. Mississippi*, 112 U. S. 12, 5 Sup. Ct. 19, 28 L. ed. 619; *State v. Wilmington B. Co.*, 3 Harr. (Del.) 312; *State v. Savannah &c. R. Co.*, 26 Ga. 665. Mandamus will not lie to compel a railroad company to locate its station at a particular point within the limits of a town. *Florida Central &c. R. Co. v. State*, 31 Fla. 482, 13 So. 103, 20 L. R. A. 419, 34 Am. St. 30.

<sup>46</sup> *People v. Rochester &c. R. Co.*, 76 N. Y. 294. And the installation and operation of gates at street intersections as required by ordinance. *Council Bluffs v. Illinois Cent. R. Co.*, 158 Iowa 679, 138 N. W. 891.

<sup>47</sup> *State v. Northeastern R. Co.*, 9 Rich. L. (S. Car.) 247, 67 Am. Dec. 551.

<sup>48</sup> *People v. Albany &c. R. Co.*, 24 N. Y. 261, 82 Am. Dec. 295. See

also *Kansas City &c. R. Co. v. State (Tex.)*, 163 S. W. 582.

<sup>49</sup> *State v. Hartford &c. R. Co.*, 29 Conn. 538.

<sup>50</sup> *Potwin Place v. Topeka R. Co.*, 51 Kans. 609, 33 Pac. 309, 37 Am. St. 312, and note. See also to same effect *State v. Marion Light &c. Co.*, 174 Ind. 622, 92 N. E. 731; *Duluth v. Duluth St. R. Co.*, 88 Minn. 158, 92 N. W. 516; *Ross Twp. v. Michigan United R. Co.*, 165 Mich. 28, 130 N. W. 358, Ann. Cas. 1912C, 885. But mandamus will not ordinarily lie to enforce mere contract obligations and there are some decisions so holding that apparently conflict with those above cited. See *Northern Colo. Irr. Co. v. Pouffirt*, 47 Colo. 490, 108 Pac. 23; *Chicago v. Chicago &c. Tel. Co.*, 230 Ill. 157, 82 N. E. 607, 12 Ann. Cas. 109, *Ward v. Comrs. of Beaufort Co.*, 146 N. Car. 534, 60 S. E. 418, 125 Am. St. 489, and note, especially on p. 511, et seq.

<sup>51</sup> *People v. Chicago &c. R. Co.*, 55 Ill. 95, 8 Am. Rep. 631.

to compel the company to operate its road and exercise its franchises.<sup>52</sup>

§ 737 (639). **Mandamus to compel restoration of highway and construction of crossings or viaducts.**<sup>53</sup>—The constitution of Illinois prescribes that "all railroad companies shall permit connections to be made with their tracks, so that any \* \* \* public warehouse, coal-bank, or coal-yard, may be reached by the cars on said railroad." Where the switch connection to which the owners of a coal mine or other specified business are entitled under this provision is improperly disconnected, they are entitled to a mandamus to compel its restoration.<sup>54</sup> Where the statute provides that railroads may construct their roadbeds

<sup>52</sup> See *People v. Albany &c. R. Co.*, 24 N. Y. 261, 82 Am. Dec. 295; *King v. Severn &c. Railway Co.*, 2 Barn. & Ald. 646. Other illustrative cases in which mandamus was awarded to compel such companies to perform their duties to the public are *State v. Atlantic Coast Line R. Co.*, 53 Fla. 650, 44 So. 213, 13 L. R. A. (N. S.) 320; *State v. Chicago &c. R. Co.*, 85 Kans. 649, 118 Pac. 872; *Emporia v. Emporia R. &c. Co.*, 92 Kans. 232, 139 Pac. 1185; *State v. Louisiana R. Co.*, 135 La. 14, 64 So. 926. Under the New Hampshire statute prohibiting the operation of a railroad by a rival and competing company, and providing that any citizen may apply for an injunction to prevent it, a citizen, as such, cannot maintain a suit for a writ of mandamus to compel one of two rival and competing companies to operate its own road. *State v. Manchester &c. R. Co.*, 62 N. H. 29. The supreme court of a state has no jurisdiction to compel an interstate railroad company to operate its road within the state, during a general strike, on the allegation that enough competent men are

willing to work "for reasonable compensation." *State v. Great Northern R. Co.*, 14 Mont. 381, 36 Pac. 458; *People v. Colorado Central R. Co.*, 42 Fed. 638; *State v. Jacksonville &c. R. Co.*, 29 Fla. 590, 10 So. 590; *People v. Chicago &c. R. Co.*, 130 Ill. 175, 22 N. E. 857; *Railroad Comrs. v. Portland &c. R. Co.*, 63 Maine 269, 18 Am. Rep. 208; *State v. Republican Valley R. Co.*, 17 Nebr. 647, 24 N. W. 329, 52 Am. Rep. 424; *State v. Paterson &c. R. Co.*, 43 N. J. L. 505; *People v. New York &c. R. Co.*, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484. For an extreme case in which mandamus was awarded against a railroad company to compel it to operate its road notwithstanding a strike, see "Mandamus as a means of settling strikes," 34 Am. L. Reg. & Rev. (2 N. S., 1895) 102. But with it compare *State v. Duluth St. R. Co.*, 153 Wis. 650, 142 N. W. 184 (holding mandamus would not lie to compel restoration of service while stopped by strike).

<sup>53</sup> See post, §§ 1442, 1447, 1574.

<sup>54</sup> *Chicago &c. R. Co. v. Suffern*, 129 Ill. 274, 21 N. E. 824. Mandamus

along, across, or upon streets or other highways, on condition that they restore such highways to their former state of usefulness, a railroad may be compelled by mandamus to restore a highway<sup>55</sup> upon or across which it has constructed its road, if it neglects to do so within a reasonable length of time;<sup>56</sup> and this is so notwithstanding the street sought to be restored lies within a city which has power to do the work and recover the expense thereof from the company,<sup>57</sup> and notwithstanding an action to compel the construction of crossings is given by statute.<sup>58</sup> So where the statute imposes upon a railroad the absolute duty to construct farm crossings their construction may be compelled by mandamus, unless a valid excuse for neglecting to build them can be shown.<sup>59</sup> And the fact that the statute gives the occupant of a farm the right to recover a penalty from the company upon its failure to construct proper crossings will not deprive him of the benefit of the writ.<sup>60</sup> Mandamus has been held proper to determine the mode in which a railroad company shall be required to restore a street and to compel it to perform its duty, although the city council has not yet changed the established grade of the street to conform to the lawful change which

will issue to compel the replacement of a track taken up in violation of the company's charter. *Rex v. Severn &c. R. Co.*, 2 B. & Ald. 646.

<sup>55</sup> *Jamestown v. Chicago &c. R. Co.*, 69 Wis. 648, 34 N. W. 728. A simple permission to the railroad company to lay its track in the street gives it no authority to destroy the street, and the company may be compelled by mandamus to restore the highway to its former condition without regard to any statute expressly imposing such duty. A failure to build and maintain suitable crossings will render the company liable for maintaining a nuisance. *Moundsville v. Ohio Riv. R. Co.*, 37 W. Va. 92, 16 S. E. 514, 54 Am. & Eng. R. Cas. 538.

<sup>56</sup> *Cummins v. Evansville &c. R. Co.*, 115 Ind. 417, 13 N. E. 6; *Indianapolis &c. R. Co. v. State*, 37 Ind. 489; *People v. Chicago &c. R. Co.*, 67 Ill. 118; *State v. Hannibal &c. R. Co.*, 86 Mo. 13. See *People v. Dutchess &c. R. Co.*, 58 N. Y. 152; *People v. New York &c. R. Co.*, 74 N. Y. 302.

<sup>57</sup> *Oshkosh v. Milwaukee &c. R. Co.*, 74 Wis. 534, 34 N. W. 489, 17 Am. St. 175.

<sup>58</sup> *State v. Chicago &c. R. Co.*, 29 Nebr. 412, 45 N. W. 469.

<sup>59</sup> *State v. Chicago &c. R. Co.*, 79 Wis. 259, 48 N. W. 243, 12 L. R. A. 180.

<sup>60</sup> *State v. Chicago &c. R. Co.*, 79 Wis. 259, 48 N. W. 243, 12 L. R. A. 180.

the relator claims should be adopted.<sup>61</sup> The writ has also been awarded to compel a railroad company to construct a bridge or viaduct where its tracks cross a street.<sup>62</sup>

**§ 738 (640). Mandamus to compel carriage of freight.**<sup>63</sup>—Where a railroad company wrongfully refuses to receive and carry freight, to the injury of the public generally, a writ of mandamus may be issued at the suit of the proper public officer commanding the company to resume the discharge of its duties, by promptly receiving, transporting and delivering all such freight as is offered for transportation, on the usual and reasonable terms and charges.<sup>64</sup> The writ has been awarded to compel the company to treat all shippers alike,<sup>65</sup> and to deliver grain to all elevators similarly situated upon its line.<sup>66</sup> But in England it has been held that it will not be granted to compel a railroad

<sup>61</sup> *State v. Minneapolis & C. R. Co.*, 39 Minn. 219, 39 N. W. 153.

<sup>62</sup> *State v. St. Paul & C. R. Co.*, 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313; *State v. Missouri & C. R. Co.*, 33 Kans. 176, 5 Pac. 772. For other somewhat similar decisions holding that the company may be compelled by mandamus to perform its duties as to providing crossings and keeping tracks in streets in condition not to obstruct the public, see *Wabash R. Co. v. Railroad Comrs*, 176 Ind. 428, 95 N. E. 673; *Emporia v. Emporia & C. R. Co.*, 92 Kans. 232, 139 Pac. 1185; *State v. Milwaukee Elec. R. & C. Co.*, 144 Wis. 386, 129 N. W. 623, 140 Am. St. 1025 (to sprinkle as required by ordinance).

<sup>63</sup> See post, § 2366.

<sup>64</sup> *People v. New York & C. R. Co.*, 28 Hun (N. Y.) 543. See also *Larabee Flour Mills Co. v. Missouri Pac. R. Co.*, 74 Kans. 808, 88 Pac. 72.

<sup>65</sup> *State v. Delaware & C. R. Co.*, 48 N. J. L. 55, 57 Am. Rep. 543. See

also *State v. Fremont & C. R. Co.*, 22 Nebr. 313, 35 N. W. 118; *Central U. Tel. Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. 114; *Central U. Tel. Co. v. State*, 123 Ind. 113, 24 N. E. 215; *Price v. Riverside & C. Co.*, 56 Cal. 431; 5 *Thomp. Corp.* (2nd ed.) § 5770; and to enforce rate fixed by railroad commission, *State v. Atlantic Coast Line R. Co.*, 48 Fla. 146, 37 So. 657; *State v. Fremont & C. R. Co.*, 22 Nebr. 313, 35 N. W. 118. See also *Public Service Com. v. Westchester St. R. Co.*, 206 N. Y. 209, 99 N. E. 536.

<sup>66</sup> *Chicago & C. R. Co. v. People*, 56 Ill. 365, 8 Am. Rep. 690. And to furnish proper transportation facilities as ordered by the railroad commission. *Board of Railroad Comrs. v. Delaware & C. R. Co.*, 79 N. J. L. 219, 76 Atl. 236. In *Mobile & C. R. Co. v. Wisdom*, 5 Heisk. (Tenn.) 125, the company was compelled by mandamus to accept tax receipts, under a statute, in payment of fare and freight charges.

company to extend equal facilities to all upon similar terms.<sup>67</sup> And where a person has an adequate remedy at law by an action for damages it would seem that he ought not to be aided by the extraordinary remedy of mandamus to redress his own private grievances caused by the failure of the company to carry his freight upon the same terms as those upon which it carries the freight of others.<sup>68</sup> It may be, however, where the company refuses to perform its duty as a common carrier and continually discriminates against him unjustly and oppressively that an action for damages will not afford him adequate relief, and, in such case, he might, in some jurisdictions, apply for a writ of mandamus. The entire matter is now very largely regulated by congressional and state legislation.

**§ 739 (641). Mandamus to compel the company to maintain stations and furnish increased facilities.**—The question as to whether mandamus will issue to compel the re-establishment of an abandoned station, or the erection and maintenance of new stations at points where they are demanded for the convenience of the public has been much discussed. That such a writ may be issued if a valid statute imposes the duty of maintaining a station at that point admits of no question,<sup>69</sup> and the courts have gone far in construing statutes to raise such an obligation. In a Maine case, the company's charter provided "that said corpora-

<sup>67</sup> Robins, *Ex parte*, 3 Jur. 103.

<sup>68</sup> *People v. New York & C. R. Co.*, 22 Hun (N. Y.) 533. See also *Crane v. Chicago & C. R. Co.*, 74 Iowa 330, 37 N. W. 397, 7 Am. St. 479. But compare *Larabee Flour Mills Co. v. Missouri Pac. R. Co.*, 74 Kans. 808, 88 Pac. 72; *State v. Chicago & C. R. Co.*, 83 Nebr. 524, 120 N. W. 163.

<sup>69</sup> *Commonwealth v. Eastern R. Co.*, 103 Mass. 254, 4 Am. Rep. 555; *Northern Pac. R. Co. v. Washington Ter.*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. ed. 1092; *People v. Louisville & C. R. Co.*, 120 Ill. 48, 10 N. E. 657;

*Concord & C. R. Co. v. Boston & C. R. Co.*, 67 N. H. 464, 41 Atl. 263; *State v. New Haven & C. R. Co.*, 37 Conn. 153; *State v. New Haven & C. R. Co.*, 43 Conn. 351. In the two latter cases the statute forbade the abandonment of a railway station established for twelve years. So in *State v. New Haven & C. R. Co.*, 41 Conn. 134, the company was compelled by mandamus to resume an abandoned station. But a statute was held unreasonable and void in *Louisiana & Ry. Co. v. State*, 91 Ark. 358, 121 S. W. 284, where it required a station in a

tion \* \* \* shall be bound at all times to have said road in good repair, and a sufficient number of engines, carriages and vehicles for the transportation of persons and articles, and be obliged to receive at all proper times and places, and convey the same." The supreme court held that a mandamus should issue for the establishment of a station at a point designated by the railroad commissioners as a proper and necessary place for the receipt and discharge of passengers and freight.<sup>70</sup> The doctrine has been advanced that the common law under the principle that it is the duty of a railway company to furnish reasonably sufficient and equal facilities to the public, whose servant it is, authorizes courts, by mandamus, to compel the erection and maintenance of new stations in proper cases.<sup>71</sup> In a case before the supreme court of Washington Territory it appeared that the defendant railroad company refused to stop its trains at Yakima City at any time or for any purpose, although the place contained at the time of the trial a resident population of one hundred and fifty persons, and maintained a flouring mill, two hotels, twenty-seven dwelling houses, and both public

sparsely settled district and the expense would be great and there would be little, if any, benefit either to the company or the public.

<sup>70</sup> *Railroad Comrs. v. Portland & C. R. Co.*, 63 Maine 269, 18 Am. Rep. 208. So, railroad commissioners are now given the power by statute in many jurisdictions to require new stations or the change of old ones and such statutes have been upheld again and again. *Minneapolis & C. R. Co. v. Minnesota*, 193 U. S. 53, 24 Sup. Ct. 396, 48 L. ed. 614; *Nashville & C. R. Co. v. State*, 137 Ala. 439, 34 So. 401; *State v. Des Moines & C. R. Co.*, 87 Iowa 644, 54 N. W. 461; *In re Railroad Comrs.*, 79 Vt. 266, 65 Atl. 82; *Minneapolis & C. R. Co. v. Railroad Comr.*, 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821, and cases cited.

<sup>71</sup> *People v. Chicago & C. R. Co.*, 130 Ill. 175, 22 N. E. 857; *State v. Republican Valley R. Co.*, 17 Nebr. 647, 24 N. W. 329, 52 Am. Rep. 424. In *McCoy v. Cincinnati & C. R. Co.*, 13 Fed. 3, the United States Circuit Court in Ohio issued an order to compel the defendant to receive and deliver stock at the plaintiff's stockyard, although the defendant had a contract with the proprietor of an adjoining stockyard for the use of his yard for all business transacted at that point. In giving his decision, Judge Baxter remarked that by accepting its charter, a railroad undertakes to erect depots, and designates stopping places wherever the public necessities require them. See also *Florida & C. R. Co. v. State*, 31 Fla. 482, 13 So. 103, 34 Am. St. 30, 20 L. R. A. 419; *Concord & C. R. Co.*



and private schools, and had been, until injured by unjust discrimination after the advent of the railroad, three times as large, and transacting a business of more than \$200,000 per year. The only facilities provided for the receipt and discharge of either passengers or freight were at the town of North Yakima, four miles distant, to and from which point all traffic had to pass by private conveyance. The court granted a writ of mandamus to compel the railway company to construct a depot and give other railroad facilities at the town.<sup>72</sup> But upon appeal to the Supreme Court of the United States this decision was reversed, Justice Brewer, Field and Harlan dissenting,<sup>73</sup> and the court held that mandamus to compel a railroad company to do a particular act in constructing its road or buildings, or in running its trains, will lie only where there is a specific duty on its part to do that act, and clear proof of a breach of that duty; and that no common law duty exists on the part of a railroad to stop its trains at

v. Boston &c. R. Co., 67 N. H. 404, 41 Atl. 263; Commonwealth v. Eastern R. Co., 103 Mass 254, 4 Am. Rep. 555.

<sup>72</sup> Northern Pac. R. Co. v. Territory, 3 Wash. Ter. 303, 13 Pac. 604, 29 Am. & Eng. R. Cas. 82. The court says: "In the absence of legislation providing other means for regulating and controlling the matter, we have no doubt of the power of a court of general jurisdiction, in a proper case, to compel a railroad to extend to the public proper facilities for the transaction of business."

<sup>73</sup> Northern Pacific R. Co. v. Washington Ter., 142 U. S. 492, 12 Sup. Ct. 283, 35 L. ed. 1092. See also *People v. New York &c. R. Co.*, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484. In his dissenting opinion in the former case, Justice Brewer says: "A railroad corporation has a public duty to perform as well as a private interest to subserve, and I never be-

fore believed that the courts would permit it to abandon the one to promote the other. Nowhere in its charter is in terms expressed the duty of carrying passengers and freight. Are the courts impotent to compel the performance of this duty? Is the duty of carrying passengers and freight any more of a public duty than that of placing its depots and stopping its trains at those places which will best accommodate the public? If the state of Indiana incorporates a railroad to build a road from New Albany through Indianapolis to South Bend, and that road is built, can it be that the courts may compel the road to receive passengers and transport freight, but in the absence of a specific direction from the legislature are powerless to compel the road to stop its trains and build a depot at Indianapolis? I do not so belittle the power or duty of the courts."

any particular point.<sup>74</sup> Under the Illinois statute it has been held that a railroad company may be compelled by mandamus to stop all regular trains at certain stations to discharge and receive passengers and freight.<sup>75</sup> But, in the absence of any statutory provision upon the subject, it has been held that a railroad company will not be compelled by mandamus to furnish increased passenger facilities by running any particular number of trains, especially if the amount of travel will not support an additional train.<sup>76</sup> So, it has been held that a railroad company may discontinue a station in the exercise of its discretion, where the station is not needed and that mandamus will not lie to compel its continuance.<sup>77</sup>

<sup>74</sup> Northern Pac. R. Co. v. Washington Ter., 142 U. S. 492, 12 Sup. Ct. 283, 35 L. ed. 1092. To the same effect see *People v. Chicago &c. R. Co.*, 35 Am. & Eng. R. Cas. 462, reversed, 130 Ill. 175, 22 N. E. 857; *St. Louis &c. R. Co. v. State*, 61 Ark. 9, 51 S. W. 570; *Page v. Louisville &c. R. Co.*, 129 Ala. 232, 29 So. 676; *Mobile &c. R. Co. v. People*, 132 Ill. 559, 24 N. E. 463; *Chicago &c. R. Co. v. People*, 152 Ill. 230, 38 N. E. 562, 26 L. R. A. 224; *State v. Kansas City Ry. Co.*, 51 La. Ann. 200, 25 So. 126; *Jacquelin v. Erie R. Co.*, 69 N. J. Eq. 432, 61 Atl. 18 (can not prevent discontinuance); *People v. New York &c. R. Co.*, 104 N. Y. 58, 66, 9 N. E. 856, 58 Am. Rep. 484; *Bonham v. Columbia &c. R. Co.*, 26 S. Car. 353, 2 S. E. 127. In the absence of a law or a rule of the railroad commission prescribing the type to be used in printing schedules of rates to be posted by railroad companies in their stations, the supreme court cannot by mandamus direct in what size type they shall

be printed. *State v. Pensacola &c. R. Co.*, 27 Fla. 403, 9 So. 89. Mandamus will lie to compel a railway company to pay into the county court the amount of damages assessed by reason of the location and operation of its railway across the petitioner's premises, on a showing that the right of way has been lawfully condemned, the damages duly awarded, and no appeal taken therefrom. *State v. Grand Island &c. R. Co.*, 27 Nebr. 694, 43 N. W. 419.

<sup>75</sup> *Illinois &c. R. Co. v. People*, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119. See also *New Haven &c. R. Co. v. State*, 44 Conn. 376, 384.

<sup>76</sup> *Ohio &c. R. Co. v. People*, 120 Ill. 200, 11 N. E. 347; *People v. Long Island R. Co.*, 31 Hun (N. Y.) 125; *Commonwealth v. Fitchburg R. Co.*, 12 Gray (Mass.) 180. See also *People v. Rome &c. R. Co.*, 103 N. Y. 95, 8 N. E. 369; *People v. New York, &c. R. Co.*, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484.

<sup>77</sup> *Chicago &c. R. Co. v. State*, 74 Nebr. 77, 103 N. W. 1087. See, how-

§ 740 (642). **When mandamus will not lie.**—Mandamus will not issue to compel the performance of acts which are not clearly within the legal duties of those against whom the writ is directed, and it must appear in the application for a writ of mandamus that the defendant is under legal obligation to perform such acts, and that the petitioner has a legal right to demand their performance.<sup>78</sup> And even where the duty seems clear the court will not issue a mandamus when, if issued, it would prove unavailing,<sup>79</sup> as in a case of the performance of duties involving the exercise of a large measure of good faith and discretion on the part of the corporation and its agents. For this reason courts of equity hesitate to undertake to compel a railroad corporation to construct or to complete its road, since the proper construction of a railroad would necessarily involve the exercise of much technical skill and judgment, and depend largely upon the good faith of the parties directing the work.<sup>80</sup> So, where the company is utterly unable, by reason of insolvency or the like, to perform its duties to the public, the courts will not, as a rule, attempt to compel it to do so by mandamus, as this would be "a vain and

ever, ante, § 736, and compare *Day v. Tacoma & C. A. Co.*, 80 Wash. 161, 141 Pac. 347, L. R. A. 1915B, 547.

<sup>78</sup> *People v. Colorado Cent. R. Co.*, 42 Fed. 638. In this case the petitioner appeared "on behalf of the people of the state of Colorado," but failed to show that he was one of them. See also *People v. St. Louis Elec. & C. R. Co.*, 122 Ill. App. 422; and numerous cases cited and reviewed in note to *Ward v. Comrs. of Beaufort Co.*, 146 N. Car. 534, 60 S. E. 418, 125 Am. St. 489, 493 et seq. Also *State v. Northern Pac. R. Co.*, 53 Wash. 370, 102 Pac. 24. Relator must come into court with clean hands. *United States v. Fisher*, 222 U. S. 204, 32 Sup. Ct. 37, 56 L. ed. 165.

<sup>79</sup> See *State v. Seattle Baseball Ass'n*, 61 Wash. 79, 111 Pac. 1055, 31

L. R. A. (N. S.) 512. The court will deny an application for writ of mandamus to compel the operation of a road to a point beyond its jurisdiction. *People v. Colorado Central R. Co.*, 42 Fed. 638.

<sup>80</sup> *Ohio & C. R. Co. v. People*, 120 Ill. 200, 11 N. E. 347; *Ross v. Union Pac. R. Co.*, Fed. Cas. No. 12080; 1 Woolw. 26; *Fallon v. Railroad Co.*, 1 Dill. (U. S.) 121, Fed. Cas. No. 4629; *Danforth v. Philadelphia & C. R. Co.*, 30 N. J. Eq. 12, and cases in reporter's note; *Heathcote v. North Staffordshire R. Co.*, 20 N. J. Ch. 82; *South Wales R. Co. v. Wythes*, 5 De G., M. & G. 880; *Ranger v. Great Western R. Co.*, 1 Eng. R. & C. Cas. 1, 51; *Wheatley v. Westminster & C. Coal Co.*, L. R. 9 Eq. 538.

fruitless thing.”<sup>81</sup> Some courts, however, have issued the writ notwithstanding the return of the company that it had no funds and no means of obtaining any.<sup>82</sup> There is some reason for the latter practice, especially when the company, by its own fault, has placed itself in such a position, for circumstances may change, and, in any event, it may be well to thus compel the company to make a bona fide effort to perform its duties and comply with the order. If it is then found to be impossible the court can see that no injustice is done to the company and will refuse to punish it for contempt. Mandamus will not lie ordinarily, at least, to enforce private contracts with a railroad company,<sup>83</sup> nor, as a general rule, in any case where there is an adequate remedy at law.<sup>84</sup> It will not lie to prevent the exercise of a lawful discretion with which the company is vested,<sup>85</sup> nor to compel a judge to decide in a particular way an application by the receivers of a railroad company for authority to enter into an agreement for

<sup>81</sup> *State v. Dodge City &c. R. Co.*, 53 Kans. 329, 36 Pac. 755, 24 L. R. A. 564, and note; *Ohio &c. R. Co. v. People*, 120 Ill. 200, 11 N. E. 347; *Queen v. Ambergate &c. R. Co.*, 1 El. & Bl. 372; *Bristol &c. R. Co., In re*, L. R. 3 Q. B. D. 10; *Queen v. London &c. R. Co.*, 16 Ad. & E. (N. S.) 864.

<sup>82</sup> *Savannah &c. Co. v. Shuman*, 91 Ga. 400, 17 S. E. 937, 44 Am. St. 43; *Silverthorne v. Warren R. Co.*, 33 N. J. L. 173; *People v. Dutchess &c. R. Co.*, 58 N. Y. 152; *Queen v. Birmingham &c. R. Co.*, 2 Ad. & E. (N. S.) 47; *Queen v. Trustees &c.*, 1 Ad. & E. (N. S.) 860. See also *Fort Dodge v. Minneapolis &c. R. Co.*, 87 Iowa 389, 54 N. W. 243, 55 Am. & Eng. R. Cas. 58 (holding lack of funds no reason for refusing to compel a receiver to perform a legal duty, such as constructing a crossing).

<sup>83</sup> *State v. New Orleans &c. R. Co.*, 37 La. Ann. 589; *Florida Cent. R. Co. v. State*, 31 Fla. 482, 13 So. 103, 20 L. R. A. 419, 34 Am. St. 30; *State v. Paterson &c. R. Co.*, 43 N. J. L. 505; *State v. Washington Irr. Co.*, 41 Wash., 283, 83 Pac. 308, 111 Am. St. 1019; *State v. Milwaukee Medical College*, 128 Wis. 7, 106 N. W. 116, 3 L. R. A. (N. S.) 1115, 116 Am. St. 21, 8 Ann. Cas. 407; note in 125 Am. St. 511, 512.

<sup>84</sup> *State v. Mobile &c. R. Co.*, 59 Ala. 321.

<sup>85</sup> *People v. New York &c. R. Co.*, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484; *Florida &c. R. Co. v. State*, 31 Fla. 482, 13 So. 103, 20 L. R. A. 419, 34 Am. St. 30; *State v. Canal &c. R. Co.*, 23 La. Ann. 333; *Chicago &c. R. Co. v. State*, 74 Nebr. 77, 103 N. W. 1087; *Seward v. Denver &c. R. Co.*, 17 N. Mex. 557, 131 Pac. 980, 46 L. R. A. (N. S.) 242, and nu-

the partial readjustment of its affairs.<sup>86</sup> A railroad company may be estopped by its acts to claim the benefit of a writ of mandamus. The fact that a railroad company agreed to the entry of a judicial order as to a crossing by it over the track of another company and has acted under it is a sufficient reason for denying a writ of mandamus to set aside and vacate the order.<sup>87</sup>

§ 741 (643). **Who may be relator.**—There is considerable conflict among the authorities as to whether a private party may be a relator in a proceeding for a mandamus to enforce a public right. The attorney-general, or other public officer, may doubtless apply for the writ in all such cases,<sup>88</sup> but not, ordinarily, unless he seeks to protect some public right or to secure some public interest.<sup>89</sup> Some of the courts also hold that a private party cannot be a relator unless he has some private interest to be protected or some particular right to be enforced independent of that which he has merely as one of the general public.<sup>90</sup> But the weight of authority is to the effect that a private citizen may, as one of the general public, be relator and apply for a mandamus to enforce a public right or duty, due to the public at large and not merely to the government, without showing any special and peculiar interest.<sup>91</sup> He must, however,

merous authorities cited in note in 125 Am. St. 502.

<sup>86</sup> Rice, In re, 155 U. S. 396, 15 Sup. Ct. 149, 39 L. ed. 198; see also California &c. Co. v. Mogan, 13 Cal. App. 65, 108 Pac. 882; Norris v. Cross, 25 Okla. 287, 105 Pac. 1000.

<sup>87</sup> Fort Street Union Depot Co. v. State R., &c. Co., 81 Mich. 248, 45 N. W. 973.

<sup>88</sup> 5 Thomp. Corp. (2nd ed.), § 5785.

<sup>89</sup> Attorney-General v. Albion &c. Inst., 52 Wis. 469, 9 N. W. 391; People v. Rome &c. R. Co., 103 N. Y. 95, 8 N. E. 369.

<sup>90</sup> Mitchell v. Boardman, 79 Me.

469, 10 Atl. 452; Bobbett v. State, 10 Kans. 9; Smith v. Saginaw, 81 Mich. 123, 45 N. W. 964; Martindale v. Kansas City &c. R. Co., 60 Mo. 508; Heffner v. Commonwealth, 28 Pa. St. 108.

<sup>91</sup> Union Pac. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428; Savannah &c. Co. v. Shuman, 91 Ga. 400, 17 S. E. 937, 44 Am. St. 43; Glencoe v. People, 78 Ill. 382; Chicago &c. R. Co. v. Suffern, 129 Ill. 274, 21 N. E. 824; State v. Board &c., 92 Ind. 133; Attorney-General v. Boston, 123 Mass. 460, 469; State v. Weld, 39 Minn. 426, 40 N. W. 561; State v.

in such a case, show that he is one of the general public to whom the duty is due or whose rights are injuriously affected.<sup>92</sup>

§ 742 (644). **Quo warranto.**—We have elsewhere considered the subject of quo warranto as a means of forfeiting the charter of a corporation and as a remedy for abuse of powers as well as the usurpation of franchises.<sup>93</sup> In that connection we also considered, to some extent, the general nature of the proceeding, the jurisdiction of the courts and the proper parties to the proceeding. Little, therefore, remains to be said, as the practice is so far regulated by different statutory provisions in the various states that few general rules can be laid down. At common law the writ of quo warranto was a writ of right, but in modern practice it has been, almost everywhere, superseded by an information in the nature of a quo warranto, which is a civil proceeding and is governed by the rules of civil practice<sup>94</sup> rather than those relating to criminal prosecutions, although it is, in a sense, an extraordinary remedy and is usually

Hannibal &c. R. Co., 86 Mo. 13; State v. Francis, 95 Mo. 44, 8 S. W. 5; Chumasero v. Potts, 2 Mont. 242; State v. Gracey, 11 Nev. 223; State v. VanDuyn, 24 Nebr. 586, 39 N. W. 612; State v. Brown, 38 Ohio St. 344; State v. Dayton &c. R. Co., 36 Ohio St. 434; State v. Ware, 13 Ore. 380, 10 Pac. 885; Wise v. Bigger, 79 Va. 269. See Crane v. Chicago &c. R. Co., 74 Iowa 330, 37 N. W. 397, 7 Am. St. 479, and note; People v. New York, 137 App. Div. 936, 121 N. Y. S. 1143. See also Loraine v. Pittsburgh &c. Co., 205 Pa. St. 132, 54 Atl. 580, 61 L. R. A. 502, and authorities cited as to the right of one having a special interest. And see as to what persons may join as relator, Alley v. Musick, 68 W. Va. 523, 70 S. E. 124, Ann. Cas. 1912B, 419, 420-422 and cases there cited.

<sup>92</sup> People v. Colorado &c. R. Co., 42 Fed. 638.

<sup>93</sup> See ante, §§ 64, 65, 66.

<sup>94</sup> People v. Cook, 8 N. Y. 67, 59 Am. Dec. 451; Ames v. Kansas, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. ed. 482; Atchison &c. R. Co. v. People, 5 Colo. 60; Attorney-General v. Sullivan, 163 Mass. 446, 40 N. E. 843, 28 L. R. A. 455; State v. Kupferle, 44 Mo. 154, 100 Am. Dec. 565. See also State v. Dover, 113 Minn. 452, 130 N. W. 74, 539. Contra Donnelly v. People, 11 Ill. 552, 52 Am. Dec. 459; Territory v. Lockwood, 3 Wall. (U. S.) 236. Compare also People v. Gartenstein, 248 Ill. 546, 94 N. E. 128. As to right to jury trial, see State v. Cobb, 24 Okla. 662, 104 Pac. 361, 24 L. R. A. (N. S.) 639, and cases there cited in note.

regulated very largely by statute. The proceeding will not lie to forfeit the charter of a corporation in a foreign court,<sup>95</sup> but although actions to recover possession of real estate must be brought in the county in which it is located, quo warranto proceedings for usurping the franchise of being a corporation and owning and using land in one county for railroad purposes, need not necessarily be instituted in such county.<sup>96</sup> Such proceedings have been held proper both to determine the rights of individuals to corporate franchises and to determine whether franchises properly granted have been misused and forfeited,<sup>97</sup> to try the right of a foreign corporation to do business in the state,<sup>98</sup> and to determine the right of a company duly incorporated to exercise a particular franchise.<sup>99</sup> So, under a statute providing that quo warranto proceedings may be instituted against a corporation "when it claims a franchise privilege or right in contravention of law, such proceedings will lie against a railroad company to contest its claim to exercise a right or privilege in state canal lands.<sup>1</sup> Other decisions showing when quo warranto will or will not lie are reviewed elsewhere.<sup>2</sup> And in a recent case it is held that no state has any right to forfeit the franchise of a railroad company for making unlawful charges upon traffic within the provisions of the interstate commerce law, and that quo warranto will not lie to prevent a railroad company from making unlawful charges for services where the matter is cov-

<sup>95</sup> Ante, § 66.

<sup>96</sup> *Smith v. State*, 140 Ind. 343, 39 N. E. 1060. See *Eel River R. Co. v. State*, 143 Ind. 231, 42 N. E. 617; *Eel River R. Co. v. State*, 155 Ind. 433, 57 N. E. 388.

<sup>97</sup> *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 353, 8 Am. Dec. 243; *Petty v. Tooker*, 21 N. Y. 267; *State v. Milwaukee &c. R. Co.*, 45 Wis. 579; *State v. Barron*, 57 N. H. 498. See also *People v. Bleeker St. &c. R. Co.*, 140 App. Div. 611, 125 N. Y. S. 1045; *State v. Cincinnati &c. R. Co.*,

47 Ohio St. 130, 23 N. E. 928, 7 L. R. A. 319.

<sup>98</sup> *State v. Fidelity &c. Co.*, 39 Minn. 538, 41 N. W. 108; *State v. Western &c. Society*, 47 Ohio St. 167, 24 N. E. 392, 8 L. R. A. 129.

<sup>99</sup> *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 353, 8 Am. Dec. 243; *State v. Citizens &c. Assn.*, 6 Mo. App. 163. See also *State v. Business Men's Athletic Club*, 178 Mo. App. 548, 163 S. W. 901.

<sup>1</sup> *State v. Pittsburgh &c. R. Co.*, 53 Ohio St. 189, 41 N. E. 205.

<sup>2</sup> See ante, §§ 59-62.

ered by a statute which provides another and exclusive remedy.<sup>3</sup> As we have seen the proceedings are usually instituted on behalf of the state by the attorney-general, or in some jurisdictions, by the prosecuting attorney, but in most jurisdictions, private persons having an interest in the matter, may file the information, with leave of the court.<sup>4</sup> There is some difference of opinion as to whether the corporation or individuals assuming to act as the corporation, or both, should be made defendants, but much depends on the grounds and purpose of the quo warranto proceeding. The prevailing rule is that the individuals alone are necessary parties where the proceeding is for usurping the franchise to be a corporation as distinguished from usurpation of a power or franchise by the corporation, and that, in the latter case, the corporation alone is a necessary party.<sup>5</sup> In some jurisdictions the defendant must either disclaim or justify, and it is held that a plea of not guilty or non usurpavit is not good,<sup>6</sup> but in others he may set forth as many defenses as he may have.<sup>7</sup> The entire matter is largely regulated by statute. If the information is insufficient a demurrer would seem to be proper.<sup>8</sup>

<sup>3</sup> State v. Atchison &c. R. Co., 176 Mo. 687, 75 S. W. 776, 63 L. R. A. 761.

<sup>4</sup> And it is held that the attorney-general cannot maintain a quo warranto proceeding to vindicate or redress merely private rights or grievances. State v. Atchison &c. R. Co., 176 Mo. 687, 75 S. W. 776, 63 L. R. A. 761.

<sup>5</sup> Armstrong v. State, 29 Okla. 161, 116 Pac. 770, Ann. Cas. 1913A, 565, 570-574, citing and reviewing numerous authorities.

<sup>6</sup> Illinois &c. R. Co. v. People, 84 Ill. 426; Buckman v. State, 34 Fla. 48, 15 So. 697, 24 L. R. A. 806; Distilling &c. Co. v. People, 156 Ill. 448, 41 N. E. 188, 47 L. R. A. 200; State v. Utter, 14 N. J. L. 84; State v. Barron, 57 N. H. 498; Attorney-General v. Foote, 11 Wis. 14, 78 Am.

Dec. 689. See also People v. O'Connor, 239 Ill. 272, 87 N. W. 1016; State v. Lincoln Trac. Co., 90 Nebr. 535, 134 N. W. 278.

<sup>7</sup> State v. Brown, 34 Miss. 688; People v. Stratton, 28 Cal. 382; People v. Plymouth &c. Co., 31 Mich. 178; State v. McDaniel, 22 Ohio St. 354; Rex v. Autridge, 8 T. R. 467.

<sup>8</sup> State v. Boal, 46 Mo. 528; Commonwealth v. Commercial Bank, 28 Pa. St. 383; People v. Woodbury, 14 Cal. 43; Territory v. Lockwood, 3 Wall. (U. S.) 236, 18 L. ed. 47. It is held in a recent case in Georgia that a special demurrer will not successfully question the petition alone where its defects are cured by the information accompanying it and constituting with it one proceeding. Milton v. Mitchell, 139 Ga. 614, 77 S. E. 821.



## CHAPTER XXVI.

### REMOVAL OF CAUSES.

Sec.	Sec.
745. When removal is authorized —Statutes now in force.	755. Effect of application on jurisdiction of state and federal court.
746. What are suits of a civil nature under the removal acts.	756. Remanding and dismissing cause.
747. Parties.	757. Remanding — Amendment — Waiver.
748. Rights of removal as affected by amount in controversy.	758. Pleading and practice in federal court after removal.
749. Diverse citizenship as a ground for removal.	759. Recent cases—Miscellaneous.
750. Separable controversy.	760. Question of jurisdiction where neither party resides in federal district—Waiver.
751. Action against company and employe.	761. Right to proceed in state court after dismissal in federal court.
752. Prejudice or local influence as a ground for removal.	
753. Removal where federal question is involved.	
754. Time and manner of making application for removal.	

**§ 745 (645). When removal is authorized—Statutes now in force.**—The act of congress of March 3, 1911<sup>1</sup> defines the jurisdiction of the district courts of the United States, requiring the amount or value of the matter in dispute to exceed three thousand dollars, and provides for the removal from any state court to the district court of the United States for the proper district of “any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction” by such act; that any other suit of a civil nature, of which the district courts are so given jurisdiction, may be removed from any state

<sup>1</sup>Act of Mar. 3, 1911, 36 State at L. 1091-1094; Barnes’ Fed. Code, §§ 785, 790, 794.

court to the proper circuit court by the defendant or defendants therein, being non-residents of that state; that when in any suit of any of the classes specified there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove the suit; that suits may be removed, under specified circumstances, on account of prejudice or local influence, and that suits between citizens of the same state may also be removed, under certain circumstances, where the title to land is concerned and they claim under grants from different states. The act of March 3, 1887, as corrected by the act of August 13, 1888, tended to restrict<sup>2</sup> rather than to extend the right of removal, as given by previous acts, and repealed several of the older acts, although it left some of them still in force.<sup>3</sup> The act of March 3, 1911, repeals the act referred to, but the provisions for removal above referred to are the same in both acts, except that the district court is now substituted for the circuit court and that no case under the Federal Employers' Liability Act shall be removed. The provisions found in sections 641 and 642 of the Revised Statutes of the United States relating to suits or criminal prosecutions "against any person who is denied or cannot enforce

<sup>2</sup> *Hanrick v. Hanrick*, 153 U. S. 192, 197, 14 Sup. Ct. 835, 38 L. ed. 685; *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. ed. 635; *Pennsylvania Co., In re*, 137 U. S. 451, 454, 11 Sup. Ct. 141, 34 L. ed. 738.

<sup>3</sup> It expressly repealed § 640 Rev. Stat. U. S., and the last paragraph of § 5 of the act of March 3, 1874, and all laws or parts of laws in conflict with its provisions, but expressly provided that it shall not be deemed to repeal §§ 641, 642, 643, or 722, of title 24, Rev. Stat. U. S., or § 8 of the act of March 3, 1875. It has been held that it repealed by implication the act of March 2, 1867. *Short v.*

*Chicago &c. R. Co.*, 33 Fed. 114; *Whelan v. New York &c. R. Co.*, 35 Fed. 849; *Minnick v. Union Ins. Co.*, 40 Fed. 369. But see *Hills v. Richmond &c. R. Co.*, 33 Fed. 81; *Fisk v. Henarie*, 32 Fed. 417, reversed in 142 U. S. 459, 12 Sup. Ct. 207, 35 L. ed. 1080. The Federal Employers' Liability Act, as amended in 1910 provides that no case arising thereunder brought in any state court of competent jurisdiction shall be removed to any court of the United States. U. S. Comp. Stat. Supp. 1911, p. 1324, 36 Stat. at L. 291, ch. 143, *Barnes' Fed. Code*, §§ 790, 8074, and this prohibition has been upheld in a number of cases. *Teel v. Ches-*

in the judicial tribunals of the state or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for equal civil rights of citizens of the United States or of all persons within the jurisdiction of the United States are also retained." This law is intended to carry out the provisions of the Fourteenth Amendment to the United States Constitution,<sup>4</sup> and is directed against state action denying civil rights.<sup>5</sup>

**§ 746 (646). What are suits of a civil nature under the removal acts.**—As most of the provisions for the removal of causes authorize the removal only where the suit is of a civil nature, it is important to determine what is meant by the term "suit of a civil nature." It has been held that an action to recover a penalty for the violation of a state statute, although the statute expressly provides that the penalty shall be recovered in a civil action, is essentially criminal in its nature and cannot be removed.<sup>6</sup> So, it has been held that a special assessment proceeding under the Illinois law, involving the exercise of the taxing

peake &c. R. Co., 204 Fed. 918, 47 L. R. A. (N. S.) 21; Kansas City &c. R. Co. v. Leslie, 238 U. S. 599, 35 Sup. Ct. 844; Hulac v. Chicago &c. R. Co., 194 Fed. 747; Symonds v. St. Louis &c. R. Co., 192 Fed. 353, Jones v. Kansas City &c. R. Co., 137 La. 178, 68 So. 401, note in 47 L. R. A. (N. S.) 70-72, citing other cases to this effect, and also cases holding that it is a personal privilege of the plaintiff which may be waived by him.

<sup>4</sup> *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664; *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667.

<sup>5</sup> *Alabama, Ex parte*, 71 Ala. 363; *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *State v. Chue Fan*, 42 Fed. 865; *Cooper v. State*, 64 Md. 40, 20 Atl. 986.

<sup>6</sup> *Iowa v. Chicago &c. R. Co.*, 37 Fed. 497; *Ferguson v. Ross*, 38 Fed. 161; *United States v. Mexican &c. R. Co.*, 40 Fed. 769; *Texas v. Day &c. Co.*, 41 Fed. 228. See also *Ames v. Kansas*, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. ed. 482; *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. ed. 746; *Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. ed. 239; *Arkansas v. St. Louis &c. R. Co.*, 173 Fed. 572; *Southern R. Co. v. State (Ind. App.)*, 74 N. E. 174; *Herriman v. Burlington &c. R. Co.*, 57 Iowa 187, 9 N. W. 378, 10 N. W. 340. And it has been so held as to a suit by a city to restrain a company from doing business in violation of a city ordinance requiring a license and prescribing a fine. *City of Montgomery v. Postal Tel. Co.*, 218 Fed. 471.

power, is not a "suit" within the meaning of the removal act;<sup>7</sup> nor is a claim for a right of way pending before the board of county commissioners.<sup>8</sup> But it seems to be well settled that proceedings to determine the value of land condemned or affected by a taking under the power of eminent domain may be removed in a proper case.<sup>9</sup> So mandamus,<sup>10</sup> habeas corpus,<sup>11</sup> and quo warranto<sup>12</sup> proceedings have been held to come within the meaning of the removal acts. Actions in ejectment,<sup>13</sup> and replevin,<sup>14</sup> and those begun by attachment<sup>15</sup> have been removed under former acts; but it has been held that a suit begun by foreign at-

<sup>7</sup> *Chicago, In re*, 64 Fed. 897. See and compare *Union Pacific R. Co. v. Myers*, 115 U. S. 1, 5 Sup. Ct. 1113, 135 U. S. 467, 10 Sup. Ct. 651, 34 L. ed. 196, and *Jarnecke Ditch, In re*, 69 Fed. 161.

<sup>8</sup> *Fuller v. Colfax*, 14 Fed. 177.

<sup>9</sup> *Mississippi &c. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *Union Pacific R. Co. v. Myers*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. ed. 319; *Searl v. School Dist.*, 124 U. S. 197, 8 Sup. Ct. 460, 31 L. ed. 415; *Chicago v. Hutchinson*, 11 Biss. (U. S.) 484, 15 Fed. 129; *Mineral Range R. Co. v. Detroit &c. Co.*, 25 Fed. 515; *Kansas City &c. R. Co. v. Interstate Lumber Co.*, 37 Fed. 3. See also *Madisonville Traction Co. v. St. Bernard &c. Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. ed. 462, *South Dakota &c. R. Co. v. Chicago &c. R. Co.*, 141 Fed. 578; *Helena &c. Co. v. Spratt*, 146 Fed. 310. As to when a separable controversy is presented in condemnation proceedings, see post, § 750, note 60.

<sup>10</sup> *Kendall v. United States*, 12 Pet. (U. S.) 524, 9 L. ed. 1181; *Washington Imp. Co. v. Kansas Pac. R. Co.*, 5 Dill. (U. S. C. C.) 489, Fed. Cas. No. 17242. See also *People*

*v. Colorado Cent. R. Co.*, 42 Fed. 638. But compare *Rosenbaum v. Bauer*, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. ed. 743.

<sup>11</sup> *Holmes v. Jennison*, 14 Pet. (U. S.) 540, 10 L. ed. 579; *Milligan, Ex parte*, 4 Wall. (U. S.) 2, 18 L. ed. 281. But not, it seems, under the later acts, where the jurisdiction depends on the value of the matter in dispute. *Kurtz v. Moffitt*, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. ed. 458; *Snow v. United States*, 118 U. S. 346, 354, 30 L. ed. 207.

<sup>12</sup> *Ames v. Kansas*, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. ed. 482; *Illinois v. Illinois Cent. R. Co.*, 33 Fed. 721.

<sup>13</sup> *Torrey v. Beardsly*, 4 Wash. (U. S. C. C.) 242; *Girard, Ex parte*, 3 Wall. Jr. (U. S.) 263, Fed. Cas. No. 5457.

<sup>14</sup> *Beecher v. Gillett*, 1 Dill. (U. S. C. C.) 308, Fed. Cas. No. 1225; *Dennistoun v. Draper*, 5 Blatchf. (U. S.) 336, Fed. Cas. No. 3804.

<sup>15</sup> *Sayles v. Northwestern Ins. Co.*, 2 Curtis (U. S.) 212, Fed. Cas. No. 12421; *Barney v. Globe Bank*, 5 Blatchf. (U. S.) 107, Fed. Cas. No. 1031; *Keith v. Levi*, 2 Fed. 743. But see *Bentlif v. London &c. Corp.*, 44 Fed. 667, and authorities there cited.

tachment, without personal service, cannot be removed under the last act.<sup>16</sup> It is said, however, in another case, that the court in the decision just referred to erroneously assumed that there was no distinction in this regard between cases originally brought in the circuit court and cases removed thereto, and that the circuit court had jurisdiction of the suit removed after the state court had acquired jurisdiction by foreign attachment, although there was no personal service.<sup>17</sup> Many years ago in a case in which it was held that a proceeding for a writ of prohibition was a "suit" within the meaning of another statute, Chief Justice Marshall said: "The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but, if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit."<sup>18</sup> The mere fact that a bill or petition is filed, however, without having any process issued or giving any notice, and without any appearance by the adverse party, does not make the proceeding a "suit" within the meaning of the removal acts.<sup>19</sup> Neither is a mere auxiliary proceeding a "suit" within the meaning of such acts.<sup>20</sup> But a proceeding against stockholders to obtain an execution for the amount of their unpaid stock, under the Missouri statute, after a return of nulla bona on an execution against the corporation,

<sup>16</sup> Perkins v. Hendryx, 40 Fed. 657.

<sup>17</sup> Crocker Nat. Bank v. Pagensteher, 44 Fed. 705. See also Am-sinck v. Balderston, 41 Fed. 641; Fales v. Chicago &c. R. Co., 32 Fed. 673; American Finance Co. v. Bostwick, 151 Mass. 19, 23 N. E. 656. But compare Bentlif v. London &c. Corp., 44 Fed. 667, and authorities there cited.

<sup>18</sup> Weston v. Charleston, 2 Pet. (U. S.) 449, 464, 7 L. ed. 481.

<sup>19</sup> See West v. Aurora City, 6 Wall. (U. S.) 139, 18 L. ed. 819;

Iowa &c. Co., In re, 3 McCrary (U. S.) 310, 10 Fed. 401.

<sup>20</sup> Barow v. Hunton, 99 U. S. 80, 25 L. ed. 407; First Nat. Bank v. Turnbull, 16 Wall. (U. S.) 190, 21 L. ed. 296; Poole v. Thatcherdeft, 19 Fed. 49; Hockstadter v. Harrison, 71 Ga. 21; Goodrich v. Hunton, 29 La. Ann. 372; Jackson v. Gould, 74 Maine 564; Weeks v. Billings, 55 N. H. 371; Smith v. St. Louis &c. Co., 3 Tenn. Ch. 350. See also Lawrence v. Morgans &c. R. Co., 121 U. S. 634, 30 L. ed. 1018.

has been held to be a "suit" which can be removed by the stockholders on the ground of diverse citizenship, and not merely a proceeding auxiliary to the suit against the corporation.<sup>21</sup>

§ 747 (647). **Parties.**—One who is not a party to a cause and refuses to become a party of record is not entitled to have the cause removed, although he may be interested in the controversy.<sup>22</sup> But it has been held, under former acts, that parties properly required to interplead, or having a statutory right to intervene, which they have attempted to exercise, may have the cause removed, in a proper case, although the state court refused to permit them to intervene.<sup>23</sup> Substituted parties generally stand in the same position, with regard to the right of removal, as those whose place they take.<sup>24</sup> It is well settled that the right of removal can neither be obtained nor prevented by joining merely nominal or improper parties for that purpose.<sup>25</sup> It is not

<sup>21</sup> *Lackawanna &c. Co. v. Bates*, 56 Fed. 737, overruling *Webber v. Humphreys*, 5 Dill. (U. S.) 223, Fed. Cas. No. 17326. See also *Bondurant v. Watson*, 103 U. S. 281, 26 L. ed. 447; *Pettus v. Georgia R. &c. Co.*, 3 Woods' (U. S.) 620, Fed. Cas. No. 11048; *Pelzer &c. Co. v. Hamburg &c. Ins. Co.*, 62 Fed. 1; *Kalamazoo &c. Co. v. Snavelly*, 34 Fed. 823.

<sup>22</sup> *Bertha Zinc &c. Co. v. Carico*, 61 Fed. 132.

<sup>23</sup> *Snow v. Texas &c. R. Co.*, 16 Fed. 1; *Hack v. Chicago &c. R. Co.*, 23 Fed. 356; *Healy v. Prevost*, 8 The Rep. 103. See also *Burdick v. Peterson*, 2 McCrary (U. S.) 135, 6 Fed. 840. Contra, *Williams v. Williams*, 24 La. Ann. 55. See also *Olds Wagon Works v. Benedict*, 67 Fed. 1.

<sup>24</sup> *Richmond &c. R. Co. v. Findley*, 32 Fed. 641; *Cable v. Ellis*, 110 U. S. 389, 4 Sup. Ct. 85, 28 L. ed. 186; *Jefferson v. Driver*, 117 U. S.

272, 6 Sup. Ct. 729, 29 L. ed. 897; *Houston &c. R. Co. v. Shirley*, 111 U. S. 358, 4 Sup. Ct. 472, 28 L. ed. 455; *Grand Trunk R. Co. v. Twitchell*, 59 Fed. 727.

<sup>25</sup> *Hatch v. Chicago &c. R. Co.*, 6 Blatchf. (U. S.) 105, Fed. Cas. No. 6204; *Carneal v. Banks*, 10 Wheat. (U. S.) 181, 6 L. ed. 297; *Barney v. Latham*, 103 U. S. 205, 26 L. ed. 514; *Bates v. New Orleans &c. R. Co.*, 16 Fed. 294; *Chattanooga &c. R. Co. v. Cincinnati &c. R. Co.*, 44 Fed. 456; *Powers v. Chesapeake &c. R. Co.*, 65 Fed. 129; *Axline v. Toledo &c. R. Co.*, 138 Fed. 169; *Worstman v. Wade*, 77 Ga. 651, 4 Am. St. 102; *Danvers Sav. Bank v. Thompson*, 133 Mass. 182; *United States v. Douglas*, 113 N. Car. 190, 18 S. E. 202. See and compare *Merchants' &c. Co. v. Ins. Co.*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. ed. 195; *Arrowsmith v. Nashville &c. R. Co.*, 57 Fed. 165; *Springer v. Sheets*, 115 N.

always easy to determine, however, who are merely nominal parties and who are necessary parties actually interested as such in the controversy.<sup>26</sup> It has been held that the voluntary joinder of a number of complainants to enforce a common liability of the defendants has the same effect on the right of removal on the ground of diverse citizenship as if they had been compelled to unite.<sup>27</sup> But the court, for the purpose of determining the right of removal, will arrange the parties as plaintiffs or defendants according to their actual interest in the controversy,<sup>28</sup> and if parties are collusively joined for the mere purpose of effecting a removal, the petition may be refused,<sup>29</sup> or if the cause has already been removed the court may remand it.<sup>30</sup> So, on the

Car. 370, 20 S. E. 469. See also *Richardson v. Southern Idaho & Co.*, 209 Fed. 949; *McAllister v. Chesapeake & C. R. Co.*, 198 Fed. 660.

<sup>26</sup> As to who are actually interested and not mere nominal parties, see *Knapp v. Railroad Co.*, 20 Wall. (U. S. 117, 22 L. ed. 328; *Myers v. Swann*, 107 U. S. 546, 2 Sup. Ct. 685, 27 L. ed. 583; *Thayer v. Life Assn.*, 112 U. S. 717, 5 Sup. Ct. 355, 28 L. ed. 864; *Central R. Co. v. Mills*, 113 U. S. 249, 5 Sup. Ct. 456, 28 L. ed. 949; *Chicago & C. R. Co. v. Crane*, 113 U. S. 424, 28 L. ed. 1064; *St. Louis & C. R. Co. v. Wilson*, 114 U. S. 60, 5 Sup. Ct. 738, 29 L. ed. 66; *Merchants' & C. Co. v. Insurance Co.*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. ed. 195; *Wilson v. Oswego Twp.*, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. ed. 70; *Miller v. Sharp*, 37 Fed. 161; *Fox v. Mackay*, 60 Fed. 4; *Douglas v. Richmond & C. R. Co.*, 106 N. Car. 65, 10 S. E. 1048. As to who are merely nominal parties, see *Hatch v. Chicago & C. R. Co.*, 6 Blatchf. (U. S.) 105, Fed. Cas. No. 6204; *Arapahoe Co. v. Kansas Pac. R. Co.*, 4 Dill.

(U. S.) 277, Fed. Cas. No. 502; *Bacon v. Rives*, 106 U. S. 99, 1 Sup. Ct. 3, 27 L. ed. 69; *Bates v. New Orleans & C. R. Co.*, 16 Fed. 294; *Taylor Co. v. Baltimore & C. R. Co.*, 35 Fed. 161; *Over v. Lake Erie & C. R. Co.*, 63 Fed. 34; *Shattuck v. North British & C. Ins. Co.*, 58 Fed. 609.

<sup>27</sup> *Merchants' & C. Co. v. Insurance Co.*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. ed. 195; *Corporation v. Winter*, 1 Wheat. (U. S.) 91, 4 L. ed. 476.

<sup>28</sup> *Harter v. Kernochan*, 103 U. S. 562, 26 L. ed. 411; *Ayers v. Chicago*, 101 U. S. 184, 25 L. ed. 838; *Anderson v. Bowers*, 40 Fed. 708. But see *Springer v. Sheets*, 115 N. Car. 370, 20 S. E. 469.

<sup>29</sup> *Cashman v. Amador & C. Co.*, 118 U. S. 58, 6 Sup. Ct. 926, 30 L. ed. 72; *Sachse v. Citizens' Bank*, 37 La. Ann. 364. See also *Clark v. Chicago & C. R. Co.*, 194 Fed. 505; *Landers v. Cincinnati & C. R. Co.*, 156 Ky. 301, 160 S. W. 1050.

<sup>30</sup> *Williams v. Nottowa*, 104 U. S. 209, 26 L. ed. 719; *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. ed.

other hand, it has been held that where a plaintiff makes a party a co-defendant for the purpose of preventing a removal, and, after the time for removal is past, dismisses as to such party, the cause may, nevertheless, be removed upon proper application by a party entitled to such removal.<sup>31</sup>

**§ 748 (648). Right of removal as affected by amount in controversy.**—The value of the matter in dispute must exceed two thousand dollars, exclusive of interest and costs. It is not sufficient that its value is exactly two thousand dollars.<sup>32</sup> Thus, where the prayer for relief in the complaint asked for “two thousand dollars and all other proper relief,” and, under the pleadings, no other proper relief could be obtained, it was held that the cause could not be removed.<sup>33</sup> The amount is to be determined from the complaint, declaration or bill,<sup>34</sup> and it seems that if the

269. But see *Deputron v. Young*, 134 U. S. 241, 10 Sup. Ct. 539, 33 L. ed. 923.

<sup>31</sup> *Powers v. Chesapeake &c. R. Co.*, 65 Fed. 129; *Arrowsmith v. Nashville &c. R. Co.*, 57 Fed. 165. But see *Provident &c. Society v. Ford*, 114 U. S. 635, 5 Sup. Ct. 1104, 29 L. ed. 261; *Lathrop &c. Co. v. Interior Const. &c. Co.*, 215 U. S. 246, 30 Sup. Ct. 76, 54 L. ed. 177; *Vimont v. Chicago &c. R. Co.*, 64 Iowa 513, 17 N. W. 31, 21 N. W. 9.

<sup>32</sup> *Tod v. Cleveland &c. R. Co.*, 65 Fed. 145; *Baltimore v. Postal Tel. Co.*, 62 Fed. 500; *Pittsburgh &c. R. Co. v. Ramsey*, 22 Wall. (U. S.) 322, 22 L. ed. 823; *Walker v. United States*, 4 Wall. (U. S.) 163, 18 L. ed. 319. See also *Kaufman v. I. Rheinstrom Sons Co.*, 188 Fed. 544. Compare *Weber v. Travelers' Ins. Co.*, 45 Fed. 657.

<sup>33</sup> *Baltimore &c. R. Co. v. Workman*, 12 Ind. App. 494, 40 N. E. 751. See also *Barber v. Boston &c.*

*R. Co.*, 145 Fed. 52. But where other relief may be obtained and the value of the matter in dispute exceeds two thousand dollars the cause may be removed although the money judgment demanded is less than that sum. *Dickinson v. Union &c. Co.*, 64 Fed. 895.

<sup>34</sup> *Yarde v. Baltimore &c. R. Co.*, 57 Fed. 913; *Gordon v. Longest*, 16 Pet. (U. S.) 97, 10 L. ed. 900; *Western Union Tel. Co. v. Levi*, 47 Ind. 552. And not from mere assertions as to the amount in the petition for removal. *Bacon v. Iowa Cent. R. Co.*, 157 Iowa 493, 137 N. W. 1011. But amount stated in affidavit for attachment rather than in ad dominion of complaint has been held to control. *Starke v. Hoerning*, 206 Fed. 1006. In an action in tort the amount of damages claimed by the plaintiff is the value of the matter in dispute. *Gordon v. Longest*, 16 Pet. (U. S.) 97, 10 L. ed. 900; *Western Union Tel. Co. v. Levi*, 47 Ind. 552; *Louis-*



amount, as so determined, is insufficient, the filing of a counterclaim by the defendant exceeding that amount does not entitle him to remove the suit.<sup>35</sup> This rule, if it can be sustained at all as a general rule, must be placed upon the ground that the defendant, having voluntarily submitted his claim to the state court as a plaintiff in the cross-complaint, cannot for that reason take advantage of his own act and remove the suit which could not otherwise have been removed by him. The jurisdictional amount may be made up of several distinct claims exceeding two thousand dollars in the aggregate.<sup>36</sup>

**§ 749 (649). Diverse citizenship as a ground for removal.**—We have already called attention to the provisions of the removal acts in regard to removals on the ground of diverse citizenship.<sup>37</sup> A corporation, as we have elsewhere shown,<sup>38</sup> is regarded as a citizen of the state in which it was incorporated, within the meaning of these acts.<sup>39</sup> The citizenship of the

ville &c. R. Co. v. Roehling, 11 Ill. App. 264; Chicago &c. R. Co. v. Stone, 70 Kans. 708, 79 Pac. 655. It is also held in the case last cited that the removal cannot be defeated by amendment reducing the amount after a sufficient petition and bond have been filed. But it is held otherwise where the amendment is before the filing of the petition and bond. Collins v. Twin Falls &c. Co., 204 Fed. 134; Lake Erie &c. R. Co. v. Huffman, 177 Ind. 126, 97 N. E. 434, Ann. Cas. 1914C, 1272. See generally Stephens v. St. Louis &c. R. Co., 47 Fed. 530, 14 L. R. A. 184; Hayward v. Nordberg Mfg. Co., 85 Fed. 4.

<sup>35</sup> Bennett v. Devine, 45 Fed. 705; La Montagne v. T. W. Harvey Lumber Co., 44 Fed. 645; Falls Wire &c. Co. v. Broderick, 2 McCrary (U. S.) 489, 6 Fed. 654. Contra, Clarkson v. Manson, 18 Blatchf. (U. S.) 443, 4 Fed. 257; Carson &c. Lumber Co.

v. Holtzclaw, 39 Fed. 578. Whether the amount of a counterclaim may be added to plaintiff's claim so as to give the court jurisdiction is said to be so doubtful under the authorities as to require the court to decline jurisdiction. Crane Co. v. Guanica Centrale, 132 Fed. 713.

<sup>36</sup> Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. ed. 870; Bernheim v. Birnbaum 30 Fed. 885. See also Brown v. Trousdale, 138 U. S. 389, 34 L. ed. 987.

<sup>37</sup> Ante, § 745.

<sup>38</sup> Ante, § 32.

<sup>39</sup> "Federal Jurisdiction of Corporations as Citizens," 36 Cent. L. J. 333; Marshall v. Baltimore &c. R. Co., 16 How. (U. S.) 314, 14 L. ed. 953; Rundle v. Delaware &c. Canal Co., 14 How. (U. S.) 80, 14 L. ed. 335; Railway Co. v. Whitton, 13 Wall. (U. S.) 270, 20 L. ed. 571; Louisville &c. R. Co. v. Letson,

stockholders is immaterial.<sup>40</sup> But a state itself is not a citizen of any state, and where it is the real party in interest, as in case of a prosecution in its name on the relation of a prosecuting attorney, to recover a statutory penalty, there can be no removal on the sole ground of diverse citizenship.<sup>41</sup> We have also shown that no state can deprive a foreign corporation of the right of removal given by congress.<sup>42</sup> But a corporation may be adopted so as to become a domestic corporation and a citizen of the state adopting it,<sup>43</sup> or it may be formed by concurrent

2 How. (U. S.) 497, 11 L. ed. 193; *Ohio &c. R. Co. v. Wheeler*, 1 Black (U. S.) 286, 17 L. ed. 130; *Bonaparte v. Camden &c. R. Co.*, Bald. (U. S.) 205, Fed. Cas. No. 1617; *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *Stone v. Chicago &c. R. Co.*, 195 Fed. 832; *Western Union Tel. Co. v. Dickinson*, 40 Ind. 444, 13 Am. Rep. 295; *Stanley v. Chicago &c. R. Co.*, 62 Mo. 508; *Quigley v. Cent. Pacific R. Co.*, 11 Nev. 350, 21 Am. Rep. 757. The citizenship of a corporation is sufficiently disclosed by an allegation that it is a corporation duly organized under the laws of New York. *Dodge v. Tulleys*, 144 U. S. 451, 12 Sup. Ct. 728, 36 L. ed. 501. See also *Robertson v. Scottish &c. Ins. Co.*, 68 Fed. 173. But a mere general conclusion that it is a citizen of a certain state has been held insufficient. *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404, 405, 15 L. ed. 340; *Chicago &c. Ry. Co. v. Stephens*, 218 Fed. 535.

<sup>40</sup> *Baltimore &c. R. Co. v. Cary*, 28 Ohio St. 208; *Quigley v. Central R. Co.*, 11 Nev. 350, 21 Am. Rep. 757; *Pomeroy v. New York &c. R. Co.*, 4 Blatch. (U. S.) 120, Fed. Cas.

No. 11261; *Hatch v. Chicago &c. R. Co.*, 6 Blatch. (U. S.) 105, Fed. Cas. No. 6204; *Minnett v. Milwaukee &c. R. Co.*, 3 Dill. (U. S.) 460, Fed. Cas. No. 9636. See also, as to agent or trustee whose authority is revocable. *Bogue v. Chicago &c. R. Co.*, 193 Fed. 728.

<sup>41</sup> *Southern R. Co. v. State*, 165 Ind. 613, 75 N. E. 272.

<sup>42</sup> "Federal Jurisdiction of Corporation as Citizens," 36 Cent. L. J. 333; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. ed. 943. See also *Herndon v. Chicago &c. R. Co.*, 218 U. S. 135, 30 Sup. Ct. 633, 54 L. ed. 970. But compare as to provision that it shall no longer do business in the state if it removes causes without consent. *State v. Louisville &c. R. Co.*, 97 Miss. 35, 51 So. 918, 53 So. 454, Ann. Cas. 1912C, 1150; *Security &c. Inc. Co. v. Prewitt*, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. ed. 1013 (decided by a divided court and distinguished and qualified to some extent in later decisions). Ante, § 32.

<sup>43</sup> Ante, § 32. We do not mean, however, that the mere adoption or naturalization of a corporation of another state will necessarily deprive

legislation of two or more states or consolidated under their laws so as to become a citizen of each.<sup>44</sup> The mere fact, however, that it carries on business, or is authorized to carry on business or hold property in another state than that in which it is incorporated, does not make it a citizen of such other state.<sup>45</sup> Neither does a state statute requiring a foreign corporation to have an agent in the state, upon whom process can be served, make it a citizen of that state.<sup>46</sup> And it is stated as a general proposition that, for purposes of the jurisdiction of federal courts a corporation remains a citizen of the state by which it was created, although it is afterwards also made a corporation of another state.<sup>47</sup> As the jurisdictional clause of the removal act refers

it of its right to sue or be sued in the federal courts as a citizen of another state.

<sup>44</sup>Ante, §§ 35, 38. See *Colglazier v. Louisville &c. R. Co.*, 22 Fed. 568; *Wasley v. Chicago &c. R. Co.*, 147 Fed. 608 (and cannot remove an action brought in either on the ground of diverse citizenship); *Uphoff v. Chicago &c. R. Co.*, 5 Fed. 545, and compare *Nashua &c. R. Co. v. Boston &c. R. Co.*, 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. ed. 363, with *Pacific R. Co. v. Missouri Pac. R. Co.*, 23 Fed. 565, 20 Am. & Eng. R. Cas. 590. See also *Oregon Short Line &c. R. Co. v. Skottowe*, 162 U. S. 490, 16 Sup. Ct. 869, 40 L. ed. 1048; *Walters v. Chicago &c. R. Co.*, 186 U. S. 479, 22 Sup. Ct. 941, 46 L. ed. 1266; *Paul v. Baltimore &c. R. Co.*, 44 Fed. 513; *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. 812.

<sup>45</sup>*Baltimore &c. R. Co. v. Kountz*, 104 U. S. 5, 26 L. ed. 643; *Pennsylvania Co. v. St. Louis &c. R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. ed. 83; *Martin v. Baltimore &c. R. Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. ed. 313; *Guinn v. Iowa Cent.*

*R. Co.* 14 Fed. 323; *Conn v. Chicago &c. R. Co.*, 48 Fed. 177; *Holden v. Putnam &c. Ins. Co.*, 46 N. Y. 1, 7 Am. Rep. 287; *Baltimore &c. R. Co. v. Cary*, 28 Ohio St. 208; *Allegheny Co. v. Cleveland &c. R. Co.*, 51 Pa. St. 228; *Baltimore &c. R. Co. v. Wightman*, 29 Grat. (Va.) 431.

<sup>46</sup>*Martin v. Baltimore &c. R. Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. ed. 313; *Chicago &c. R. Co. v. Minnesota &c. R. Co.*, 29 Fed. 337; *Fales v. Chicago &c. R. Co.*, 32 Fed. 673; *Amsden v. Norwich &c. Ins. Co.*, 44 Fed. 515; *Western Un. Tel. Co. v. Dickinson*, 40 Ind. 444, 13 Am. Rep. 295; *Morton v. Mutual &c. Ins. Co.*, 105 Mass. 141, 7 Am. Rep. 505. But see *Scott v. Texas &c. Co.*, 41 Fed. 225.

<sup>47</sup>*Louisville &c. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. ed. 1081; *St. Louis &c. R. Co. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. ed. 802. See also *Hollingsworth v. Southern R. Co.*, 86 Fed. 351; *Missouri Pac. Ry. Co. v. Castle*, 224 U. S. 541, 32 Sup. Ct. 606, 56 L. ed. 875.

to citizens and not merely to residents of different states, the petition for removal on the ground of diverse citizenship should show that the controversy is between citizens of different states, and not merely that the defendant is a non-resident or a resident of a different state from the plaintiff.<sup>48</sup> It has been strongly urged that within the meaning of the last removal act, a corporation can only remove a cause to the federal court where it is a resident as well as a citizen of another state.<sup>49</sup> But it is now well settled by judicial decision that in order to be a "non-resident of the state" in which suit is brought within the meaning of this act, the defendant need only be a corporation created by the laws of another state.<sup>50</sup> Although there is considerable conflict among the decisions of the different circuit courts of the United States, as well as among the decisions of the various state courts, it now seems to be well settled by the decisions of the Supreme Court of the United States, as well as by the weight of authority generally, that the requisite diversity of citizenship must exist not only at the time the petition for removal is filed, but also at the time the suit is commenced.<sup>51</sup> But it has been

<sup>48</sup> *Mansfield &c. R. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. ed. 462; *Chicago &c. R. Co. v. Ohle*, 117 U. S. 123, 6 Sup. Ct. 632, 29 L. ed. 837; *Pennsylvania Co. v. Bender*, 148 U. S. 255, 13 Sup. Ct. 591, 37 L. ed. 441; *Neel v. Pennsylvania Co.*, 157 U. S. 153, 15 Sup. Ct. 589, 39 L. ed. 654; *Mexican Cent. R. Co. v. Duthie*, 189 U. S. 76, 23 Sup. Ct. 610, 47 L. ed. 715; *Brown v. Keene*, 8 Pet. (U. S.) 112, 8 L. ed. 885; *Kansas City So. R. Co. v. Prunty*, 133 Fed. 13.

<sup>49</sup> Residence of corporations under the removal act, by Charles R. Pence, 35 Cent. L. J. 285.

<sup>50</sup> *Martin v. Baltimore &c. R. Co.*, 151 U. S. 673, 676, 14 Sup. Ct. 533, 38 L. ed. 313; *Fales v. Chicago &c. Co.*, 32 Fed. 673; *Henning v. West-*

*ern Union Tel. Co.*, 43 Fed. 97; *Robertson v. Scottish &c. Ins. Co.*, 68 Fed. 173. The receiver of a railroad company, being a citizen of another state, may remove an action brought against him in his official capacity for death by wrongful act, though the railroad company is a citizen of the state in which the action is brought. *Brisenden v. Chamberlain*, 53 Fed. 307.

<sup>51</sup> *La Confiance &c. v. Hall*, 137 U. S. 61, 11 Sup. Ct. 5, 34 L. ed. 573; *Crehore v. Railroad Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. ed. 144. *Stevens v. Nichols*, 130 U. S. 230, 9 Sup. Ct. 518, 32 L. ed. 914; *Indianapolis &c. R. Co. v. Risley*, 50 Ind. 60; *Blackwell v. Lynchburg &c. R. Co.*, 107 N. Car. 217, 12 S. E. 133. See also *Laird v. Connecticut &c. R.*

held in a comparatively recent case, contrary to the rule which prevails where the removal is sought upon the ground of a federal question or where the question is as to a separable controversy, that the diverse citizenship may be shown in the petition for removal and that it need not appear in the complaint.<sup>52</sup> So, it is said in distinguishing the question of diverse citizenship from the ordinary case of a federal question that "it is obvious that in the instance of diverse citizenship a different question is presented. Plaintiff may run his own risk in respect of the cause of action on which he proceeds but he cannot cut off defendant's constitutional right as a citizen of a different state than the plaintiff to choose a federal forum, by omitting to aver or mistakenly or falsely stating the citizenship of the parties. And this must be so also as to federal railroad corporations."<sup>53</sup>

**§ 750 (650). Separable controversy.**—The latest act upon the subject of the removal of causes restricts the right of removal where there is a separable controversy, which was formerly given to one or more of the plaintiffs or defendants, to "one or more of the defendants actually interested in such controversy;" but the decisions as to what is a separate controversy apply equally well to both acts. This separable controversy must be wholly between citizens of different states and must also be such as can be fully determined as between them;<sup>54</sup> but it need not be

Co., 55 N. H. 375, 20 Am. Rep. 215; Macey Co. v. Macey, 135 Fed. 725. But this rule seems to have been relaxed in a recent case. Kinney v. Columbia, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. ed. 103, followed in LaBelle Box Co. v. Stricklin, 218 Fed. 529, 533.

<sup>52</sup> Ysleta v. Canda, 67 Fed. 6. See also Kinney v. Columbia, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. ed. 103. The rule seems to be that the matter is to be determined from the face of the record or state of the pleadings and record, including the petition for removal at the time of the applica-

tion. Helena &c. Co. v. Spratt, 146 Fed. 310; Madisonville Traction Co. v. St. Bernard &c. Co., 196 U. S. 239, 25 Sup. Ct. 251, 49 L. ed. 462; Alabama So. R. v. Thompson, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. ed. 441. See also Wells v. Russellville &c. Co., 206 Fed. 528.

<sup>53</sup> Texas &c. R. Co. v. Cody, 166 U. S. 606, 17 Sup. Ct. 703, 705, 41 L. ed. 1132. See however Oregon Short Line &c. R. Co. v. Skottowe, 162 U. S. 490, 16 Sup. Ct. 869, 40 L. ed. 1048.

<sup>54</sup> Corbin v. Van Brunt, 105 U. S. 576, 26 L. ed. 1176; Shainwald v.

the principal controversy in the case, and the number of controversies is immaterial.<sup>55</sup> In an action in tort against a railroad company and one of its employees, where each was charged with a different negligent act causing the injury to the plaintiff, it has been held that a separable controversy was presented and that the suit might be removed.<sup>56</sup> But it has been held, on the other hand, that there is no separable controversy where the only question is as to the priority of different liens on the same property,<sup>57</sup> even though each defendant makes a separate defense,<sup>58</sup> or where land is sought to be condemned as against both the lessor and lessee,<sup>59</sup> or where a railroad company in one proceeding files a petition for condemnation against numerous property owners,<sup>60</sup> or where two corporations are jointly charged with

Lewis, 108 U. S. 158, 2 Sup. Ct. 385, 27 L. ed. 691; *Torrence v. Shedd*, 144 U. S. 527, 530, 12 Sup. Ct. 726, 36 L. ed. 528; *Capital City Bank v. Hodgkin*, 22 Fed. 209. The *Jarnecke Ditch*, *In re*, 69 Fed. 161, and numerous authorities there cited; *National Docks &c. R. Co. v. Pennsylvania R. Co.*, 52 N. J. Eq. 58, 28 Atl. 71.

<sup>55</sup> *Farmers' Loan &c. Co. v. Chicago &c. R. Co.*, 9 Biss. (U. S.) 133, Fed. Cas. No. 4665; *Snow v. Smith*, 4 Hughes (U. S.) 204, 88 Fed. 657. See also for cases in which it was held that there was a separable controversy. *Taylor Co. v. Baltimore &c. R. Co.*, 35 Fed. 161; *Foster v. Chesapeake &c. R. Co.*, 47 Fed. 369.

<sup>56</sup> *Ferguson v. Chicago &c. R. Co.*, 63 Fed. 177; *Beuttel v. Chicago &c. R. Co.*, 26 Fed. 50. See also *Trivette v. Chesapeake &c. R. Co.*, 212 Fed. 641; *Nichols v. Chesapeake &c. R. Co.*, 195 Fed. 913, 915, but see next following section.

<sup>57</sup> *Bissell v. Canada &c. R. Co.*, 39 Fed. 225.

<sup>58</sup> *Fidelity Ins. Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733, 29 L. ed. 898; *Young v. Parker*, 132 U. S. 267, 10 Sup. Ct. 75, 33 L. ed. 352.

<sup>59</sup> *Bellaire v. Baltimore &c. R. Co.*, 146 U. S. 117, 13 Sup. Ct. 16, 36 L. ed. 910; *Kohl v. United States*, 91 U. S. 367, 23 Fed. 449.

<sup>60</sup> *Perkins v. Lake Superior &c. R. Co.*, 140 Fed. 906. In the case cited the company, under the Wisconsin statute, filed a petition in a court of the state against numerous property owners, upon which, according to the statute, there should be a hearing as to the petitioner's right to condemn, and, if such right is sustained, for the appointment of a commission, which on request of the company or the landowner, shall appraise any piece of the property described, from which appraisal an appeal may be taken to the court, and tried by a jury as in ordinary law actions. The court held that there was a single controversy presented as to the right to condemn, to be determined between the petitioner, on one side

trespassing on the plaintiff's land, even though one of the defendants claims that the other did not have a corporate existence and that it alone committed the alleged trespass,<sup>61</sup> or where a sub-contractor sues both a railroad company and the principal contractor under a statute giving contractors and material men a lien on the railroad.<sup>62</sup> The question whether there is a separable controversy authorizing a removal is to be determined by the state of the pleadings or record at the time of the application, and not from the allegations of the petition for removal or the subsequent proceedings.<sup>63</sup> Indeed, it is held that it must be determined from the declaration or pleadings of the plaintiff, and that a defendant cannot, by answer, raise a separable controversy.<sup>64</sup> The rule is thus stated in a recent case.<sup>65</sup> "As this court has repeatedly affirmed, not only in cases of joint contracts,

and all of the parties joined as defendants, on the other; and that the mere fact that a defendant was the owner of part of the lands sought to be taken in severalty did not create a separable controversy between him and the petitioner, nor entitle him to remove the proceeding into a federal court on the ground of diversity of citizenship. See also *Jarnecke Ditch, In re*, 69 Fed. 161; *Le Mars v. Iowa Falls &c. R. Co.*, 48 Fed. 661. But compare *Pacific R. Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. ed. 319; *Chicago v. Hutchinson*, 11 Biss. (U. S.) 484, 15 Fed. 129; *Helena &c. Co. v. Spratt*, 146 Fed. 310.

<sup>61</sup> *Louisville &c. R. Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. ed. 474.

<sup>62</sup> *Ames v. Chicago &c. R. Co.*, 39 Fed. 881. See generally *Merchants' &c. Co. v. Insurance Co.*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. ed. 195; *St. Louis &c. R. Co. v. Wilson*, 114 U. S. 60, 5 Sup. Ct. 738, 29 L. ed.

66; *Thurber v. Miller*, 67 Fed. 371; *Haire v. Rome R. Co.*, 57 Fed. 321; *Sweeney v. Grand Island &c. R. Co.*, 61 Fed. 3; *Fox v. Mackay*, 60 Fed. 4.

<sup>63</sup> *Barney v. Latham*, 103 U. S. 205, 26 L. ed. 514; *Graves v. Corbin*, 132 U. S. 571, 10 Sup. Ct. 196, 33 L. ed. 462; *The Jarnecke, Ditch, In re*, 69 Fed. 161; *Grand Trunk R. Co. v. Twitchell*, 59 Fed. 727. See also *Chicago &c. R. Co. v. Dowell*, 229 U. S. 102, 111, 113, 32 Sup. Ct. 584, 57 L. ed. 1090.

<sup>64</sup> *Ayres v. Wiswall*, 112 U. S. 187, 5 Sup. Ct. 90, 28 L. ed. 693; *Louisville &c. R. Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. ed. 63; *Arrow-smith v. Nashville &c. R. Co.*, 57 Fed. 165; *Thurber v. Miller*, 67 Fed. 371; *National Docks &c. R. Co. v. Pennsylvania R. Co.*, 52 N. J. Eq. 58, 28 Atl. 71.

<sup>65</sup> *Torrence v. Shedd*, 144 U. S. 527, 530, 12 Sup. Ct. 726, 36 L. ed. 528.

but in actions for torts, which might have been brought against all or against any one of the defendants, separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to be joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings."<sup>66</sup> The fact that one of two joint defendants fails to answer or suffers a default does not make the controversy a separable one between the plaintiff and the other defendant.<sup>67</sup>

**§ 751 (650a). Action against company and employee.**—The question has arisen in a number of cases as to whether against a company and one or more of its employees, or against a lessor and lessee company, jointly can be removed as presenting a separable controversy especially where one object of the joinder appears to be to prevent a removal. There is some conflict among the authorities, but the better rule is that where, as in most jurisdictions and cases, a joint action may be maintained, the case cannot be removed as presenting a separable controversy even though one purpose of the joinder may have been to prevent a removal, and this is the rule now sustained by the great

<sup>66</sup> Citing *Louisville &c. R. Co. v. Ide*, 114 U. S. 52, 56, 5 Sup. Ct. 735, 29 L. ed. 63; *Pirie v. Tvedt*, 115 U. S. 41, 43, 5 Sup. Ct. 1034, 1161, 29 L. ed. 331; *Sloane v. Anderson*, 117 U. S. 275, 6 Sup. Ct. 730, 29 L. ed. 899; *Little v. Giles*, 118 U. S. 596, 601, 602, 7 Sup. Ct. 32, 30 L. ed. 269; *Thorne Wire Hedge Co. v. Fuller*, 122 U. S. 535, 7 Sup. Ct. 1265, 30 L. ed. 1235. See also *Thomas v. Great Northern R. Co.*, 147 Fed. 83.

<sup>67</sup> *Wilson v. Oswego Twp.*, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. ed. 70; *Putnam v. Ingraham*, 114 U. S. 57, 29 L. ed. 65; *Feison v. Hardy*, 114 N. Car. 58, 429, 19 S. E. 91, 701. So held, even where no process was served against one of the defendants and he did not appear. *Patchin v. Hunter*, 38 Fed. 51; *Ames v. Chicago &c. R. Co.*, 39 Fed. 881.



weight of authority.<sup>68</sup> But a fraudulent joinder wrongfully attempting to deprive parties of their rights in the federal courts will not defeat a removal where it is properly shown.<sup>69</sup> The federal court finally determines the question;<sup>70</sup> but the petition must state facts showing the fraudulent joinder, and not mere conclusions.<sup>71</sup> The general subject has received careful consideration in recent decisions of the supreme court of the United States, from which we quote below.<sup>72</sup>

<sup>68</sup> *Charman v. Lake Erie, &c. R. Co.*, 105 Fed. 449; *Louisville &c. R. Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. ed. 63; *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. ed. 269; *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. ed. 528; *Powers v. Chesapeake &c. R. Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. ed. 673; *Chesapeake &c. R. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. ed. 121; *Alabama &c. R. Co. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. ed. 441; *Cincinnati &c. R. Co. v. Bohon*, 200 U. S. 221, 26 Sup. Ct. 166, 50 L. ed. 448; *Chicago &c. R. Co. v. Dowell*, 229 U. S. 102, 33 Sup. Ct. 584, 57 L. ed. 1090; *Deere &c. Co. v. Chicago &c. Co.*, 85 Fed. 876; *Thomas v. Great Northern R. Co.*, 147 Fed. 83; *Illinois Cent. R. Co. v. Jones*, 118 Ky. 158, 80 S. W. 484; *Ayles v. Southern R. Co.*, 121 Ky. 59, 88 S. W. 1048, 121 Am. St. 453 (action against two companies). See also *Martin v. St. Louis &c. R. Co.*, 134 Fed. 134; *Lake Erie &c. R. Co. v. Charman*, 161 Ind. 95, 67 N. E. 923. But compare, as to lessor and lessee, *Yeates v. Illinois Cent. R. Co.*, 137 Fed. 943. And see where different and not concurrent negligence is charged. *Trivette v. Chesapeake &c. R. Co.*, 212

Fed. 641. See generally *Southern R. Co. v. Carson*, 194 U. S. 136, 24 Sup. Ct. 609, 38 L. ed. 907.

<sup>69</sup> See *Dudley v. Illinois Cent. R. Co. (Ky.)*, 96 S. W. 835.

<sup>70</sup> The present rule seems to be that the petition must be taken as true in the state court. *Burlington &c. R. Co. v. Dunn*, 122 U. S., 513, 7 Sup. Ct. 262, 30 L. ed. 1059 (tries the question of fact); *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. ed. 962.

<sup>71</sup> *Rutherford v. Illinois Cent. R. Co.*, 120 Ky. 15, 85 S. W. 199; *Illinois Cent. R. Co. v. Le Blanc*, 74 Miss. 626, 21 So. 748.

<sup>72</sup> In *Alabama &c. R. Co. v. Thompson*, 200 U. S. 236, 26 Sup. Ct. 161, 164 et seq., 50 L. ed. 441, it is said, quoting from *Powers v. Chesapeake &c. R. Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 265: "It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers and set up different defenses from the other de-

**§ 752 (651). Prejudice or local influence as a ground for removal.**—The provisions for removal where there is a separate controversy are not applicable where the removal is sought upon

defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.' *Pirie v. Tvedt*, 115 U. S. 41, 43, 5 Sup. Ct. 1034, 1161, 29 L. ed. 331, 332; *Sloane v. Anderson*, 117 U. S. 275, 6 Sup. Ct. 730, 29 L. ed. 899; *Little v. Giles*, 118 U. S. 596, 600, 601, 7 Sup. Ct. 32, 30 L. ed. 269-271; *Louisville &c. R. Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. ed. 474; *Torrence v. Shedd*, 144 U. S. 527, 530, 12 Sup. Ct. 726, 36 L. ed. 528, 531; *Connell v. Smiley*, 156 U. S. 335, 340, 15 Sup. Ct. 353, 39 L. ed. 443, 444. It is also said that the fact that by answer the defendant may show that the liability is several cannot change the character of the case made by the plaintiff in his pleading so as to affect the right of removal. It is to be remembered that we are not now dealing with joinders which are shown by the petition for removal, or otherwise, to be attempts to sue in the state courts

with a view to defeat federal jurisdiction. In such cases entirely different questions arise, and the federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the federal courts of the protection of their rights in those tribunals. \* \* \* Does this become a separable controversy within the meaning of the act of congress because the plaintiff has misconceived his cause of action, and had no right to prosecute the defendants jointly? We think, in the light of the adjudications above cited from this court, it does not. Upon the face of the complaint—the only pleading filed in the case—the action is joint. It may be that the state court will hold it not to be so. It may be (which we are not called upon to decide now) that this court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal. The case cannot be removed unless it is one which presents a separable controversy wholly between citizens of different states. In determining this question the law looks to the case made in the pleadings, and determines whether the state court shall be required to surrender its jurisdiction to the federal court.

the ground of prejudice or local influence.<sup>73</sup> The act of March 3, 1887, as corrected by the act of August 13, 1888, unlike the earlier acts, gave the plaintiff no right of removal upon the ground of prejudice or local influence, but it permitted one of several defendants, where the requirements as to citizenship and the amount in controversy were satisfied, to obtain a removal,<sup>74</sup> whereas the act of 1867 required all the defendants to join in the petition. He must, however, be a citizen of a different state from that in which the suit is brought,<sup>75</sup> and it has been held that the plaintiffs must all be citizens of the state in which the suit is brought.<sup>76</sup> A defendant who is a citizen of the same state as some of the plaintiffs cannot have the suit removed merely upon the ground of prejudice or local influence as between himself and other defendants,<sup>77</sup> nor can a non-resident defendant, joined with another defendant who is a citizen of the same state as the plaintiff, remove the cause on the ground of prejudice or local influence.<sup>78</sup>

\* \* \* The fact that the state court may take a different view from the courts of the United States of the common law as to the character of such actions, and the right to prosecute them in form joint as well as several, affords no ground of removal." See also *Cincinnati & R. Co. v. Bohon*, 200 U. S. 221, 26 Sup. Ct. 166, 50 L. ed. 448.

<sup>73</sup> *Jefferson v. Driver*, 117 U. S. 272, 6 Sup. Ct. 729, 29 L. ed. 897; *Young v. Parker*, 132 U. S. 267, 10 Sup. Ct. 75, 33 L. ed. 352.

<sup>74</sup> *Haire v. Rome R. Co.*, 57 Fed. 321; *Fisk v. Henarie*, 32 Fed. 417; *Whelan v. New York & C. R. Co.*, 35 Fed. 849. See also *Campbell v. Collins*, 62 Fed. 849. It makes no difference that some of the other defendants are residents of the state in which the suit is brought. *Jackson & C. Co. v. Pearson*, 60 Fed. 113.

<sup>75</sup> The clause authorizing a removal upon the ground of prejudice

or local influence does not apply where one party is an alien. *Cohn v. Louisville & C. R. Co.*, 39 Fed. 227; *Grand Trunk R. Co. v. Twitchell*, 59 Fed. 727.

<sup>76</sup> *Thouren v. East Tenn. & C. R. Co.*, 38 Fed. 673; *Niblock v. Alexander*, 44 Fed. 306; *Rike v. Floyd*, 42 Fed. 247. This is true at least where the plaintiffs are all jointly interested against the non-resident defendant who seeks the removal. *Young v. Parker*, 132 U. S. 267, 10 Sup. Ct. 75, 33 L. ed. 352; *Gann v. Northeastern R. Co.*, 57 Fed. 417.

<sup>77</sup> *Hanrick v. Hanrick*, 153 U. S. 192, 14 Sup. Ct. 835, 38 L. ed. 685.

<sup>78</sup> *Cochran v. Montgomery County*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. ed. 182; *Armstrong v. Kansas City & C. R. Co.*, 192 Fed. 608. Cases removable on this ground "are confined to those in which there is a controversy between a citizen or citizens of the state in which the

It is now settled, after some conflict among the authorities, that the value of the matter in dispute, exclusive of interest and costs, must exceed two thousand dollars.<sup>79</sup> The application should be made to the proper circuit court of the United States and not to the state court.<sup>80</sup> The act provided for a removal to the proper circuit court by a defendant "when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in the state court in which the suit is pending, or in any other state court to which the said defendant may under the laws of the state, have the right, on account of such prejudice or local influence, to remove it;" but it did not prescribe the method for making this appear to the circuit court. This is usually accomplished by the affidavit of the party seeking the removal. It is the better and safer practice to state the facts showing the prejudice or local influence,<sup>81</sup> but in a few of the circuits it has been held sufficient to follow the language of the statute.<sup>82</sup> It is also held in some circuits that the defendant's affidavit is conclusive and cannot be controverted,<sup>83</sup> but we think

suit is brought and a citizen or citizens of another or other states, and do not include cases wherein the controversy is between citizens of the same state." *Southern R. Co. v. Thomason*, 146 Fed. 972; *Cleveland v. Cleveland &c. R. Co.*, 147 Fed. 171.

<sup>79</sup> *Pennsylvania Co., Ex parte*, 137 U. S. 451, 11 Sup. Ct. 141, 34 L. ed. 738; *Malone v. Richmond &c. R. Co.*, 35 Fed. 625; *Carson &c. Lumber Co. v. Holtzclaw*, 39 Fed. 578; *Roraback v. Pennsylvania Co.*, 42 Fed. 420.

<sup>80</sup> *Williams v. Southern &c. R. Co.*, 116 N. Car. 558, 21 S. E. 298; *Southworth v. Reid*, 36 Fed. 451; *Huskins v. Cincinnati &c. R. Co.*, 37 Fed. 504; *Rome &c. R. Co. v. Smith*, 84 Ga. 238, 10 S. E. 728; *Beyer v. Sop-*

*Lumber Co.*, 76 Wis. 145, 44 N. W. 750, 833. But see *Short v. Chicago, &c. R. Co.*, 34 Fed. 225.

<sup>81</sup> *Pennsylvania Co., Ex parte*, 137 U. S. 451, 11 Sup. Ct. 141, 34 L. ed. 738; *Amy v. Manning*, 38 Fed. 536; *Goldworthy v. Chicago &c. R. Co.*, 38 Fed. 769; *Schwenk & Co. v. Strang*, 59 Fed. 209. It is insufficient to state that affiant believes and has reason to believe that prejudice and local influence exist. *Collins v. Campbell*, 62 Fed. 850; *Short v. Chicago &c. R. Co.*, 33 Fed. 114. See also *Niblock v. Alexander*, 44 Fed. 306.

<sup>82</sup> *Whelan v. New York &c. R. Co.*, 35 Fed. 849; *Cooper v. Richmond &c. R. Co.*, 42 Fed. 697.

<sup>83</sup> Cases cited in last note, *supra*; *Huskins v. Cincinnati &c. R. Co.*, 37

the better rule is that the court may receive counter-affidavits or other evidence as to the existence of prejudice or local influence.<sup>84</sup>

**§ 753 (652). Removal where federal question is involved.—**

As we have seen, provision is made for the removal of suits "of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made under their authority." It is not always easy, however, to determine when a suit is one arising under the constitution or laws of the United States. It was said by Chief Justice Marshall that "a case in law or equity consists of the right of the one party as well as the other, and may truly be said to arise under the constitution or a law of the United States whenever its correct decision depends on the right construction of either."<sup>85</sup> But the suit must actually arise out of the operation, construction or application of some provision of the constitution or laws of the United States, and it is not sufficient that during its progress a construction of the constitution or some law of the United States may become necessary.<sup>86</sup> If the only right claimed by the plaintiff is under a state law, a mere suggestion in his bill that the defendant will claim that such law is void because in contravention of the constitution of the United States will not entitle the defendant to remove

Fed. 504; *Hills v. Richmond &c. R. Co.*, 33 Fed. 81; *Brodhead v. Shoemaker*, 44 Fed. 518.

<sup>84</sup> *Short v. Chicago &c. R. Co.*, 34 Fed. 225; *Malone v. Richmond &c. R. Co.*, 35 Fed. 625; *Robison v. Hardy*, 38 Fed. 49; *Carson &c. Lumber Co. v. Holtzclaw*, 39 Fed. 578. See also *Walcott v. Watson*, 46 Fed. 529; *Pennsylvania Co., Ex parte*, 137 U. S. 457, 11 Sup. St. 143, 34 L. ed. 741.

<sup>85</sup> *Cohens v. Virginia*, 6 Wheat. (U. S.) 264, 379, 5 L. ed. 257. See also *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473, 7 Sup. Ct. 260, 30 L. ed. 461; *New Orleans &c. R. Co. v.*

*Mississippi*, 102 U. S. 135, 26 L. ed. 96.

<sup>86</sup> *Gold &c. Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *Starin v. New York*, 115 U. S. 248, 6 Sup. Ct. 28, 29 L. ed. 388; *Carson v. Dunham*, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. ed. 992; *Dowell v. Griswold*, 5 Sawy. (U. S.) 39, Fed. Cas. No. 4041; *Iowa v. Chicago &c. R. Co.*, 33 Fed. 391; *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. 812; *Leggett v. Great Northern R. Co.*, 180 Fed. 314; *Illinois Central R. Co. v. Chicago &c. R. Co.*, 122 Ill. 473, 13 N. E. 140; *Schuyler v. Southern Pac. Co.*, 37 Utah 581, 109 Pac. 458.

the suit upon the ground that a federal question is involved.<sup>87</sup> Among the suits that have been held removable as arising under the constitution or laws of the United States are those in which the question as to whether a state law impairs the obligation of a contract is involved,<sup>88</sup> suits by or against a corporation created by congress;<sup>89</sup> suits against receivers appointed by a federal court;<sup>90</sup> and suits against interstate carriers of goods for unjust discrimination and excessive charges contrary to the interstate commerce law.<sup>91</sup> On the other hand, an application, by a commissioner appointed to abolish grade crossings, for a mandamus to compel a railroad company to obey its order changing the location of the company's tracks has been held not to be removable on the ground that a federal question was involved.<sup>92</sup> So,

<sup>87</sup> *Tennessee v. Union & C. Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. ed. 511.

<sup>88</sup> *Smith v. Greenhow*, 109 U. S. 669, 3 Sup. Ct. 421, 27 L. ed. 1080; *People v. Chicago & C. R. Co.*, 16 Fed. 706; *Illinois v. Illinois Cent. R. Co.*, 33 Fed. 721; *State v. Port Royal & C. R. Co.*, 56 Fed. 333. But see *Hamilton Gaslight & C. Co. v. Hamilton*, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. ed. 963; *Stein v. Bienville Water Co.*, 141 U. S. 67, 11 Sup. Ct. 892, 35 L. ed. 622.

<sup>89</sup> *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. ed. 319; *Ames v. Kansas*, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. ed. 330; *Union Pac. R. v. McComb*, 1 Fed. 799. See also *Martin v. St. Louis & C. R. Co.*, 134 Fed. 134.

<sup>90</sup> *Texas & C. R. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. ed. 829; *Jewett v. Whitcomb*, 69 Fed. 417; *Evans v. Dillingham*, 43 Fed. 177; *Central Trust Co. v. East Tennessee & C. R. Co.*, 59 Fed. 523; *Hardwick v. Kean*, 95 Ky. 563, 26 S. W.

589. But the mere fact that the receiver was appointed by a federal court does not necessarily make all actions against him removable under this provision. *Gableman v. Peoria & C. R. Co.*, 179 U. S. 335, 21 Sup. Ct. 171, 45 L. ed. 220.

<sup>91</sup> *Lowry v. Chicago & C. R. Co.*, 46 Fed. 83. See also *State v. Port Royal & C. R. Co.*, 56 Fed. 333; *Lenon, Ex parte*, 64 Fed. 320. For other cases removable on this ground, see *Kansas Pac. R. Co. v. Atchison R. Co.*, 112 U. S. 414, 5 Sup. Ct. 208, 28 L. ed. 794; *Southern Pac. R. Co. v. California*, 118 U. S. 109, 6 Sup. Ct. 993, 30 L. ed. 103; *Smith v. Atchison & C. R. Co.*, 210 Fed. 988.

<sup>92</sup> *Woodruff v. New York & C. R. Co.*, 59 Conn. 63, 20 Atl. 17; *Dey v. Chicago & C. R. Co.*, 45 Fed. 82. See also *Western Un. Tel. Co. v. Southeast & C. R. Co.*, 208 Fed. 266; *State v. Louisville & C. R. Co.*, 104 Miss. 413, 61 So. 425; *North Carolina Corp. Com. v. Southern R. Co.*, 151 N. Car. 447, 66 S. E. 427. But see

a suit does not arise under the constitution or laws of the United States, and is not removable on that ground, merely because it requires the statutes of one state to be construed by a court of another state.<sup>93</sup> Nor does a bill in equity to set aside a lease by a corporation of one state to a corporation of another state as ultra vires and void and obtain an accounting, assert or raise any federal question.<sup>94</sup> It has also been held that a proceeding to prevent a bridge company from using a franchise to operate a railroad in a public street does not involve a federal question.<sup>95</sup> A suit is not removable as arising under the laws of the United States merely because the supreme court or some other federal court has, in another case, decided the questions of law involved; <sup>96</sup> but, on the other hand, it has been held that a proposition of law which has once been decided by the supreme court of the United States can no longer be treated as a federal question.<sup>97</sup> The fact that a federal question is involved must appear from the plaintiff's own statement of his claim, and where it is not so made to appear it cannot be supplied by any allegation in the petition for removal or the subsequent pleadings.<sup>98</sup>

where proceeding was to compel company to replace bridge over a navigable river. *State v. White River Val. R. Co.*, 27 S. Dak. 65, 129 N. W. 1034.

<sup>93</sup> *Chicago &c. R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18, 1 Sup. Ct. 614, 27 L. ed. 636.

<sup>94</sup> *Central R. Co. v. Mills*, 113 U. S. 249, 5 Sup. Ct. 456, 28 L. ed. 949.

<sup>95</sup> *Commonwealth v. Louisville Bridge Co.*, 42 Fed. 241.

<sup>96</sup> *Leather Manufacturers' Nat. Bank v. Cooper*, 120 U. S. 778, 7 Sup. Ct. 777, 30 L. ed. 816.

<sup>97</sup> *Kansas v. Bradley*, 26 Fed. 289. This decision, however, seems to us to be questionable and in conflict with the case cited in the last preceding note. The federal courts do not make the laws of the United

States. But see *Arkansas v. Choc-taw &c. R. Co.*, 134 Fed. 106, following the case first cited in this note and citing other cases which have followed it, so that the question now seems to be settled. Compare, however, *Cornue v. Ingersoll*, 174 Fed. 666.

<sup>98</sup> *Tennessee v. Union &c. Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. ed. 511; *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34, 39 L. ed. 85; *East Lake Land Co. v. Brown*, 155 U. S. 488, 15 Sup. Ct. 357, 39 L. ed. 233; *Postal Tel. &c. Co. v. Alabama*, 155 U. S. 482, 15 Sup. Ct. 192, 39 L. ed. 231; *Oregon Short Line R. Co. v. Shotlowe*, 162 U. S. 490, 16 Sup. Ct. 869, 40 L. ed. 1048; *Haggin v. Lewis*, 66 Fed. 199; *Caples v. Texas &c. R. Co.*, 67 Fed. 9; *Mitchell*

**§ 754 (653). Time and manner of making application for removal.**—Under the act of March 3, 1887, as corrected by the act of August 13, 1888, the application for removal upon any other ground than that of prejudice or local influence should be made by filing a petition in the state court "before the defendant is required by laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." If no application is filed within that time the right of removal is lost.<sup>99</sup> But it is held that the petitioner has the full time allowed the defendant in which to answer or plead, although the latter may demur or answer before it is expired,<sup>1</sup> and that where an amended complaint is filed which states an entirely different cause of action in which the original suit is merged the time begins to run from the filing of

&c Co. v. Worthington, 140 Fed. 947; Leggett v. Great Northern R. Co., 180 Fed. 314; Clarke v. Southern Pac. Co., 175 Fed. 122. But see, where the corporation is a federal corporation and the question is as to diverse citizenship. Texas &c. R. Co. v. Cody, 166 U. S. 606, 17 Sup. Ct. 763, 41 L. ed. 1132. See generally Galveston R. v. Texas, 170 U. S. 226, 18 Sup. Ct. 603, 42 L. ed. 1017; Boston &c. Co. v. Montana &c. Co., 188 U. S. 632, 23 Sup. Ct. 434, 47 L. ed. 626.

<sup>99</sup> Price v. Lehigh &c. R. Co., 65 Fed. 825; Woolf v. Chisholm, 30 Fed. 881; Font v. Gulf &c. Co., 47 La. Ann. 272, 16 So. 828; Williams v. Southern &c., 116 N. Car. 558, 21 S. E. 298; Beyer v. Soper Lumber Co., 76 Wis. 145, 44 N. W. 750, 833. See also Houston &c. R. Co. v. Shirley, 111 U. S. 358, 4 Sup. Ct. 472, 28 L. ed. 455; Fletcher v. Hamlet, 116 U. S. 408, 6 Sup. Ct. 426, 29 L. ed. 679; Kelley v. Virginia Bridge &c. Co., 203 Fed. 566; Lesh v. Bailey, 49 Ind. App.

254, 95 N. E. 341; Chicago &c. R. Co. v. Little Larkio Drainage Dist., 237 Mo. 86, 139 S. W. 572. For construction of statute and rule of court held to govern, see First Nat. Bank v. A. E. Appleyard & Co., 138 Fed. 939. As to sufficiency of petition as to statement that time to plead had not arrived, see Remington v. Central Pac. R. Co., 198 U. S. 95, 25 Sup. Ct. 577, 49 L. ed. 959. See, as to right to remove by acting promptly after amendment of complaint making a non-removable case a removable one, Myrtle v. Nevada &c. R. Co., 137 Fed. 193; and by renewing application after it appears that a party was fraudulently joined and no cause of action is proved against him. Dudley v. Illinois Cent. R. Co. (Ky.), 96 S. W. 835; White v. Chicago &c. R. Co. (Ky.), 96 S. W. 911.

<sup>1</sup> Tennessee &c. Co. v. Wallet, 37 Fed. 545; Gavin v. Vance, 33 Fed. 84; Conner v. Skagit &c. Coal Co., 45 Fed. 802.



such amended complaint.<sup>2</sup> The application comes too late, however, if not filed before the time at which the defendant is required to plead to the jurisdiction or in abatement, even though it is filed before the time at which he is required to plead to the merits.<sup>3</sup> A defendant who makes no application for removal himself cannot assign as error the action of the court in denying a removal upon the application of other defendants.<sup>4</sup> So, on the other hand, it is held that objection to the jurisdiction of a United States circuit court over a suit, otherwise removable, because the application for removal was not made in time, is waived where it is not made until the case is taken to the supreme court on writ of error.<sup>5</sup> The application for removal upon the ground of prejudice or local influence may be made at any time before the trial. It is held, however, that it cannot be made after one trial has been had and a reversal obtained, and it is intimated that the right of removal must be exercised before or at the term at which the cause "could be first tried, and before the trial thereof," as under the act of 1875.<sup>6</sup> Provision is also made in the removal act for the filing of a bond in certain cases and a copy of the record.<sup>7</sup> It has been held that the petition for removal forms part of the record, and if the record, including the petition, shows that the case is one of federal jurisdiction it is sufficient.<sup>8</sup> But it is said that an additional petition presented

<sup>2</sup> *Mattoon v. Reynolds*, 62 Fed. 417; *Evans v. Dillingham*, 43 Fed. 177.

<sup>3</sup> *Martin v. Baltimore &c. R. Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. ed. 311.

<sup>4</sup> *Merchants &c. v. Insurance Co.*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. ed. 195; *Rand v. Walker*, 117 U. S. 340, 6 Sup. Ct. 769, 29 L. ed. 907.

<sup>5</sup> *Martin v. Baltimore &c. R. Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. ed. 311. See also *Tod v. Cleveland &c. R. Co.*, 65 Fed. 145.

<sup>6</sup> *Fisk v. Henarie*, 142 U. S. 459, 12 Sup. Ct. 207, 35 L. ed. 1080. See

also *Lookout Mountain R. Co. v. Houston*, 32 Fed. 711; *Davis v. Chicago &c. R. Co.*, 46 Fed. 307. But compare *Huskins v. Cincinnati &c. R. Co.*, 37 Fed. 504; *Brodhead v. Shoemaker*, 44 Fed. 518; *Stix v. Keith*, 90 Ala. 121, 7 So. 423.

<sup>7</sup> 1 Supp. U. S. Rev. Stat. 613. See *Hayes v. Todd*, 34 Fla. 233, 15 So. 752; *Lucker v. Phoenix &c. Co.*, 66 Fed. 161; *Waite v. Phoenix Ins. Co.*, 62 Fed. 769; *Austin v. Gagan*, 39 Fed. 626. See also as to bond and approval, *Groton &c. Co. v. American &c. Co.*, 137 Fed. 284.

<sup>8</sup> *Supreme Lodge v. Wilson*, 66

to the federal court with the removal papers, alleging facts not presented to the state court, will not confer jurisdiction on the federal court,<sup>9</sup> although a petition may be amended in the latter court so as to more fully state the facts which appear in the record or upon which the statements in the original petition were based.<sup>10</sup>

**§ 755 (654). Effect of application on jurisdiction of state and federal court.**—When a proper petition and bond have been filed in the state court, it is the duty of that court to accept the same, and all further proceedings therein are *coram non judge*.<sup>11</sup> It has been held that the filing of a petition for removal, without objecting to the jurisdiction of the state court, constitutes a general appearance and operates as a waiver of defects in the summons or service thereof,<sup>12</sup> but we think the better rule is that a

Fed. 785. See also *Security Co. v. Pratt*, 65 Conn. 161, 32 Atl. 396; *Crehore v. Ohio &c. R. Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. ed. 144.

<sup>9</sup> *Waite v. Phoenix Ins. Co.*, 62 Fed. 769.

<sup>10</sup> *Powers v. Chesapeake &c. R. Co.*, 65 Fed. 129; *Carson v. Dunham*, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. ed. 992. See also as to amending petition. *Missouri &c. R. Co. v. Chappell*, 206 Fed. 688; *Kyle v. Chicago, &c. R. Co.*, 173 Fed. 238. *Hardwick v. Kean*, 95 Ky. 563, 26 S. W. 589.

<sup>11</sup> *Gordon v. Longest*, 16 Pet. (U. S.) 97, 10 L. ed. 900; *National Steamship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. ed. 87; *Hatch v. Chicago &c. R. Co.*, 6 Blatchf. (U. S. C. C.) 105; *New Orleans &c. R. Co. v. Mississippi*, 102 U. S. 135; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149; *Southern Pac. R. Co. v. Harrison*, 73 Tex. 103, 11 S. W. 168; *Parker v. Clarkson*, 39 W.

Va. 184, 19 S. E. 431; *Northern Pac. R. Co. v. McMullen*, 86 Wis. 501, 56 N. W. 629. See also *Chesapeake &c. R. Co. v. Cockrell*, 232 U. S. 146, 34 Sup. Ct. 278, 58 L. ed. 544; *Stevenson v. Illinois Cent. R. Co.*, 192 Fed. 956; *Mannington v. Hocking Val. R. Co.*, 183 Fed. 133. Participating in proceeding in the state court which persists in detaining jurisdiction after removal, is not necessarily a waiver of the removal. *Home &c. Ins. Co. v. Dunn*, 19 Wall. (U. S.) 214; *McMullen v. Northern Pac. R. Co.*, 57 Fed. 16; *Waite v. Phoenix Ins. Co.*, 62 Fed. 769; *Little Rock &c. R. Co. v. Iredell*, 50 Ark. 388, 8 S. W. 21; *Stanley v. Chicago &c. R. Co.*, 62 Mo. 508; *Northern Pac. R. Co. v. McMullen*, 86 Wis. 501, 56 N. W. 629.

<sup>12</sup> *Wabash Western R. Co. v. Brow*, 65 Fed. 941 (reversed, however, in 164 U. S. 271, 17 Sup. Ct. 126); *O'Donnell v. Atchison &c. R. Co.*, 49 Fed. 689; *Farmer v. National*

special appearance for the purpose of obtaining a removal does not operate as a general appearance and waiver of such defects.<sup>13</sup> The state courts have generally claimed and been conceded the right to examine the petition and record and determine whether the statutory requirements have been complied with;<sup>14</sup> but the federal courts are the final judges of their own jurisdiction, and the decision of a state court is not conclusive as to such jurisdiction.<sup>15</sup> The jurisdiction of the federal court attaches where the suit is removable, as soon as the statutory requirements are complied with, whether the state court makes an order for the removal or not.<sup>16</sup> An order for the removal of a suit, where it

&c. Assn., 138 N. Y. 265, 33 N. E. 1075.

<sup>13</sup> *Goldley v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. ed. 517; *Perkins v. Hendryx*, 40 Fed. 657; *Ahlhauser v. Butler*, 50 Fed. 705; *Garner v. Second Nat. Bank*, 66 Fed. 369; 2 *Elliott Gen. Prac.*, § 474. *Davis v. Cleveland &c. R. Co.*, 146 Fed. 403, holding that the removal does not preclude the defendant from challenging in the federal court the jurisdiction of the state court over the person nor from claiming exemption from being sued in a state other than that of its residence. See also *Wabash &c. R. Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. ed. 431; *R. J. Darnell Inc. v. Illinois Cent. R. Co.*, 190 Fed. 656; *Murray v. Wilcox*, 122 Iowa 188, 97 N. W. 1087, 64 L. R. A. 534, 101 Am. St. 263.

<sup>14</sup> *Burlington &c. R. Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262, 30 L. ed. 1159; *Beadleston v. Harpending*, 32 Fed. 644; *Roberts v. Chicago &c. R. Co.*, 45 Fed. 433; *Missouri &c. R. Co. v. Chappell*, 206 Fed. 688; *Carls-well v. Schley*, 59 Ga. 17; *Baltimore &c. R. Co. v. New Albany &c. R. Co.*, 53 Ind. 597; *Burch v. Davenport &c. R. Co.*, 46 Iowa 449, 26 Am. Rep.

150; *Larson v. Cox*, 39 Kans. 631, 18 Pac. 892; *Broadway Nat. Bank v. Adams*, 130 Mass. 431; *Hurst v. Southern R. Co.*, 162 N. Car. 368, 78 S. E. 434.

<sup>15</sup> *Barrow v. Hunton*, 99 U. S. 80, 25 L. ed. 407; *Baltimore &c. R. Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643; *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. ed. 870; *Home &c. Ins. Co. v. Dunn*, 19 Wall. (U. S.) 214; *Wilson v. Western Union Tel. Co.*, 34 Fed. 561; *Knahtla v. Oregon &c. R. Co.*, 21 Ore. 136, 27 Pac. 91.

<sup>16</sup> *Kern v. Huidekoper*, 103 U. S. 485, 26 L. ed. 354; *Fisk v. Union Pac. R. Co.*, 6 Blatchf. (U. S. C. C.) 362; *Chattanooga &c. R. Co. v. Cincinnati &c. R. Co.*, 44 Fed. 456; *Wills v. Baltimore &c. R. Co.*, 65 Fed. 532; *Shepherd v. Bradstreet Co.*, 65 Fed. 142; *Mutual L. Ins. Co. v. Langley*, 145 Fed. 415; *Hubbard v. Chicago &c. R. Co.*, 176 Fed. 241; *Hayes v. Todd*, 34 Fla. 233, 15 So. 752; *St. Anthony &c. Co. v. King &c. Co.*, 23 Minn. 186, 23 Am. Rep. 682; *State v. Johnston*, 234 Mo. 338, 137 S. W. 595; *McNeal &c. Co. v. Howland &c. Co.*, 99 N. Car. 202, 5 S. E. 745, 6 Am. St. 513.

may be remanded, merely suspends the jurisdiction of the state court, and, if the federal court remands the case, that jurisdiction will be resumed.<sup>17</sup> The general subject of this section was under consideration by the Supreme Court of the United States in a recent case, and certain propositions were said to be well settled. We quote from the decision the statement of the propositions and the authorities cited in the note below.<sup>18</sup>

<sup>17</sup> *Young v. Parker*, 132 U. S. 267, 10 Sup. Ct. 75, 33 L. ed. 352; *Southern Pac. R. Co. v. Superior Court*, 63 Cal. 607; *Wright v. Giles*, 60 Tex. Civ. App. 550, 129 S. W. 1163.

<sup>18</sup> The case to which we refer is *Madisonville Traction Co. v. St. Bernard &c. Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 253, 49 L. ed. 462, where the court says that the following propositions are well settled: "1. If the case be a removable one; that is, if the suit, in its nature, be one of which the circuit court could rightfully take jurisdiction, then, upon the filing of a petition for removal, in due time, with a sufficient bond, the case is, in law, removed, and the state court in which it is pending will lose jurisdiction to proceed further, and all subsequent proceedings in that court will be void. *New Orleans, M. & F. R. Co. v. Mississippi*, 102 U. S. 135, 141, 26 L. ed. 96, 98; *Baltimore &c. R. Co. v. Koontz*, 104 U. S. 5, 14, 26 L. ed. 643, 645; *National S. S. Co. v. Tugman*, 106 U. S. 118, 122, 1 Sup. Ct. 58, 27 L. ed. 87, 89; *St. Paul &c. R. Co. v. McLean*, 108 U. S. 212, 216, 2 Sup. Ct. 498, 27 L. ed. 703, 704; *Crehore v. Ohio &c. R. Co.*, 131 U. S. 240, 243, 9 Sup. Ct.

692, 797, 33 L. ed. 354, 357; *Marshall v. Holmes*, 141 U. S. 589, 595, 12 Sup. Ct. 62, 35 L. ed. 870, 872. 2. After the presentation of a sufficient petition and bond to the state court in a removable case, it is competent for the circuit court, by a proceeding ancillary in its nature—without violating § 720 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 581) forbidding a court of the United States from enjoining proceedings in a state court—to restrain the party against whom a cause has been legally removed from taking further steps in the state court. *French v. Hay*, 22 Wall. (U. S.) 252, 22 L. ed. 857; *Dietzsch v. Huidekoper*, 103 U. S. 494, 496, 497, 26 L. ed. 497, 498; *Moran v. Sturgess*, 154 U. S. 256, 270, 14 Sup. Ct. 1019, 38 L. ed. 981, 985. See also *Sargent v. Helton*, 115 U. S. 352, 6 Sup. Ct. 78, 29 L. ed. 413; *Harkrader v. Wadley*, 172 U. S. 165, 19 Sup. Ct. 119, 43 L. ed. 405; *Gates v. Bucki*, 12 U. S. 69, 53 Fed. 969; *Texas &c. R. Co. v. Kuteman*, 13 U. S. 99, 54 Fed. 551; *Whitelaw, Re*, 71 Fed. 733, 738; *Iron Mountain R. Co. v. Memphis*, 96 Fed. 131; *James v. Central Trust Co.*, 98 Fed. 489. 3. It is well settled that if, upon the face of the record, includ-

**§ 756 (655). Remanding and dismissing cause.**—The last removal act specifically provides for remanding suits removed on the ground of prejudice or local influence as to defendants not affected thereby, where such suits can be fully and justly determined as to them in the state court.<sup>19</sup> It is also provided generally that, "if in any suit commenced in a district court, or removed from a state court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just."<sup>20</sup> Objections appearing upon the face of the record should be taken advan-

ing the petition for removal, a suit does not appear to be a removable one, then the state court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made. *Stone v. South Carolina*, 117 U. S. 430, 432, 6 Sup. Ct. 799, 29 L. ed. 962, 963; *Carson v. Hiatt*, 118 U. S. 279, 281, 6 Sup. Ct. 1050, 30 L. ed. 167, 168; *Burlington & C. R. Co. v. Dunn*, 122 U. S. 513, 515, 7 Sup. Ct. 1262, 30 L. ed. 1159, 1160."

<sup>19</sup>Barnes' Fed. Code, § 790.

<sup>20</sup>Barnes' Fed. Code § 799. See also *Williams v. Nottawa*, 104 U. S. 209, 26 L. ed. 719; *Ayers v. Wiswall*, 112 U. S. 187, 5 Sup. Ct. 90, 28 L. ed. 694; *Graves v. Corbin*, 132 U. S. 571, 10 Sup. Ct. 196, 33 L. ed. 462; *Pennsylvania R. Co. v. Allegheny & C. R.*

*Co.*, 25 Fed. 113; *Hablin v. Chicago & C. R. Co.*, 43 Fed. 401; *Shepherd v. Bradstreet*, 65 Fed. 142. The court may also remand the suit for failure to file a transcript of the record in time, but this seems to be largely discretionary with the court. *St. Paul & C. R. Co. v. McLean*, 108 U. S. 212, 2 Sup. Ct. 498, 27 L. ed. 703; *Jackson v. Mutual L. Ins. Co.*, 3 Woods (U. S.) 413; *Lucker v. Phoenix & C. Co.*, 66 Fed. 161; *Texas & C. Co. v. Seeligson*, 122 U. S. 519, 7 Sup. Ct. 1261, 30 L. ed. 1150; *Removal Cases*, 100 U. S. 457, 25 L. ed. 593. See generally as to when the case should be remanded, *Dishon v. Cincinnati & C. R. Co.*, 133 Fed. 471; *Mystic Milling Co. v. Chicago & C. R. Co.*, 132 Fed. 289.

tage of by motion to remand,<sup>21</sup> and a party by going to trial without objection, or even by undue delay, must waive his right to have the cause remanded on account of mere irregularities, **such as the failure to file the petition for removal in time, or the like.**<sup>22</sup> But it is said that when the record on its face shows that the court has jurisdiction, the want of jurisdiction should be shown by plea in abatement.<sup>23</sup> The court, of its own motion, should remand the cause where it appears that it has no jurisdiction because the case is not one of federal cognizance, and this objection, unlike that based upon a mere irregularity, is not, therefore, waived by the failure to make it in the first instance.<sup>24</sup> It has been held that a case which has been properly

<sup>21</sup> *Martin v. Baltimore & C. R. Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. ed. 311; *Hoyt v. Wright*, 4 Fed. 168; *Newman v. Schwerin*, 61 Fed. 865; *Tod v. Cleveland & C. R. Co.*, 65 Fed. 145. See also *Armstrong v. Kansas City & C. R. Co.*, 192 Fed. 608.

<sup>22</sup> *French v. Hay*, 22 Wall. (U. S.) 238, 22 L. ed. 801; *Ayres v. Watson*, 113 U. S. 594, 5 Sup. Ct. 641, 28 L. ed. 1093; *Carrington v. Florida & C. R. Co.*, 9 Blatchf. (U. S.) 467; *Baltimore & C. R. Co. v. Ford*, 35 Fed. 170; *Wyly v. Richmond & C. R. Co.*, 63 Fed. 487; *Martin v. Baltimore & C. R. Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. ed. 311. See also *Hagerla v. Mississippi River Power Co.*, 202 Fed. 776.

<sup>23</sup> *Hoyt v. Wright*, 1 McCrary (U. S.) 130; *Clarkhuff v. Wisconsin & C. R. Co.*, 26 Fed. 465; *Rumsey v. Call*, 28 Fed. 769. See also *Coal Co. v. Blatchford*, 11 Wall. (U. S.) 172, 20 L. ed. 179. The burden of proof is upon the petitioner, and if it does not clearly appear that the federal court has jurisdiction, the cause should be remanded. *Carson v. Dur-*

*ham*, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. ed. 992; *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. 812; *Wolff v. Archibald*, 14 Fed. 369.

<sup>24</sup> *Mansfield & C. R. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. ed. 462; *Cameron v. Hodges*, 127 U. S. 322, 8 Sup. Ct. 1154, 1156, 32 L. ed. 132; *Jackson v. Allen*, 132 U. S. 27, 10 Sup. Ct. 9, 33 L. ed. 249; *Bronson v. St. Croix Lumber Co.*, 35 Fed. 634; *Ferguson v. Ross*, 38 Fed. 161; *Frisbie v. Chesapeake & C. R. Co.*, 57 Fed. 1; *Brice v. Sommers*, 8 Chicago Leg. News 290. See also *Crane Co. v. Guanica Centrale*, 132 Fed. 713. The Supreme Court on reversal of a suit because the circuit court did not have jurisdiction on removal, will direct the circuit court to remand it to the state court, without allowing any amendment of the petition for removal in the circuit court. *Crehore v. Ohio & C. R. Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. ed. 144; *Hancock v. Holbrook*, 112 U. S. 229, 5 Sup. Ct. 115, 28 L. ed. 714; *Jackson v. Allen*, 132 U. S. 27, 10 Sup. Ct. 9, 33 L. ed. 249.

removed cannot be remanded by consent.<sup>25</sup> The state court cannot review the action of the federal court in remanding the suit,<sup>26</sup> and no appeal or writ of error lies from the order of the circuit court remanding the suit.<sup>27</sup>

**§ 757 (655a). Remanding—Amendment—Waiver.**—Where a cause has been removed from a state court to a federal court on the ground of diverse citizenship and a motion to remand is made on the ground that the plaintiff sues as an assignee of a chose in action and that the petition for removal does not show the citizenship of the assignor, the court may permit such petition to be amended so as to show, in accordance with the fact, that the citizenship of the assignors was such as to give jurisdiction.<sup>28</sup> Defects in the petition for removal in matter of form may sometimes be waived by appearing and making an issue without objection on that ground. Thus, it is held in a recent case that merely formal defects, such as that the petition is signed by attorneys of another state and not by attorneys admitted to practice in the court in which it is filed, are waived by appearing in the federal court and moving to remand on another ground, namely, that the alleged cause for removal does not exist.<sup>29</sup> So it has been held that distinct and unambiguous allegations in the petition for removal, not denied in any pleading

<sup>25</sup> *Lawton v. Blitch*, 30 Fed. 641. But see *Southwestern Tel. & Co. v. Shirley* (Tex. Civ. App.), 155 S. W. 663; *Wadleigh v. Standard & Ins. Co.*, 76 Wis. 439, 45 N. W. 109.

<sup>26</sup> *Tilley v. Cobb*, 56 Minn. 295, 57 N. W. 799; *Fitzgerald v. Fitzgerald & Co.*, 44 Nebr. 463, 62 N. W. 899. See also *Queen Ins. Co. v. Peters*, 10 Ga. App. 289, 73 S. E. 536.

<sup>27</sup> *Morey v. Lockhart*, 123 U. S. 56, 8 Sup. Ct. 65, 31 L. ed. 68; *Burlington & C. R. Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262, 30 L. ed. 1150; *Chicago & C. R. Co. v. Gray*, 131 U. S. 396, 9 Sup. Ct. 793, 33 L.

ed. 212; *Richmond & C. R. Co. v. Thouron*, 134 U. S. 45, 10 Sup. Ct. 517, 33 L. ed. 871; *Birdseye v. Schaeffer*, 140 U. S. 117, 11 Sup. Ct. 885, 35 L. ed. 402; *May v. State Nat. Bank*, 59 Ark. 614, 28 S. W. 431.

<sup>28</sup> *Muller v. Chicago & C. R. Co.*, 149 Fed. 939.

<sup>29</sup> *Tomson v. Iowa & C. Assn. (Nebr.)*, 110 N. W. 997. See also *Gerling v. Baltimore & C. R. Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. ed. 311; *Ayres v. Watson*, 113 U. S. 594, 5 Sup. Ct. 641, 28 L. ed. 1093; *Bryant Bros. Co. v. Robinson*, 149 Fed. 321.

of the plaintiff or put in issue by him, nor contradicted by the record, are to be taken as true on a motion to remand, or other proceeding challenging the jurisdiction of the federal court.<sup>30</sup> Where, after removal, a rule was granted in the federal court against the plaintiff to show cause why the case should not proceed, it was held that, although his counsel had been negligent, the federal court was not authorized to enter a non-suit and dismissal and judgment and execution for costs, but could only dismiss the proceedings and remand to the state court.<sup>31</sup> As a general rule, where the jurisdiction of the federal court is doubtful, and that of the state court is unquestionable, the federal court will remand the case.<sup>32</sup> Mandamus, rather than prohibition, has been held to be the proper remedy where the federal circuit court refused to remand to the state court a case over which such federal court had no jurisdiction,<sup>33</sup> but the broad doctrine of the case cited has lately been qualified and limited and it is now held that mandamus is not, ordinarily, the proper remedy.<sup>34</sup>

**§ 758 (656). Pleading and practice in federal court after removal.**—It is not necessary to file new pleadings in the circuit court after removal, if the pleadings filed in the state court are in proper condition for the trial of the issue between the parties.<sup>35</sup> The general rule is that no repleader is necessary if the action is, in its nature, a common-law action;<sup>36</sup> but if legal and

<sup>30</sup> *Commonwealth v. Powers*, 139 Fed. 452 (reversed on other grounds in 201 U. S. 1, 26 Sup. Ct. 387). See also *Phillips v. Western Terra Cotta Co.*, 174 Fed. 873; *Dishon v. Cincinnati &c. R. Co.*, 133 Fed. 471; *Lane Bros. Co. v. Rickard*, 135 Ga. 650, 70 S. E. 565, Ann. Cas. 1912A, 234.

<sup>31</sup> *Dawson v. Kinney*, 144 Fed. 710.

<sup>32</sup> *Kessinger v. VanNatta*, 27 Fed. 890; *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. 812, 820; *Ernst v. American &c. Co.*, 114 Fed. 981; *Dodd v. Louisville &c. Co.*, 130 Fed. 186,

198; *Groel v. United Elec. Co.*, 132 Fed. 253, 265; *Nash v. McNamara*, 145 Fed. 541; *Western Union Tel. Co. v. Louisville &c. R. Co.*, 201 Fed. 932.

<sup>33</sup> *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. ed. 264.

<sup>34</sup> *Ex parte Harding*, 219 U. S. 363, 31 Sup. Ct. 150, 55 L. ed. 252, 37 L. R. A. (N. S.) 392.

<sup>35</sup> *Gridley v. Westbrook*, 23 How. (U. S.) 218, 3 Cent L. J. 13; *Detroit v. Detroit City R. Co.*, 55 Fed. 569.

<sup>36</sup> *Thompson v. Railroad Companies*, 6 Wall. (U. S.) 134; *Partridge*



equitable causes of action or defenses are united under the state practice a suit may be recast or separated into an action at law and a suit in equity,<sup>37</sup> and a repleader is usually necessary.<sup>38</sup> The rules of practice in the federal court govern the case, in general, after its removal,<sup>39</sup> but the federal district courts, on the law side, are bound to follow the state practice "as near as may be" in most respects, and it has been held that where a receiver appointed by a federal court, on being sued in a state court as authorized by the recent Act of Congress, removes the suit to the federal court, the plaintiff is entitled to a trial by jury if he would have been entitled to such a trial in the state court.<sup>40</sup> So, as a general rule, the federal district court will follow the rulings of the state court made in the case before its removal.<sup>41</sup> Where service of summons has been set aside in the federal court after removal, on motion of the defendant, the court may permit the plaintiff to file an amended petition and order summons to issue thereon in a proper case.<sup>42</sup> And where a cause is

v. Phoenix &c. Ins. Co., 15 Wall. (U. S.) 573; Dart v. McKinney, 9 Blatchf. (U. S. C. C.) 359; Bills v. New Orleans &c. R. Co., 13 Blatchf. (U. S.) 227; West v. Smith, 101 U. S. 263, 25 L. ed. 809. But court may permit amended pleading to be filed. United States &c. Co. v. Board, 145 Fed. 144.

<sup>37</sup> Fisk v. Union Pac. R. Co., 8 Blatchf. (U. S. C. C.) 299; Perkins v. Hendryx, 23 Fed. 418; Lecroix v. Lyons, 27 Fed. 403. See Northern Pac. R. Co. v. Paine, 119 U. S. 561, 7 Sup. Ct. 323, 30 L. ed. 513. See also Utah &c. Co. v. De Lamar, 145 Fed. 505.

<sup>38</sup> Hurt v. Hollingsworth, 100 U. S. 100, 25 L. ed. 569; Whittenton &c. Co. v. Memphis &c. R. Co., 19 Fed. 273; La Mothe &c. Co. v. National Tube Works, 15 Blatchf. (U. S.) 432.

<sup>39</sup> Henning v. Western Union Tel. Co., 40 Fed. 658; Hitchings v. Cobalt &c. Mines Co., 189 Fed. 241.

<sup>40</sup> Vany v. Receiver of Toledo &c. R. Co., 67 Fed. 379. See also North Alabama &c. Co. v. Orman, 55 Fed. 18.

<sup>41</sup> Bryant v. Thompson, 27 Fed. 881; Davis v. St. Louis &c. R. Co., 25 Fed. 786; Duncan v. Gegan, 101 U. S. 810, 25 L. ed. 875. But see Spring Co. v. Knowlton, 103 U. S. 49, 26 L. ed. 347. It may act on motions pending in the state court at time of removal. Mannington v. Hocking Val. R. Co., 183 Fed. 133.

<sup>42</sup> United States Fidelity &c. Co. v. Board, 145 Fed. 144. Denial by inferior state court of motion to vacate service of summons is not res judicata on questions of validity of the service when raised in federal

removed in which the state court was competent to grant either legal or equitable relief the plaintiff may elect to proceed in the federal court either at law or in equity, but if he elects to proceed in equity and no case for equitable relief is made the federal court cannot retain and try the case as an action at law.<sup>43</sup>

§ 759 (656a). **Recent cases—Miscellaneous.**—A suit by a city to restrain a telegraph company from doing intrastate business in the city without paying a license tax required by ordinance prescribing a fine for so doing has been held not to be a suit of a civil nature and therefore not removable.<sup>44</sup> But a proceeding in garnishment after judgment, under the Washington statute has been held to be a civil suit in which an issue of fact is, or may be, joined between the plaintiff and garnishee, and removable by a non-resident garnishee, where the jurisdictional requisites appear, although the parties to the judgment are citizens of the same state.<sup>45</sup> As already stated, the general rule is that a case not depending on diversity of citizenship cannot be removed as arising under the constitution or laws of the United States unless the same appears from plaintiff's statement of his cause of action; and where the petition alleged a cause of action both under a federal statute and under a state law it was held for the court to determine under which the action was maintainable, if at all, on petition to remove to the federal court.<sup>46</sup> In a recent

court after removal. *Remington v. Central Pac. R. Co.*, 198 U. S. 95, 25 Sup. Ct. 577, 49 L. ed. 959. See also *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 30 Sup. Ct. 125, 54 L. ed. 272.

<sup>43</sup> *Union Stock Yards Co. v. Nashville Packing Co.*, 140 Fed. 701. See also *Thompson v. Railroad Co.*, 6 Wall. (U. S.) 134.

<sup>44</sup> *City of Montgomery v. Postal Tel. &c.*, 218 Fed. 471.

<sup>45</sup> *Baker v. Dunwamish Mill Co.*, 149 Fed. 612.

<sup>46</sup> *Hall v. Chicago &c. R. Co.*, 149 Fed. 564, also holding that if one

construction of the federal statute would defeat a recovery and another sustain it, under that statute, the action would be one arising under a law of the United States, and therefore of federal cognizance. Citing *Starin v. New York*, 115 U. S. 248, 6 Sup. Ct. 28, 29 L. ed. 388; *Carson v. Dunham*, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. ed. 992. See also that right must appear from plaintiff's own statement in his bill or declaration. *Cella v. Brown*, 144 Fed. 742; *Mitchell &c. Co. v. Worthington*, 140 Fed. 947.

case it is held that even if an allegation in the complaint of a switchman against a railroad company, that the "cars in use on defendant's said railway, and particularly the cars on which plaintiff was injured, were not properly equipped with automatic couplers, as required by law," necessarily implied a reliance on the Act of Congress, requiring automatic couplers, still a removable case is not made out, sections 1 and 2 of the act of March 2, 1893, in regard to safety appliances showing it applies only to carriers engaged in interstate commerce, and neither the complaint in the case, nor the petition for removal showing that defendant was so engaged, nor that the cars in question were being used in such commerce.<sup>47</sup> In several other Texas cases it has been held that joint petitions of defendants would not justify a removal under the facts shown.<sup>48</sup> But it is held in a recent South Carolina case that both defendants must join in a petition to remove an action against them for a joint tort on the ground that they are non-residents, and that a petition by one of them, on the ground of non-residence, alleging that the other defendant is a sham defendant, joined to prevent removal, is insufficient.<sup>49</sup> A lessee under a long term lease of a railroad,

<sup>47</sup> *International &c. R. Co. v. Elder*, 44 Tex. Civ. App. 605, 99 S. W. 856.

<sup>48</sup> *Texas &c. R. Co. v. Huber*, 100 Tex. 1, 92 S. W. 832; *Eastin v. Knox &c. R. Co. (Tex.)*, 92 S. W. 838.

<sup>49</sup> *Baber v. Southern R. Co. (S. Car.)*, 56 S. E. 540. See also *Blackburn v. Blackburn*, 142 Fed. 901. But see *Eastin v. Knox &c. R. Co. (Tex.)*, 92 S. W. 838; *Iowa &c. Co. v. Bliss*, 144 Fed. 446; *Slaughter v. Nashville &c. R. Co. (Ky.)*, 91 S. W. 744. In the Kentucky case just cited the action was against a railroad company and its trainmaster, but a good cause of action was not stated as against the trainmaster. See also as to whether there is a

separable controversy and as to the right of removal where employer and employe are joined, *Louisville &c. R. Co. v. Vincent*, 116 Tenn. 317, 95 S. W. 179; *Atlantic Coast Line R. Co. v. Bailey*, 151 Fed. 891; *Chicago &c. R. Co. v. Stepp*, 151 Fed. 908; *Southern R. Co. v. Grizzle*, 124 Ga. 735, 53 S. E. 244; *Lanning v. Chicago &c. R. Co.*, 196 Mo. 647, 94 S. W. 491. For an action by an employe against lessor and lessee held removable, see *Curtis v. Cleveland &c. R. Co.*, 140 Fed. 777. See generally *Chicago &c. R. Co. v. Martin*, 178 U. S. 245, 20 Sup. Ct. 1055, 44 L. ed. 1055; *Cochran v. Montgomery County*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. ed. 182.

assuming all the lessor's obligations, has been held the real party to a suit to compel a grant of switch connection in accordance with a stipulation in the grant of the right of way, and entitled to intervene and remove the cause to the federal court on the ground that the lessee is a citizen of another state.<sup>50</sup> An alien non-resident cannot successfully claim the privilege of removing an action commenced against him in a state court.<sup>51</sup> The amount in controversy must be sufficient or there can be no removal.<sup>52</sup> The petition for removal must be filed in due time;<sup>53</sup> but it is held that the right of removal arises at any time, during the progress of a case, when, by a change in the pleadings or proceedings, the cause is first rendered removable.<sup>54</sup> The case made by the plaintiff's petition or complaint as it stood at the time of the petition for removal is usually, however, the test of the right to remove.<sup>55</sup> Questions as to the necessity for filing bond

<sup>50</sup> Chase v. Beech Creek R. Co., 144 Fed. 571. But see as to parties brought in by cross-complaint and succeeding to rights of plaintiff, Nash v. McNamara, 145 Fed. 541.

<sup>51</sup> O'Connor v. State, 202 U. S. 501, 26 Sup. Ct. 726, 50 L. ed. 1120. See also Adzenoska v. Erie R. Co., 210 Fed. 553; Colosino v. Pittsburg & R. Co., 210 Fed. 550. But compare Smellie v. So. Pac. Co., 197 Fed. 641; Attleboro Mfg. Co. v. Frankfort & Ins. Co., 202 Fed. 293; Roner v. Katalla Co., 182 Fed. 946; Best v. Great Northern Ry. Co., 243 Fed. 789. (May claim removal where he lives in the state.)

<sup>52</sup> Nashville & C. R. Co. v. Hill, 146 Ala. 240, 40 So. 612; Barber v. Boston & C. R. Co., 145 Fed. 52; Barataria Canning Co. v. Louisville & C. R. Co., 143 Fed. 113. But, as already shown, this is usually to be determined from the complaint, declaration, or bill. Ante, § 748. See also Roessler-Hasslacher & Co. v. Doyle, 142 Fed. 118; City of Mem-

phis v. Postal Tel. & C. Co., 145 Fed. 602; South Dakota & C. R. Co. v. Chicago & C. R. Co., 141 Fed. 578; Southern Cash & C. Co. v. National & C. Co., 143 Fed. 659. As to evidence held sufficient to show that employe was made defendant for sole purpose of preventing removal, and right to inquire into same, see Wecker v. National Enameling & C. Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. ed. 430.

<sup>53</sup> Bryson v. Southern R. Co., 141 N. Car. 594, 54 S. E. 434. See also ante, § 754. But see as to effect of stipulation granting time, Russel v. Harriman Land Co., 145 Fed. 745, and see Sanderlin v. People's Bank, 140 Fed. 191.

<sup>54</sup> Barber v. Boston & C. R. Co., 145 Fed. 52. See also Robert v. Pineland Club, 139 Fed. 1001; Powers v. Chesapeake & C. Ry. Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. ed. 673.

<sup>55</sup> Bernheim v. Louisville & C. Co., 221 Fed. 273; Miller v. Soule, 221 Fed. 493. The right of removal generally depends upon the state of the

in the state court and a copy of the record in the federal court, and as to the transfer of jurisdiction, and the like, have already been considered, but additional recent decisions upon these questions are cited below.<sup>56</sup> Several recent cases upon the general subject also deserve further consideration. In one of them it is held that issues of fact raised by a petition for removal, affecting the question of removability, are cognizable solely by the circuit court to which the cause is sought to be removed; that the refusal of a state court to grant the removal does not affect the jurisdiction of the federal court which attaches as matter of law on the filing of a sufficient petition and bond when the cause is removable, and that where such removal has been effected under the law by the filing of a sufficient petition and bond, the federal court has power, on a bill in equity, to enjoin the plaintiff from further proceedings in the cause in the state court.<sup>57</sup> In another it is likewise held that where the cause is properly removed from the state court into the federal court and the plaintiff undertakes to ignore the removal, and proceed with the prosecution of the case in the state court, the federal court, having obtained jurisdiction, may by injunction restrain

pleadings and record at that time. *West Side R. Co. v. California Pac. R. Co.*, 202 Fed. 331; *Munnss v. American &c. Co.*, 216 Mass. 423, 103 N. E. 859. Verification of petition for removal slightly, but not substantially defective may be amended by leave of court. *Murray v. Southern Bell Tel. Co.*, 210 Fed. 925.

<sup>56</sup> *Miller v. Soule*, 221 Fed. 493 (ruling on practically all of these questions and also holding that an averment in the petition that defendant is a resident of another state named is sufficient under the Judicial Code—Act March 3, 1911, ch. 231,

36 Stat. 1087—authorizing removal by defendant "being a nonresident"); *Johnson v. Computing Scale Co.*, 139 Fed. 380; *Lebensberger v. Scofield*, 139 Fed. 380; *Mays v. Newlin*, 142 Fed. 574; *Preston v. McNeil Lumber Co.*, 143 Fed. 555; *Woodward Lumber Co. v. Vizard*, 144 Fed. 982; *Mutual Life Ins. Co. v. Langley*, 145 Fed. 415; *Atlantic Coast Line R. Co. v. Bailey*, 151 Fed. 891; *City of Montgomery v. Postal Tel. &c. Co.*, 218 Fed. 471; *Buxton v. Penna. Lumber Co.*, 221 Fed. 718; *Cincinnati &c. R. Co. v. Curd (Ky.)*, 89 S. W. 140.

<sup>57</sup> *Atlantic Coast Line R. Co. v. Bailey*, 151 Fed. 891.

the plaintiff from such threatened action.<sup>58</sup> In another it is held that the removal by one of two defendants of a cause which was not removable because of the absence of a separable controversy does not give the federal court jurisdiction, otherwise than to remand, and that it should be remanded at any stage, either at the instance of a party or on the court's own motion, whenever such fact appears.<sup>59</sup> As a general rule the federal courts in a case removed from a state court will not sit in review of any act done by that court prior to the removal,<sup>60</sup> but in a recent case it is held that where the state court acted without jurisdiction a different rule applies, and that a motion to quash the service on a defendant who has not entered a general appearance, which involves the question of jurisdiction over the defendant, although overruled by the state court, may be renewed after removal.<sup>61</sup> So, in still later cases it is held that the sufficiency

<sup>58</sup> *Chicago &c. R. Co. v. Stepp*, 151 Fed. 908, citing *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239, 245, 25 Sup. Ct. 251, 49 L. ed. 462; *Mutual Life Ins. Co. v. Langley*, 145 Fed. 415.

<sup>59</sup> *International &c. R. Co. v. Hoyle*, 149 Fed. 180. The state court, it is held, after remand cannot question the correctness of the order but must proceed to exercise jurisdiction. *Feeney v. Wabash R. Co.*, 123 Mo. App. 420, 99 S. W. 477.

<sup>60</sup> See *Bragdon v. Perkins &c. Co.*, 82 Fed. 338; *Mutual Reserve Assn. v. Phelps*, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. ed. 987.

<sup>61</sup> *Lathrop &c. Co. v. Interior Const. &c. Co.*, 150 Fed. 666, where the court said: "Beyond doubt, it is a general rule that the federal courts in a case removed from the state court will not sit in review of any act done by that court prior to the removal, and comity dictates that what was done by a court of co-

ordinate jurisdiction before the case was removed is entitled to great respect, and the decrees of such court are ordinarily regarded as correct adjudications of the questions involved. Where, however, the state court acted without jurisdiction, a different rule unquestionably applies. (*Loomis v. Carrington* [C. C.] 18 Fed. 97), and the inaptitude of the doctrine of *res adjudicata* is plainly apparent in a case such as this, where the defendant, a citizen of another state having withdrawn its business and property from this state, has the absolute right to remove an action brought against it to the federal court. Such a right unless waived by general appearance, or otherwise forfeited, is founded upon the defendant's alienage or citizenship of another state and was granted by an act of Congress. Under such circumstances no state is permitted by its action to abridge or nullify a right granted pursuant

of process by which the suit was commenced in the state court may be raised in a proper manner after removal,<sup>62</sup> and that a federal court has the same jurisdiction to modify or set aside orders or rulings previously made in a case that the state court would have had if the cause had not been removed.<sup>63</sup> It has also been held that a cause, properly removable, on being removed will not be remanded because of irregularities in the removal proceedings, or because it was removed under the wrong statute, and that an equity suit, after such removal, must proceed according to the equity rules and practice of the federal court.<sup>64</sup>

**§ 760. Question of jurisdiction where neither party resides in federal district—Waiver.**—It is a general rule that a cause is not removable unless it could have been brought originally in the federal court into which it is sought to be removed.<sup>65</sup> Thus, where an action is brought in a state court and neither party is a citizen or resident of the state, so that it could not have been instituted originally in the federal court, such action is not removable to the federal court of the district in which the state court is located on ground of diversity of citizenship even though it is instituted by a citizen of one state against a citizen of another.<sup>66</sup> So it has been held that an action brought in a

to constitutional law. *Tortat v. Harden Min. & Mfg. Co. (C. C.)*, 111 Fed. 426."

<sup>62</sup> *Fountain v. Detroit &c. R. Co.*, 210 Fed. 982.

<sup>63</sup> *Buxton v. Penna &c. Co.*, 221 Fed. 718. See also *Remington v. Chicago &c. R. Co.*, 198 U. S. 95, 25 Sup. Ct. 577, 49 L. ed. 959. But, as already shown, the court ordinarily follows the state court rulings already made in the cause.

<sup>64</sup> *Bryant Bros. v. Robinson*, 149 Fed. 321.

<sup>65</sup> *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. ed. 264; *In re Moore*, 209 U. S. 490, 28 Sup. Ct.

585, 52 L. ed. 904, 706, 14 Ann. Cas. 1164; *Hall v. Great Northern R. Co.*, 197 Fed. 488; *Waterman v. Chesapeake &c. R. Co.*, 199 Fed. 667; *Western Un. Tel. Co. v. Southeast &c. R. Co.*, 208 Fed. 266; *Turk v. Illinois Cent. R. Co.*, 218 Fed. 315.

<sup>66</sup> *Wisner, Ex parte*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. ed. 644; *Yellow Aster Min. &c. Co. v. Crane Co.*, 150 Fed. 580. But compare *Louisville &c. R. Co. v. Western Union Tel. Co.*, 218 Fed. 91, refusing to follow the *Wisner* case and holding that the question of removability does not depend upon whether the suit could have been originally

court of the state in which the plaintiff resides, but outside the federal district of his residence, cannot be removed into the federal court for the district in which the state court is located.<sup>67</sup> But there are some cases that an action pending in a state court may be removed into a federal court outside of the state.<sup>68</sup> And where an action brought in a court of a state in which neither party resides has been removed by the defendant into the federal court of the district in which the state court is located, without objection by the plaintiff, who has filed pleadings in the case in the federal court, he will be deemed to have waived objection to the jurisdiction of the federal court.<sup>69</sup>

**§ 761. Right to proceed in state court after dismissal in federal court.**—It is held in a comparatively recent case that where a cause is removed, notwithstanding the refusal of the state court to grant the application for removal, and the party resisting it appears and submits himself to the jurisdiction of the federal court and takes a non-suit and consents that a judgment be entered against him, although he had asked that the cause be remanded, he cannot thereafter prosecute the same suit in the state court, but, if entitled to proceed in the state court at all,

brought in the court to which it is removed. See also *Southern Pac. R. Co. v. Burch*, 152 Fed. 168; *George v. Tennessee &c. Co.*, 184 Fed. 951; *Puget Sound &c. Works v. Great Northern R. Co.*, 195 Fed. 350. See also *M. Hohenberg & Co. v. Mobile Liners*, 245 Fed. 169. Where jurisdiction depends on the case arising under the law of the United States it cannot be removed to the District Court for a district other than that of which the defendant is an inhabitant. *Orr v. Baltimore &c. R. Co.*, 242 Fed. 608.

<sup>67</sup> *Shawnee Nat. Bank v. Missouri &c. R. Co.*, 175 Fed. 456; *St. Louis &c. R. Co. v. Kitchen*, 98 Ark. 507, 136 S. W. 970, 50 L. R. A. (N. S.)

828. See also *St. Louis &c. R. Co. v. Kiser* (Tex. Civ. App.), 136 S. W. 852; *St. Louis &c. R. Co. v. Casselberry* (Tex. Civ. App.), 139 S. W. 1161.

<sup>68</sup> *Stewart v. Cybur Lumber Co.*, 211 Fed. 343; *Mattison v. Boston &c. R. Co.*, 205 Fed. 821.

<sup>69</sup> *Re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 52 L. ed. 904, 14 Ann. Cas. 1164 (overruling *Ex parte Wisner*, 203 U. S. 449 on this point); *Kreigh v. Westinghouse &c. Co.*, 214 U. S. 249, 29 Sup. Ct. 619, 53 L. ed. 984; *Shanberg v. Fidelity &c. Co.*, 158 Fed. 1, 19 L. R. A. (N. S.) 1206. See also *Moyer v. Chicago &c. R. Co.*, 168 Fed. 105.



he must institute a new suit.<sup>70</sup> As a general rule, however, after the transfer to a federal court, the plaintiff may dismiss, without prejudice, and bring a new action in the state court,<sup>71</sup> and it has been held that it is immaterial that the action was not dismissed in the federal court until after the new action had been commenced in the state court, provided there was such a dismissal before the trial of the second action.<sup>72</sup>

<sup>70</sup> *Texas &c. R. Co. v. Huber* (Tex. Civ. App.), 95 S. W. 568.

<sup>71</sup> *Southern R. Co. v. Millar*, 217 U. S. 209, 30 Sup. Ct. 450, 54 L. ed. 732; *Louisville &c. R. Co. v. Newman*, 132 Ga. 523, 64 S. E. 541, 26 L. R. A. (N. S.) 969n; *Behen v. Metropolitan St. R. Co.*, 85 Kans. 491, 118 Pac. 73, Ann. Cas. 1913A, 328; *Stevenson v. Illinois Cent. R. Co.*, 117 Ky. 855, 79 S. W. 767, 4

Ann. Cas. 890; *Baltimore &c. R. Co. v. Lanvill*, 83 Ohio St. 108, 93 N. E. 619, 34 L. R. A. (N. S.) 1195 (overruling *Baltimore &c. R. Co. v. Fulton*, 59 Ohio St. 575); *McPherson v. Swift*, 27 S. Dak. 296, 130 N. W. 768; *Holbrook v. Quinlan*, 84 Vt. 411, 80 Atl. 339.

<sup>72</sup> *S. F. Dana & Co. v. Blackburn* 121 Ky. 706, 90 S. W. 237.

## CHAPTER XXVII

### GOVERNMENT CONTROL, LOCATION AND CONSTRUCTION

Sec.	Sec.
770. Introductory.	780. Police power—Legislative and judicial questions.
771. Effect of the commerce clause of the federal constitution upon the power of the states.	781. The police power and the commerce clause of the federal constitution.
772. Legislative power over private rights of railroad companies—Nature of.	782. Regulations that have been held valid—Miscellaneous.
773. Constitutional protection.	783. Regulations as to equipment held valid.
774. The limits of legislative power sometimes unduly extended.	784. Regulations as to lighting tracks held valid.
775. Regulations affecting acts and duties of a public nature—Relating to stations.	785. The power to impose penalties in favor of private persons—Constitutional questions.
776. Regulations as to station accommodations—Other illustrative cases.	786. Regulating speed of trains.
777. Corporate rights are subject to the police power.	787. Stopping trains at highway crossings.
778. The police power is fettered by limitations.	788. Fencing tracks.
779. Subject must be one over which the police power extends—Cases adjudging statutes invalid.	789. Grade crossings.
	790. Grade crossings continued.
	791. Requiring services and denying compensation.
	792. Federal corporation—State can not transform into a domestic corporation.

§ 770 (657). **Introductory**—The question as to the limitations that may be imposed upon railroad corporations, or as to the burdens which may be laid upon them, or as to the duties exacted of them, by legislative enactments passed prior to the organization or adopted at the time of the creation of the corporation, is very different from that which arises where the legislative enactments are passed subsequent to the creation of the corporation. The familiar doctrine, heretofore discussed that the charter of a corporation protects it because the charter is a con-

tract, materially limits the legislative power, but it does not, by any means, carry corporations beyond the domain over which that power extends. The legislature may effectively prescribe many regulations for the government of railway companies although the statutes prescribing the regulations may be enacted subsequent to the organization of the company. It is our purpose in this chapter to consider the nature and extent of the legislative power to enact such statutes. We shall, however, treat only incidentally of the influence of the commerce clause of the federal constitution, and of regulations operating upon railroads in their capacity of common carriers we shall do little else than make mention. The subjects just named will be considered in another part of our work, but it is necessary to speak of them—incidentally, at least—in this chapter, since in some phases they are intimately connected with the topics to the discussion of which this chapter is devoted.

**§ 771 (658). Effect of the commerce clause of the federal constitution upon the power of the states.**—It is not our purpose at this place to do more than direct attention to the commerce clause of the federal constitution, and, in general terms, to say that it materially limits the power of the states. A state cannot, in any form, enact a statute which constitutes a regulation of interstate commerce, but it may effectively regulate intrastate commerce.<sup>1</sup>

<sup>1</sup> *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Wabash &c. R. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. ed. 694, and cases cited; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. ed. 1187; *Norfolk &c. R. Co. v. Commonwealth*, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. ed. 394; *Mon-dou v. New York &c. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 173, 56 L. ed. 327; *Simpson v. Shepard*, 230 U. S. 402, 33 Sup. Ct. 729, 741, 57 L. ed. 1511, 48 L. R. A. (N. S.)

1151; *United States v. Michigan &c. R. Co.*, 43 Fed. 26; *Swift v. Philadelphia &c. R. Co.*, 58 Fed. 858; *State v. Woodruff &c. Co.*, 114 Ind. 155, 15 N. E. 814; *State v. Indiana &c. Co.*, 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579; *Carton v. Illinois &c. R. Co.*, 59 Iowa 148, 13 N. W. 67, 44 Am. Rep. 672; *State v. Chicago &c. R. Co.*, 70 Iowa 262, 30 N. W. 398; *Hardy v. Atchison &c. R. Co.*, 32 Kans. 698, 5 Pac. 6; *Bangor v. Smith*, 83 Maine 422, 22 Atl. 379; *Commonwealth v. Housatonic &c. R. Co.*, 143 Mass. 264, 9 N. E. 547; *Fitzgerald v. Fitzgerald &c. R. Co.*,

There can be no doubt that the states are prohibited from regulating interstate commerce, but there is some doubt as to what shall be considered a regulation of commerce between the states, for it is not every legislative enactment which bears upon the subject that can be regarded as a regulation of interstate commerce. But as this chapter is directed to a consideration of the power of the states, and the purpose is to only touch the question of the rights and powers of the federal government, we do not here, except incidentally, consider the extent or scope of the national power.

41 Neb. 374, 59 N. W. 838. See upon the general subject, *Fargo v. Michigan*, 121 U. S. 230, 30 L. ed. 888; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. ed. 311; *Louisville &c. R. Co. v. Kentucky*, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. ed. 298; *Louisville &c. Co. v. Railroad Commissioners*, 19 Fed. 679; *Illinois &c. R. Co. v. Stone*, 20 Fed. 468. In the case of *Chicago &c. R. Co. v. Wolcott*, 141 Ind. 267, 39 N. E. 451, 50 Am. St. 320, the court seems to make the question of the power of the state to legislate turn upon the question whether the statute is in "conflict with the right of congress to legislate upon interstate commerce," but we respectfully affirm that this view is erroneous, for the states have no power at all to enact statutes that are regulations of commerce between the states. The conclusion we affirm is strongly supported by the decision in *Gulf &c. R. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. ed. 910, in which it was held that a provision of a state statute prohibiting the collection of any greater rate of freight than that specified in the bill of lading was in conflict with

the commerce clause of the federal Constitution and void. The court cited, among others, the cases of *Railroad Co. v. Fuller*, 17 Wall. (U. S.) 560, 21 L. ed. 710; *Wilson v. Black Bird &c. Co.*, 2 Pet. (U. S.) 245, 7 L. ed. 412; *Cooley v. Board*, 12 How. (U. S.) 299, 13 L. ed. 996; *James Gray v. John Fraser*, 21 How. (U. S.) 184, 16 L. ed. 106; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713, 18 L. ed. 96; *McNiell, Ex parte*, 13 Wall. (U. S.) 236, 20 L. ed. 624; *Henderson v. Mayor*, 92 U. S. 259, 23 L. ed. 543; *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525; *Packet Co. v. Catlettsburg*, 105 U. S. 559, 26 L. ed. 1169; *Escanaba &c. Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. ed. 442; *Morgan's &c. Co. v. Louisiana &c.*, 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. ed. 237. In *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. ed. 619, it is held elevators on a railroad right of way may be classified and a license required and that the fact that grain is there stored to be shipped out of the state does not make such a license an unlawful regulation of interstate commerce.

**§ 772 (659). Legislative power over private rights of railroad companies—Nature of.**—It is true that railroad corporations are in a sense public corporations, but this is true only in a qualified and limited sense.<sup>2</sup> They are not, as elsewhere said, governmental corporations or governmental subdivisions, and the power of the legislature over them falls far short of that which it has over governmental corporations. But, as a railroad corporation is in a sense public, the legislative power over it is greater than its power over strictly private corporations or individuals. Yet, the legislative power is only greater in so far as a railroad corporation is public, and, on principle, it is not greater over private rights, such, for instance, as contract and property rights not affecting public duties, than is its power over strictly private corporations or natural persons. There is reason for affirming that, in so far as a railroad corporation is public, the legislative power is much greater than over natural persons or strictly private corporations, but there is no valid reason for affirming that, as to purely private rights, the legislative power is greater than over strictly private corporations or individuals. Thus, for illustration, a railroad corporation, in so far as concerns its rights and duties as a common carrier, is, in a qualified sense, a public corporation, while as to its strictly private rights and duties it is a private corporation. But even as to its public rights the legislative power is limited, for under guise of controlling such rights the legislature cannot destroy private corporate rights. For instance, the legislature may regulate charges for transporting freight and passengers, but it cannot deprive the corporation of the right to compensation, nor can it fix the charges at such a low rate that the corporation cannot make a fair and reasonable profit.<sup>3</sup> The element of private right is so strong that it limits

<sup>2</sup> Ante, §§ 3, 43. In considering the legal status of a railroad corporation we have discussed questions closely allied to some of the questions of which this chapter treats. Ante, Chapter III.

<sup>3</sup> *Chicago &c. R. Co. v. Dey*, 35 Fed. 866; *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. ed.

841; *Chicago &c. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. ed. 970; *Chicago &c. R. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. ed. 176; *Reagan v. Farmers' Loan &c. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1021; *St. Louis &c. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed.

the legislative control over the public element which enters into the corporate being. While it is within the legislative power to regulate public rights and duties it is beyond that power to make a regulation that will destroy property or contract rights of a private nature. In other words, the public element cannot be used as a weapon to destroy vested private rights. There is, as it seems to us, no reason to doubt that the nature of the legislative power over railroad companies, in so far as their private rights are concerned, is substantially the same as that which it possesses over similar rights possessed by private corporations, or, indeed, individuals, and no greater, but that as to public rights, or matters in which the corporation is "affected by the public interest," its legislative power is much more extensive, and that, although the power over public matters is the greater, it is not extensive enough to justify the destruction of private rights vested in the corporation.<sup>4</sup>

567; Railroad Commission Cases, 116 U. S. 307, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191, 29 L. ed. 636; Chicago &c. R. Co. v. Becker, 35 Fed. 883. See, also, Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; Cotting v. Kansas City &c. Co., 183 U. S. 79, 22 Sup. Ct. 30, 46 L. ed. 92; East Side Levee &c. Dist. v. East St. Louis &c. Ry. Co., 279 Ill. 123, 116 N. E. 720, 723 (citing text); Public Service Com. v. Northern Cent. R. Co., 122 Md. 355, 90 Atl. 105; Seward v. Denver &c. R. Co., 17 N. Mex. 557, 131 Pac. 980, 46 L. R. A. (N. S.) 242.

<sup>4</sup> See generally Wisconsin &c. R. Co. v. Jacobson, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. ed. 194; Lake Shore &c. R. Co. v. Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858; Louisville &c. R. Co. v. Kentucky, 183 U. S. 503, 22 Sup.

Ct. 95, 46 L. ed. 298; Atlantic Coast Line R. Co. v. N. Car. Corp. Com., 206 U. S. 1, 27 Sup. Ct. 584, 51 L. ed. 933. Compare also Houston &c. R. Co. v. Mayes, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. ed. 773; Missouri Pac. Ry. Co. v. Nebraska, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. ed. 727. But it is held in a very recent case that a statute providing for the taking over of an elevated interurban railway company by the state for ten years, and possibly longer, on acceptance by a majority of the stockholders, is constitutional as dealing with a public matter, and that fares might then be made less than the cost of operation and assessment of taxes on the towns and cities affected of enough to make up the difference and pay dividends. In re Opinion of Justices, 231 Mass. 603, 122 N. E. 763.

§ 773 (660). **Constitutional protection.**—It is evident from what has been said that, so far as concerns property or contract rights, railroad corporations are protected by the provisions of the state and federal constitution. The legislature cannot take from them any right guaranteed to them by the constitution, except in some mode not forbidden by the constitution. The principle, that railroad corporations are within the protection given to property, property rights and contract rights, is recognized in many cases and in a variety of forms. Thus, it is held that even where the power to amend or repeal the charter is reserved the legislature cannot authorize a seizure of the property of a railroad company for a highway without compensation, nor compel it to devote its property to the use of the public and fit it for that use.<sup>5</sup> So, a corporation is a person, and entitled to protection as such under the fourteenth amendment to the federal constitution.<sup>6</sup> So, also, railroad corporations are protected by constitutional provisions against unequal or double taxation. It is not within the legislative power to pass special or local laws affecting railroad companies where the constitution prohibits the enactment of such laws.<sup>7</sup> There is, in truth, no diversity of

<sup>5</sup> *Miller v. New York &c. R. Co.*, 21 Barb. (N. Y.) 513; *People v. Lake Shore &c. R. Co.*, 52 Mich. 277, 17 N. W. 841; *Detroit v. Detroit Plank Road Co.*, 43 Mich. 140, 5 N. W. 275; *Chicago &c. R. Co. v. Hough*, 61 Mich. 507, 21 N. W. 532. But see *Portland &c. R. Co. v. Deering*, 78 Maine 61, 57 Am. Rep. 784; *Boston &c. R. Co. v. Commissioners*, 79 Maine 386, 2 Atl. 670; *Illinois Central &c. R. Co. v. Willenborg*, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862; *Montclair v. New York &c. R. Co.*, 45 N. J. Eq. 436, 18 Atl. 242.

<sup>6</sup> *Pembina &c. Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. ed. 650; *Santa Clara Co. v. Southern Pacific &c. R. Co.*, 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. ed.

118, 24 Am. & Eng. R. Cas. 523; *Minneapolis &c. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. ed. 585; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 424, 42 L. ed. 819; *McGuire v. Chicago &c. R. Co.*, 131 Iowa 340, 108 N. W. 902.

<sup>7</sup> *Indiana &c. R. Co. v. Gapen*, 10 Ind. 292; *South &c. R. Co. v. Morris*, 65 Ala. 193; *Brown v. Alabama &c. R. Co.*, 87 Ala. 370, 6 So. 259; *Madison &c. R. Co. v. Whiteneck*, 8 Ind. 217; *Wilder v. Chicago &c. R. Co.*, 70 Mich. 382, 384, 385, 38 N. W. 289; *Chicago &c. R. Co. v. Moss*, 60 Miss. 641. See generally *Lafferty v. Chicago &c. R. Co.*, 71 Mich. 35, 38 N. W. 660; *Zeigler v. South and N. R. Co.*, 58 Ala. 594; *South &c. R. Co. v. Morris*, 65 Ala. 193; *Smith v.*

opinion upon the general question, but there is much diversity of opinion in the application of the principles to actual cases.

§ 774 (661). **The limits of legislative power sometimes unduly extended.**—Theoretically all the courts act upon the principle that railroad corporations as to similar property and contract rights are entitled to substantially the same constitutional protection as natural persons,<sup>8</sup> but many of the courts, while professing to adopt the true theory, practically deny the same measure of protection to railroad corporations in respect to such rights that they yield to individual citizens. There are cases wherein statutes directed against corporations are upheld which would be overthrown if the persons against whom the statutes are directed were natural instead of artificial persons. The tendency is to strip corporations of constitutional protection, and, as it seems to us, many of the cases go too far in that direction. Differences between corporations and natural persons are often assumed to exist which are purely imaginary. This unjust assumption is made for the purpose of sustaining legislation directed against corporations, which, if directed against individuals, would be promptly condemned as unconstitutional. Burdens are frequently imposed upon railroad companies, which, in effect, constitute a taking of property without compensation. This course is generally defended upon the ground that statutes imposing such burdens are enacted in the exercise of the police power. The constitutional inhibitions directed against local and special legislation are sometimes evaded by holding that the peculiar nature of a railroad corporation justifies particular legislation. It may be, and doubtless is, a reasonable basis for classification in some instances, but by indirection that is done in many instances which would be unhesitatingly overthrown if done directly. So, too,

Louisville &c. R. Co., 75 Ala. 449; Schut v. Chicago &c. R. Co., 70 Mich. 433, 38 N. W. 291; Grand Rapids &c. R. Co. v. Runnels, 77 Mich. 104, 43 N. W. 1006.

<sup>8</sup> We do not mean, of course, that corporate rights are as free from limitation as the rights of

natural persons. Corporate rights, as elsewhere said and as is well known, are derivative, and are limited by the charter of the corporation. But as to contract and property rights conferred by the charter the constitutional protection extends.



unconstitutional statutes are frequently so disguised by the form they are made to assume, that, although in their practical effect and operation they invade private rights, yet the courts, misled by form, lose sight of substance and sustain them.<sup>9</sup>

**§ 775 (662). Regulations affecting acts and duties of a public nature—Relating to stations.**—Some of the cases seem to place the power of the legislature to regulate the public acts and duties of railroad companies entirely upon the police power, losing sight of the fact that as to matters wherein corporate property rights and duties are “affected by a public interest” the legislature possesses the power to enact reasonable regulations for the comfort, welfare and safety of the public, although such regulations may not be strictly police regulations. Where the rights and property of a railroad company are “affected by a public interest,” the company, in accepting a special charter or availing itself of the benefit of a general act of incorporation submits its rights and property to public control, and this control extends far beyond that to which private property is subject.<sup>10</sup> Where the subject of the legislation is the public part, or element, of a corporation, the legislative authority does not, as we have else-

<sup>9</sup> *East Side Levee &c. Dist. v. East St. Louis &c. Ry. Co.*, 279 Ill. 123, 116 N. E. 720, 723 (citing text).

<sup>10</sup> *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Railroad Co. v. Fuller*, 17 Wall. (U. S.) 560, 21 L. ed. 710; *Chicago &c. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Chicago &c. R. Co. v. Ackley*, 94 U. S. 179, 24 L. ed. 99; *Winona &c. R. Co. v. Blake*, 94 U. S. 180, 24 L. ed. 99; *Railroad Co. v. Richmond*, 96 U. S. 521, 24 L. ed. 734; *Ruggles v. Illinois*, 108 U. S. 526, 2 Sup. Ct. 832, 27 L. ed. 812; *Illinois Central R. Co. v. People*, 108 U. S. 541, 2 Sup. Ct. 839, 27 L. ed. 818, 1 Am. & Eng. R. Cas. 188; *New York &c. R. Co. v. New York*, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. ed. 853;

*Hockett v. State*, 105 Ind. 250, 5 N. E. 202, 55 Am. Rep. 201; *Southern Indiana R. Co. v. Railroad Com.*, 172 Ind. 113, 87 N. E. 966; *Rushville v. Rushville &c. Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; *Commonwealth v. Duane*, 98 Mass. 1; *Zanesville v. Zanesville &c. Co.*, 47 Ohio St. 1, 23 N. E. 55; *Sharpless v. Mayor*, 21 Pa. St. 147; 59 Am. Dec. 759. See also *Atlantic Coast Line R. Co. v. Coachman*, 59 Fla. 130, 52 So. 377; *Railroad Com. v. Louisville &c. R. Co.*, 140 Ga. 817, 80 S. E. 327, L. R. A. 1915E, 902n, Ann. Cas. 1915A, 1018n; *Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 73, 28 Sup. Ct. 28, 52 L. ed. 108.

where indicated, rest entirely upon the police power, but rather upon the right to regulate the acts, business and duties of a public corporation. The power of the legislature to make regulations concerning the public rights, duties and acts of railroad companies is analogous to that which it possesses over municipal or governmental corporations, but is by no means so broad or comprehensive as that power. It is to be observed that, as heretofore shown, no state regulation can be valid, whether rested on the police power or on the power to control public corporations, if it is, in fact, a regulation of commerce between the states in the constitutional sense of the term. Under the power to control the public part, or element, of a railroad company, many important duties may be imposed upon it and many requirements be made that could not be made or imposed in matters of strictly private right.<sup>10a</sup> It has been held that under the general power to control matters of a public nature the state may require railroad companies to place in their stations blackboards, and note thereon the time of the arrival of trains, "and if late how much."<sup>11</sup> There are also decisions correctly adjudging that it is competent for the legislature to require railroad companies to erect and maintain suitable stations for the accommodation of passengers,<sup>12</sup> and to provide reasonable facilities for the inter-

<sup>10a</sup> *East Side Levee &c. Dist. v. East St. Louis Ry. Co.*, 279 Ill. 123, 116 N. E. 720, 723 (quoting text).

<sup>11</sup> *State v. Indiana &c. R. Co.*, 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502. The questions decided in the case are close and it may be doubted whether there is not error in some of the conclusions asserted. In the course of the opinion the court said: "While this statute may be on the border of legislative authority, yet we do not think it is an attempt to regulate commerce or to interfere with it." In *State v. Kentucky &c. R. Co.*, 136 Ind. 195, 35 N. E. 991, it was held that

the statute did not apply to cases where the time occupied in running over the entire route was less than twenty minutes. See also *Pennsylvania &c. Co. v. State*, 142 Ind. 428, 41 N. E. 937.

<sup>12</sup> *San Antonio &c. R. Co. v. State*, 79 Texas 264, 14 S. W. 1063. See also *Minneapolis &c. R. Co. v. Minnesota*, 193 U. S. 53, 24 Sup. Ct. 396, 48 L. ed. 614; *Nashville &c. R. Co. v. State*, 137 Ala. 439, 34 So. 401; *Minneapolis &c. R. Co. v. Railroad Com.*, 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821, and additional authorities there cited.

change of freight.<sup>13</sup> But it has also been held that such a statute, requiring a station at a certain point may be reviewed by the courts as to its reasonableness and whether there is a real public necessity.<sup>14</sup>

**§ 776. Regulations as to station accommodations—Other illustrative cases.**—Statutes requiring railroad companies to provide station agents with certificates of authority, and requiring such companies to redeem unused tickets, have been adjudged to be valid.<sup>15</sup> So, a statute has been upheld which forbids carriers to receive for transportation uninspected hides, though consigned to points without the state.<sup>16</sup> It is held competent for the legislature to compel railroad companies to provide waiting rooms,<sup>17</sup> to properly light and heat them,<sup>18</sup> to provide water closets,<sup>19</sup> to require rules and schedules to be posted in stations or depots,<sup>20</sup> to

<sup>13</sup> *State v. Kansas City &c. R. Co.*, 32 Fed. 722. See also *Wisconsin &c. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. ed. 194.

<sup>14</sup> *Louisiana &c. R. Co. v. State*, 85 Ark. 12, 106 S. W. 960.

<sup>15</sup> *Burdick v. People*, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. 329, 10 Am. R. & Corp. R. 451; *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238; *State v. Fry*, 81 Ind. 7; *State v. Corbett*, 57 Minn. 345, 59 N. W. 317; *State v. Thompson*, 47 Ore. 492, 84 Pac. 476; *Commonwealth v. Wilson*, 14 Phila. (Pa.) 384, 56 Am. & Eng. R. Cas. 230. See *State v. Ray*, 109 N. Car. 736, 14 S. E. 83, 14 L. R. A. 529; *State v. Clark*, 109 N. Car. 739, 14 S. E. 84.

<sup>16</sup> *Territory of New Mexico v. Denver &c. R. Co.*, 203 U. S. 38, 27 Sup. Ct. 1, 51 L. ed. 78.

<sup>17</sup> *State v. St. Paul &c. R. Co.*,

40 Minn. 353, 42 N. W. 21; *State v. Wabash &c. R. Co.*, 83 Mo. 144, 25 Am. & Eng. R. Cas. 133; *San Antonio &c. R. Co. v. State*, 79 Tex. 264, 14 S. W. 1063, 45 Am. & Eng. R. Cas. 586; *State v. Kansas City &c. R. Co.*, 32 Fed. 722. See *Kinealy v. St. Louis &c. R. Co.*, 69 Mo. 658; *Baltimore &c. R. Co. v. Compton*, 2 Gill (Md.) 20.

<sup>18</sup> *Texas &c. R. Co. v. Mayes* (Texas), White & W. Civ. Cas. Ct. App. §159, 15 S. W. 43. See *State v. Cleveland &c. R. Co.*, 137 Ind. 75, 36 N. E. 713.

<sup>19</sup> *Louisville &c. R. Co. v. Commonwealth*, 97 Ky. 207, 30 S. W. 616. See also *State v. Southern Kans. R. Co.*, 44 Tex. Civ. App. 218, 99 S. W. 167.

<sup>20</sup> *Chicago &c. R. Co. v. Fuller*, 17 Wall. (U. S.) 560, 21 L. ed. 710; *Fuller v. Chicago &c. R. Co.*, 31 Iowa 187; *Thomp. Com. Neg.* (2d ed.) §1528.

station flagman and maintain gates at crossings,<sup>21</sup> to require signals by trains approaching highway crossings,<sup>22</sup> and to require its ticket office to be kept open a specified length of time before the departure of trains.<sup>23</sup> Some of the cases seem to hold that, independent of statute, there is an absolute duty to erect and maintain depots or stations, which performance may be coerced by mandamus,<sup>24</sup> but there are well-reasoned cases limiting and qualifying this broad doctrine.<sup>25</sup>

**§ 777 (663). Corporate rights are subject to the police power.—**  
All corporate rights are taken subject to the great power reserved

<sup>21</sup> *State v. St. Paul &c. R. Co.*, 98 Minn. 380, 108 N. W. 261, 120 Am. St. 581. But see *Pennsylvania R. Co.*, In re, 213 Pa. St. 373, 62 Atl. 986, holding that a city has no power to compel the erection of safety gates at the expense of the railroad company.

<sup>22</sup> *Galena &c. R. Co. v. Appleby*, 28 Ill. 283; *Galena &c. R. Co. v. Loomis*, 13 Ill. 548, 56 Am. Dec. 471. See also *Southern R. Co. v. Grizzle*, 131 Ga. 287, 62 S. E. 177; *Seaboard Air Line Ry. v. Blackwell*, 143 Ga. 237, 84 S. E. 472 (even to check speed on approaching crossings). Compare *Southern Ry. Co. v. King*, 217 U. S. 524, 30 Sup. Ct. 594, 54 L. ed. 868.

<sup>23</sup> *Brady v. State*, 15 Lea (Tenn.) 628.

<sup>24</sup> *State v. Republican Valley &c. R. Co.*, 17 Nebr. 647, 24 N. W. 329, 52 Am. Rep. 424; *Railroad Commissioners v. Portland &c. R. Co.*, 63 Maine 269, 18 Am. Rep. 208; *State v. New Haven &c. R. Co.*, 43 Conn. 351. See also *Florida &c. R. Co. v. State*, 31 Fla. 482, 13 So. 103, 20 L. R. A. 419, 34 Am. St. 30; *People v. Chicago &c. R. Co.*, 130

Ill. 175, 22 N. E. 857; *North Pacific R. Co. v. Territory*, 3 Wash. 303, 13 Pac. 604. The case last cited was reversed on appeal.

<sup>25</sup> *Northern Pac. R. Co. v. Washington Territory*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. ed. 1092, 48 Am. & Eng. R. Cas. 475; *Page v. Louisville &c. R. Co.*, 129 Ala. 232, 29 So. 676; *State v. Kansas City Ry. Co.*, 51 La. Ann. 200, 25 So. 126; *Southeastern Ry. v. Ry. Comrs.*, 50 L. J. Q. B. 201, 6 Q. B. D. 586. See *York &c. R. Co. v. Regina*, 1 El. & B. 858; *Atchison &c. R. Co. v. Denver*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. ed. 291, 16 Am. & Eng. R. Cas. 57; *Commonwealth v. Fitchburg &c. R. Co.*, 12 Gray (Mass.) 180; *State v. Southern &c. R. Co.*, 18 Minn. 40; *People v. New York &c. R. Co.*, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484. Compare, however, *Chicago &c. R. Co. v. People*, 152 Ill. 230, 38 N. E. 562, 26 L. R. A. 224; *Ohio &c. R. Co. v. People*, 120 Ill. 200, 11 N. E. 347; *People v. Chicago &c. R. Co.*, 130 Ill. 175, 22 N. E. 857; *Mobile &c. R. Co. v. People*, 132 Ill. 559, 24 N. E. 643, 22 Am. St. 556.

in every state and commonly known as the police power.<sup>26</sup> This power is governmental in the strictest sense of the term, and can neither be surrendered nor bargained away by contract. All property is subject to this power whether it belongs to natural or artificial persons. The legislature could not, if it would, grant a charter which would place corporate rights above this power. There is no contrariety of opinion, nor can there be, upon the proposition that corporate rights, no matter what their nature, are subject to the proper exercise of this high power, but there is often difficulty in determining what is or is not a valid exercise of the power. Statutes have been upheld on the ground that in enacting them the legislature exercised this power, when, in truth, the subject of the statutes was not a subject over which the police power extends. So, too, statutes have been upheld upon the theory that the legislature is the sole judge of what subjects are or are not within the police power. The courts have sometimes surrendered the power it was their clear duty to exercise, and assumed without just reason that the legislative judgment was conclusive and closed all inquiry and forbade all in-

<sup>26</sup> The principle is so familiar and so firmly established that it is hardly necessary to cite authorities, but we cite a few of the multitude of cases: *Boston &c. Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Railroad Co. v. Richmond*, 96 U. S. 521, 24 L. ed. 734; *Buckley v. New York &c. R. Co.*, 27 Conn. 479; *Toledo &c. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Indianapolis &c. R. Co. v. Kercheval*, 16 Ind. 84; *Jamieson v. Indiana &c. Co.*, 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; *Jones v. Galena &c. Co.*, 16 Iowa 6; *Kansas Pacific R. Co. v. Mower*, 16 Kans. 573; *Wilder v. Maine &c. R. Co.*, 65 Maine 332, 20 Am. Rep. 698; *Boston &c. R. Co. v. County Commissioners*, 79 Maine 386, 10 Atl. 113; *Sawyer v. Vermont &c. R.*

*Co.*, 105 Mass. 196; *State v. Hoskins*, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759, 61 Am. & Eng. R. Cas. 571; *Sloan v. Pacific R. Co.*, 61 Mo. 24, 21 Am. Rep. 397; *Horn v. Atlantic &c. Co.*, 35 N. H. 169; *Cincinnati &c. R. Co. v. Cole*, 29 Ohio St. 126, 23 Am. Rep. 729; *Pennsylvania Co. v. Riblet*, 66 Pa. St. 164, 5 Am. Rep. 360; *Thorpe v. Rutland &c. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625. See also *New York &c. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. ed. 269; *Louisville &c. R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. ed. 849; *Chicago &c. R. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. ed. 328; *Chicago &c. R. Co. v. Anderson*, 182 Ind. 140, 105 N. E. 49.

vestigation. So they have in some instances adjudged the subject to be within the police power when it was not, and, again, in other instances, they have tacitly conceded that the police power is without limit. These unsound theories and undue assumptions have led to unjust results and have given force to unconstitutional measures oppressive and tyrannical in their nature and effect.

**§ 778 (664). The police power is fettered by limitations.—**There are limitations upon the police power. The legislative judgment is not always conclusive. The courts are not bound to inactivity because the legislature assumes to decide that a regulation it prescribes is a valid exercise of the police power, nor are the courts invariably concluded by the legislative judgment that the subject upon which it legislates is one which falls within the scope of the police power.<sup>27</sup> When the question is one of

<sup>27</sup> *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. ed. 169, and authorities there cited. The doctrine we assert is illustrated by the cases which declare and enforce the rule that the legislature can not make that a nuisance which is not, in fact, a nuisance. *Janesville v. Carpenter*, 77 Wis. 288, 46 N. W. 128, 8 L. R. A. 808, 20 Am. St. 123; *Hutton v. Camden*, 10 Vroom (N. J.) 122, 23 Am. Rep. 203; *O'Leary, Ex parte*, 65 Miss. 180, 3 So. 144, 7 Am. St. 640; *Coe v. Schultz*, 47 Barb. (N. Y.) 64. The Court of Appeals of New York, in *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, 643, after citing many cases, said: "These citations are sufficient to show that the police power is not without its limitations, and that in its exercise the legislature must respect the great fundamental rights guaranteed by the constitution. If this were otherwise, the power of the

legislature would be practically without limitation. In the assumed exercise of the police power in the interest of health, the welfare or safety of the public, every right of the citizen might be invaded and every constitutional barrier swept away." The doctrine asserted in the case last cited was approved and enforced in *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. 465. In the case of *Toledo & C. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611, the court thus stated the rule: "What are reasonable regulations, and what are subjects of police powers, must necessarily be judicial questions. The law-making power is the sole judge when the necessity exists, and when, if at all, it will exercise that right to enact such laws. Like other powers of government, there are constitutional limitations to its exercise. It is not within the power of the general assembly,

power or no power, as, for instance, whether the subject is one over which the police power extends, or whether there was power to enact the particular statute, the question is a judicial one and is for the courts. It is always the duty of the courts to decide whether the statute is in truth a police regulation or an invasion of substantial rights under the guise of a police regulation. An arbitrary assumption that a subject is one over which the police power extends or that the regulation is valid as an exercise of that power will not remove the question from the domain of the judiciary.<sup>28</sup> To affirm that the legislature may by an arbitrary decision of its own foreclose controversy upon such a question is to affirm that, upon questions concerning the highest rights of property, the legislative power is unlimited. Such a doctrine is

under the pretense of exercising the police power of the State, to enact laws not necessary to the preservation of the health and safety of the community that will be oppressive and burdensome upon the citizen. If it should prohibit that which is harmless in itself, or command that to be done which does not tend to promote the health, safety or welfare of society, it would be an unauthorized exercise of power, and it would be the duty of the courts to declare such legislation void." In the case of *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71, it was said: "As a general proposition, it may be stated, it is the province of the law-making power to determine when the exigency exists, calling into exercise this power. What are the subjects of its exercise is clearly a judicial question. There must necessarily be constitutional limitations upon this power. It is essential that such regulations must have refer-

ence to the comfort, safety or welfare of society, and, when applied to corporations, they must not be in conflict with any of the provisions of the charter. It is not lawful, under the pretense of police regulations, to take from a corporation any of the essential rights and privileges conferred by the charter."

<sup>28</sup> *Lawton v. Steele*, 152 U. S. 133, 137, 14 Sup. Ct. 499, 501, 38 L. ed. 385; *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 20, 49 L. ed. 169; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558, 22 Sup. Ct. 431, 438, 46 L. ed. 679. In the *Slaughter House* cases, 16 Wall. (U. S.) 36, 87, 21 L. ed. 394, the court said: "But under the pretense of prescribing a police regulation, the state can not be permitted to encroach upon any of the just rights of the citizen which the constitution intended to secure against abridgment."

directly opposed to the foundation theory of our government.<sup>29</sup> The question whether there is a reasonable necessity for the exercise of the police power or not,<sup>30</sup> and the question whether the subject is one within the field of the police power are judicial questions or else the system of distributed power and checks and balances is an empty, impotent abstraction.

**§ 779 (665). Subject must be one over which the police power extends—Cases adjudging statutes invalid.**—A statute professing to make a police regulation and assuming to be based upon that power is invalid, if it be clear that the subject is not one within the scope of that power.<sup>31</sup> In an Illinois case the statute assumed to require railroad companies to bear the expense of coroners' inquests held upon persons who died on their trains, and also the expense of the burial of such persons, but the court

<sup>29</sup> In the case of *Loan Association v. Topeka*, 20 Wall. (U. S.) 655, 663, 22 L. ed. 455, it was said: "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments." Cases decided by some of the courts tacitly disregard or are unmindful of this fundamental principle. Some of the expressions in *State v. Hoskins*, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759, 61 Am. & Eng. R. Cas. 571, are opposed to this doctrine.

<sup>30</sup> See generally *Lake Shore & R. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858; *Washington & Co. v. State*, 18 Conn. 53; *Philadelphia & R. Co. v.*

*Bowers*, 4 Houst (Del.) 506; *Bailey v. Philadelphia & R. Co.*, 4 Harr. (Del.) 389, 44 Am. Dec. 593; *State v. Noyes*, 47 Maine 189; *Mayor v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *People v. Jackson & Co.*, 9 Mich. 284; *Sloan v. Pacific R. Co.*, 61 Mo. 24, 21 Am. Rep. 397; *Commonwealth v. Pennsylvania & Co.*, 66 Pa. St. 41, 5 Am. Rep. 329; *White's Creek & Co. v. Davidson County*, 3 Tenn. Ch. 396. But the courts will not lightly interfere with the legislature in such matters. *Missouri & R. Co. v. May*, 194 U. S. 267, 24 Sup. Ct. 638, 48 L. ed. 971.

<sup>31</sup> *East Side Levee & Co. Dist. v. East St. Louis & Ry. Co.*, 279 Ill. 123, 116 N. E. 720, 723 (quoting text). The authorities referred to in a preceding section sustain the statement of the text, and our immediate purpose is to show the application of the general doctrine.



rightly declared the statute unconstitutional.<sup>32</sup> The police power will not authorize the enactment of a statute declaring a railway depot or the like to be a nuisance,<sup>33</sup> for such a structure of itself is not injurious to the public welfare. It is held that a statute which assumes to make a railroad company liable for stock killed by its trains, where there is no negligence on the part of the company, is unconstitutional.<sup>34</sup> It was held in a well-re-

<sup>32</sup> *Ohio &c. R. Co. v. Lackey*, 78 Ill. 55, 20 Am. Rep. 259. The court, it is proper to say, does not discuss the question whether the statute could be upheld upon the ground that it was a valid exercise of the police power, but it is evident that the court did not regard the subject of the statute as within the scope of that power. But see *Gano v. Minneapolis Railroad*, 114 Iowa 713, 719, 87 N. W. 714, 55 L. R. A. 263, 89 Am. St. 393; *Gee v. Gee*, 190 U. S. 557, 23 Sup. Ct. 854, 47 L. ed. 1183-1185.

<sup>33</sup> *State v. Jersey City*, 29 N. J. L. 170. See *Yates v. Milwaukee*, 10 Wall. (U. S.) 497, 19 L. ed. 984.

<sup>34</sup> *Schenck v. Union Pacific R. Co.*, 5 Wyo. 430, 40 Pac. 840. In the case the court said: "The principles upon which such statutes are held to be unconstitutional have been so often discussed that a new consideration of them would be unprofitable and tedious." The court cited *Jensen v. Union Pacific R. Co.*, 6 Utah 253, 21 Pac. 994, 4 L. R. A. 724; *Zeigler v. South &c. R. Co.*, 58 Ala. 594; *Denver &c. Railway v. Outcalt*, 2 Colo. App. 395, 31 Pac. 177; *Parsons v. Russell*, 11 Mich. 113, 83 Am. Dec. 728; *Atchison &c. R. Co. v. Baty*, 6 Nebr. 37, 29 Am. Rep. 356; *Taylor v. Porter*, 4 Hill. (N.

Y.) 140, 40 Am. Dec. 274; *Oregon &c. R. Co. v. Smally*, 1 Wash. 206, 23 Pac. 108, 22 Am. St. 145. See also *Birmingham &c. R. Co. v. Parsons*, 100 Ala. 662, 13 So. 602, 27 L. R. A. 263, 46 Am. St. 92; *Cottrel v. Union Pac. R. Co.*, 2 Idaho 540, 21 Pac. 416; *Bielenberg v. Montana &c. R. Co.*, 8 Mont. 271, 20 Pac. 314, 2 L. R. A. 813, 38 Am. & Eng. R. Cas. 275; *East Kingston v. Towle*, 48 N. H. 57, 97 Am. Dec. 575; *People v. Tighe*, 9 Misc. 607, 30 N. Y. S. 368; *Sioux Falls v. Kirby*, 6 S. D. 62, 60 N. W. 156, 25 L. R. A. 621. Some of the cases cited bear directly upon the point that where there is a right to notice, a statute which is professedly enacted in the exercise of the police power is invalid, if it deprives the party of notice, but they serve to show that the exercise of the police power is not beyond judicial investigation as well as to show that a police regulation can not override constitutional limitations. It seems difficult to reconcile the cases holding invalid statutes assuming to make railroad companies absolutely liable with *Mathews v. St. Louis &c. R. Co.*, 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161; *Union &c. R. Co. v. De Busk*, 12 Colo. 294, 3 L. R. A. 350, 13 Am. St. 221; *Atchison*

soned case that a statute assuming to compel persons and corporations to pay employes in full upon discharging them, although such employes by their wrongful acts may have caused injury to the employer, is not a valid exercise of the police powers, and is unconstitutional as to individuals, but is valid as to corporations under the reserved power to amend,<sup>35</sup> and this

&c. R. Co. v. Mathews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. ed. 909; Missouri &c. R. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. ed. 585, and other cases in which statutes making railroad companies absolutely liable for injuries caused by fires from their locomotives were upheld. There is, we venture to say, notwithstanding the array of authority, reason for affirming that in the class of cases just referred to the doctrine has been pressed too far. In authorizing the construction and operation of railroads the legislature necessarily authorizes the use of fire, and we can not perceive how a lawful and proper use of that which is lawful can be made the basis of a statute inflicting a penalty, in the form of damages upon a party whether that party be a corporation or a citizen, for doing in a lawful mode what the party is authorized by law to do. See post, §§ 1746, 1747.

<sup>35</sup> Leep v. St. Louis &c. R. Co., 58 Ark. 407, 25 S. W. 75, 41 Am. St. 109. In the opinion in the case cited the court referred with approval to the cases of Ramsey v. People, 142 Ill. 380, 32 N. E. 364, 17 L. R. A. 853; Braceville &c. Co. v. People, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. 206; Commonwealth v. Perry, 155 Mass. 117, 28 N. E. 1126, 14 L. R. A. 325,

31 Am. St. 533; State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; Godcharles v. Wigeman, 113 Pa. St. 431, 6 Atl. 354; San Antonio &c. R. Co. v. Wilson (Tex.), White & W. Civ. Cas. Ct. App. § 323, 19 S. W. 910; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. 863; State v. Fore Creek &c. Co., 33 W. Va. 188, 10 S. E. 285, 6 L. R. A. 359, 25 Am. St. 891, and disapproved the cases of State v. Peel &c. Co., 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385, and Hancock v. Yaden, 121 Ind. 366, 23 N. E. 253, 6 L. R. A. 576, 16 Am. St. 396. The court justly discriminated the decision in Hancock v. Yaden, and said that the "statute was held to be constitutional" on the ground that "it protected and maintained the medium of payment established by the sovereign power of the nation." The holding in Hancock v. Yaden as cited in Leep v. St. Louis &c. R. Co. supra, proceeds upon the theory that the state may protect the money of the national government by interdicting parties from contracting in advance that some other thing than money shall be taken as payment. See generally State v. Brown &c. Co., 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856. Blacklisting statutes requiring corporations to give a clearance

view as to corporations was also taken by the Supreme Court of the United States.<sup>36</sup> A statute providing that, upon filing a sworn statement showing that the company is indebted for work and labor performed or for services rendered it, the court should issue an injunction restraining the company from operating its road, was held unconstitutional upon the ground that it made it obligatory upon the courts to grant the injunction and deprived the company of a hearing, and, in effect, was a taking of the property without due process of law.<sup>37</sup> And a statute providing that, in an action against a railroad company for personal injury inflicted in another state, it shall not be competent for the company to plead or prove the decisions or statute of such other state as a defense, has likewise been held unconstitutional.<sup>38</sup>

### § 780 (666). Police power—Legislative and judicial questions.

—It is clear that if the question which the legislature is required to decide is a legislative one, the decision of the legislature is conclusive.<sup>39</sup> The difficulty is to determine what are and what are not legislative questions. So far as concerns matters of policy and expediency there is no doubt that the legislative decision is final.<sup>40</sup> But it is by no means within the legislative power to shut out judicial investigation and judgment. It is true that judicial investigation very often ends with the discovery that the question is one of policy or expediency. This is far from being

card stating the reason of discharge of a servant have also been held invalid. *St. Louis S. W. Ry. Co. of Tex. v. Griffin*, 106 Tex. 477, 171 S. W. 703. See also *Wallace v. Georgia &c. R. Co.*, 94 Ga. 732, 22 S. E. 579; *Atchison &c. R. Co. v. Brown*, 80 Kans. 312, 102 Pac. 459, 23 L. R. A. (N. S.) 247, 133 Am. St. 213.

<sup>36</sup> *St. Louis &c. Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. ed. 746.

<sup>37</sup> *Creech v. Pittsburgh &c. R. Co.*, 29 W. L. Bull. 112.

<sup>38</sup> *Baltimore R. Co. v. Reed*, 158

Ind. 25, 62 N. E. 488, 56 L. R. A. 468, 92 Am. St. 293. See also *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. ed. 215.

<sup>39</sup> *State v. Wiley*, 109 Mo. 439, 19 S. W. 197; *Stockton v. Powell*, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42, 50, *Elliott Gen. Prac.* § 148.

<sup>40</sup> The principle is a familiar one and was thus stated in the *License Tax Cases*, 5 Wall. (U. S.) 462: "This court can know nothing of public policy except from the constitution and the laws, and the course of administration and decision. It has no legislative powers.

true, however, in all cases. It often becomes necessary for the courts to ascertain and decide whether a constitutional provision is violated under the pretense of exercising the police power. The legislature cannot make that a legislative question which is a judicial one. If, for instance, a trade or occupation is not injurious to the community the legislature cannot arbitrarily decide that it is injurious, and by that decision exclude the interference of the judiciary.<sup>41</sup> If the case is one wherein due process of law requires notice, then the legislature cannot arbitrarily decide, without providing for notice, that an act shall or shall not be done.<sup>42</sup> "Due process of law" and the "law of the land" are terms of great force, and the requirements made by such terms are not satisfied by a legislative enactment which denies a hearing where a hearing is required by the organic law.<sup>43</sup> The power to adjudicate where adjudication is necessary is judicial and not legislative.<sup>44</sup> If, therefore, an adjudication is essential,

It can not modify or amend any legislative acts. It can not examine any questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must be addressed to the legislature. Questions of policy there are concluded here." See also *McGuire v. Chicago &c. R. Co.*, 131 Iowa 340, 108 N. W. 902.

<sup>41</sup> *State v. Moore*, 113 N. Car. 697, 18 S. E. 342, 22 L. R. A. 472; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *People v. Marx*, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; ante, § 778.

<sup>42</sup> The principle considered in the text is illustrated by the cases which hold that although the legislature may confer authority to summarily seize property it can not authorize a destruction of the property without giving the owner a hearing. *Lowry v. Rainwater*, 70 Mo. 152, 35 Am. Rep. 420; *Attorney-Gen. v.*

*Justices &c.*, 103 Mass. 456; *State v. Robbins*, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438. See *Lincoln v. Smith*, 27 Vt. 328; *Wynehamer v. People*, 13 N. Y. 378; *People v. Haug*, 68 Mich. 549, 37 N. W. 21. See also authorities cited in note to the preceding section, and *Chicago &c. R. Co. v. Kieth*, 67 Ohio St. 279, 65 N. E. 1020, 60 L. R. A. 525.

<sup>43</sup> *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 3 L. ed. 162; *Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121; *Trustee &c. v. Bailey*, 10 Fla. 238; *Taylor v. Porter*, 4 Hill (N. Y.) 140, 40 Am. Dec. 274; *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291; *Hoke v. Henderson*, 15 N. Car. 1, 25 Am. Dec. 677; *Ervine's Appeal*, 16 Pa. St. 256, 266, 55 Am. Dec. 499; *Norman v. Heist*, 5 Watts & S. (Pa. St.) 171.

<sup>44</sup> *Taylor v. Place*, 4 R. I. 324; *Merrill v. Sherburne*, 1 N. H. 199,

the legislature, while it may prescribe regulations, cannot make an adjudication, that is, it cannot adjudicate in the sense that a court of justice does when it pronounces judgment. If the case be one in which the organic law secures to the party a hearing, then the legislature cannot abridge that right by arrogating to itself the power to decide arbitrarily and conclusively. The duty of the courts is to ascertain if the case is one in which the party is entitled to a hearing, and, in the event that it be found that he is entitled to a hearing, overthrow the statute if it denies the right to a hearing. So it is often necessary for the courts to ascertain and decide whether, under the pretense of a police regulation, there is, in fact, an attempt to authorize the taking of property without compensation. It has been adjudged that the legislature cannot arbitrarily fix the value of animals killed by the trains of a railroad company, for the question of value is one upon which there is a right to "a day in court."<sup>45</sup> It has also been held that the legislature cannot, under the police power, authorize a railroad company to utilize a public highway as its roadbed in elevating its tracks to abolish a grade crossing without making compensation for the destruction of access of the abutter who owns the fee.<sup>46</sup>

**§ 781 (667). The police power and the commerce clause of the federal constitution.**—The police power is resident in the states,<sup>47</sup>

203, 8 Am. Dec. 52; *People v. Board of Supervisors*, 16 N. Y. 424; *Cincinnati & C. R. Co. v. Commissioners*, 1 Ohio St. 77; *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567.

<sup>45</sup> *Wadsworth v. Union Pacific R. Co.*, 18 Colo. 600, 33 Pac. 515, 23 L. R. A. 812, 36 Am. St. 309, 56 Am. & Eng. R. Cas. 145. In the case referred to the court quoted the well-known statement of Webster: "By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgment

only after trial."

<sup>46</sup> *McKeon v. N. Y. & C. R. Co.*, 75 Conn. 343, 53 Atl. 656, 61 L. R. A. 730; affirmed in 189 U. S. 508, 23 Sup. Ct. 853.

<sup>47</sup> *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. ed. 205; *Prigg v. Pennsylvania*, 16 Pet. (U. S.) 539, 10 L. ed. 417; *United States v. De Witt*, 9 Wall. (U. S.) 41, 19 L. ed. 593; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Jamieson v. Indiana & C. Co.*, 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; *Railroad Com. v. Grand Trunk & C. R. Co.*, 179 Ind. 255, 100 N. E. 852.

and may be exercised by them upon interstate railroads, but not in such a way as to unlawfully interfere with commerce between the states.<sup>48</sup> The commerce clause of the federal constitution is, as we have seen, a limitation upon the police power of the states, but it does not destroy that power. Where, however, the power of the federal government and the power of the state to enact police regulations come in conflict, the federal power will prevail. It follows from the rule just stated that if, under pretense of prescribing a police regulation, the legislature in fact assumes to regulate interstate commerce, the statute will be void.<sup>49</sup> But police regulations may be valid although they do affect interstate commerce, provided they are not in fact regulations of commerce between the states.<sup>50</sup> And this is held to be true even

<sup>48</sup> *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. ed. 1187; *Bowman v. Chicago &c. R. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 31 L. ed. 700; *Chicago &c. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. ed. 972; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. ed. 128; *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. 725, 34 L. ed. 150; *Wilkerson v. Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. ed. 572; *Plumley v. Commonwealth*, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. ed. 223; *Kansas City So. Ry. Co. v. Kaw Valley Drainage Dist.*, 233 U. S. 75, 34 Sup. Ct. 564, 58 L. ed. 857, and cases cited; *United States v. Fiscus*, 42 Fed. 395; *Beine, In re*, 42 Fed. 545; *American &c. Co. v. Board &c.*, 43 Fed. 609; *Spickler, In re*, 43 Fed. 653, 659; *State v. Gooch*, 44 Fed. 276; *Spellman v. New Orleans*, 45 Fed. 3; *Scott, Ex parte*, 66 Fed. 45; *Cuban &c. Co. v. Fitzpatrick*, 66 Fed. 63; *Seaboard Air Line Ry. v. Blackwell*, 143 Ga. 237, 84 S. E. 472, Ann. Cas. 1917A,

967, and elaborate note reviewing most of the recent cases upon the subject.

<sup>49</sup> *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *Henderson v. Mayor &c. of New York*, 92 U. S. 259, 23 L. ed. 543; *Hannibal &c. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Kimmish v. Ball*, 129 U. S. 217, 9 Sup. Ct. 277, 32 L. ed. 695; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455. See *Telegraph Co. v. Texas*, 105 U. S. 460, 10 Sup. Ct. 862, 26 L. ed. 1067; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. ed. 708; *Central Georgia R. Co. v. Groesbeck*, 175 Ala. 189, 57 So. 380.

<sup>50</sup> *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. ed. 1187. The court said in the case cited that: "Undoubtedly under the reserved powers of the state, which are designated under that somewhat ambiguous term of 'police powers,' regulations may be prescribed for the good order, peace, and protection of the community." In *Hannibal*

where congress has acted upon the subject when there is no repugnancy and congress has shown no intention to cover it.<sup>51</sup>

&c. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527, the court said: "Many acts of a state may, indeed, affect commerce without amounting to any regulation of it in the constitutional sense of the term" *Simpson v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151. See *Sherlock v. Alling*, 93 U. S. 90, 23 L. ed. 819; *Siebold*, Ex parte, 100 U. S. 371, 25 L. ed. 717; *Wilson v. McNamee*, 102 U. S. 572, 26 L. ed. 234; *Smith v. Alabama &c. R. Co.*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. ed. 509; *Nashville &c. R. Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. ed. 352; *Pittsburg &c. Coal Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. 415, 39 L. ed. 538; *Seaboard Air Line Ry. Co. v. Blackwell*, 143 Ga. 237, 84 S. E. 472, Ann. Cas. 1917A, 967; *McGuire v. Chicago &c. R. Co.*, 131 Iowa 340, 108 N. W. 902; *State v. Penny*, 19 S. Car. 218. Many authorities are cited and reviewed in *Railroad Com. v. Grand Trunk &c. R. Co.*, 179 Ind. 255, 260, 100 N. E. 852. See also upon the general subject the notes in 7 Ann. Cas. 5 and 13 Ann. Cas. 147, and Ann. Cas. 1917A, 972-997.

<sup>51</sup> *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. ed. 108; *Missouri &c. Ry. Co. v. Harris*, 234 U. S. 412, 34 Sup. Ct. 790, 58 L. ed. 1377. But, as shown by the same authorities, when Congress has acted and occupied the field, within its jurisdiction, such exercise of its authority overrides or

supersedes state action upon the subject. See also *Northern Pac. R. Co. v. Washington*, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. ed. 237; *Erie R. Co. v. New York*, 233 U. S. 671, 34 Sup. Ct. 756, 760, 58 L. ed. 1149, 52 L. R. A. (N. S.) 266, and cases cited in note. Many additional authorities are reviewed in *Staley v. Illinois Cent. R. Co.*, 268 Ill. 356, 109 N. E. 342. And the following propositions upon the general subject are stated as settled in *Southern R. Co. v. Railroad Com.*, 179 Ind. 23, 31-35, 100 N. E. 337, and numerous authorities are there cited in support of each one of them: 1. The power of regulating commerce "among the states" is in congress, and the subject of exclusive federal control. 2. When congress does act, and its action covers the subject-matter, its action is exclusive as to interference. 3. Until and unless congress does act, and its action covers the subject-matter, the states may act. 4. So long as the action of the states is not repugnant to, does not interfere with, place burdens upon, or undertake to regulate interstate commerce, or is mere police regulation, their action, though in aid of interstate commerce, is not invalid, unless it is a direct interference. 5. It is not enough to render the state law invalid that it is similar to the federal act upon the same subject; it must in operation interfere directly or substantially with interstate commerce, and not be an incidental or casual

**§ 782 (668). Regulations that have been held valid—Miscellaneous.**—It is now firmly settled that statutes requiring railroad companies to fence their tracks are valid.<sup>52</sup> Railroad companies may be compelled to conduct examinations to ascertain the qualifications of their employees.<sup>53</sup> It has been held that a statute prohibiting railroad companies from making "flying" or "running switches," and making them liable to a person injured, although

interference, or remotely affect it hurtfully. 6. Where both the acts of congress and of the state make a defined act an offense, the commission of the act may be an offense against each and punishable by each.

<sup>52</sup> The decisions upon this question are very numerous, but the rule is so well established that it is only necessary to cite a few of the many cases: *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. ed. 463; *Bulkley v. New York &c. R. Co.*, 27 Conn. 479; *Illinois Central R. Co. v. Arnold*, 47 Ill. 173; *New Albany &c. R. Co. v. Tilton*, 12 Ind. 3, 74 Am. Dec. 195; *Jones v. Galena &c. R. Co.*, 16 Iowa 6; *Kansas &c. R. Co. v. Mower*, 16 Kans. 573; *O'Bannon v. Louisville &c. R. Co.*, 8 Bush (Ky.) 348; *Owensboro &c. R. Co. v. Todd*, 91 Ky. 175, 15 S. W. 56, 11 L. R. A. 285; *Wilder v. Maine &c. R. Co.*, 65 Maine 332; *Sawyer v. Vermont &c. R. Co.*, 105 Mass. 196; *Winona &c. R. Co. v. Waldron*, 11 Minn. 515, 88 Am. Dec. 100; *Gorman v. Pacific &c. R. Co.*, 26 Mo. 441, 72 Am. Dec. 220; *Burlington &c. R. Co. v. Webb*, 18 Nebr. 215, 24 N. W. 706, 53 Am. Rep. 809; *Horn v. Atlantic &c. R. Co.*, 35 N. H. 169; *Corwin v. New York &c. R. Co.*, 13 N. Y. 42;

*Pennsylvania Co. v. Riblet*, 66 Pa. St. 164, 5 Am. Rep. 360; *Thorpe v. Rutland &c. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625; *Quackenbush v. Wisconsin &c. R. Co.*, 62 Wis. 411, 52 N. W. 519. In the case of the *Birmingham &c. R. Co. v. Parsons*, 100 Ala. 662, 13 So. 602, 27 L. R. A. 263, 46 Am. St. 92, a different view of the question is taken, the court holding that as the legislature may make the duty to build fences absolute it may leave the question whether a fence shall be built to the decision of the land-owner. In that case the court sanctions the doctrine that land-owners may release the company from the duty to fence, but we suppose that a release by a land-owner would not avail the company if the breach of duty to fence was the proximate cause of an injury to a passenger or other person having a right of action against the damages for injuries resulting from negligence.

<sup>53</sup> *Nashville &c. R. Co. v. State*, 83 Ala. 71, 3 So. 702; *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. ed. 508; *Nashville &c. R. Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. ed. 352; *McDonald v. State*, 81 Ala. 279, 2 So. 829. In *Nashville &c. R. Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. ed. 352, it was said in the course



such person is guilty of contributory negligence, is a valid exercise of the police power.<sup>54</sup> So, too, there are decisions that it is competent for the legislature to enact a law applicable exclusively to railroad companies, prescribing who shall and who shall not be deemed fellow servants of a common master.<sup>55</sup> It has been held that a statute making railroad companies absolutely liable to persons injured on their trains, except where the injury is attributable to the criminal negligence of the person injured or to a violation of a rule or regulation of the company, is constitutional.<sup>56</sup> Statutes requiring trains to stop at crossings of other roads, at county seats and the like, have been held valid.<sup>57</sup> And even a statute requiring railroad companies to

of the opinion that the company could be compelled to bear the expense of such examinations. *Louisville &c. R. Co. v. Baldwin*, 85 Ala. 619, 5 So. 311, 7 L. R. A. 266, 38 Am. & Eng. R. Cas. 5.

<sup>54</sup> *Jones v. Alabama &c. R. Co.*, 72 Miss. 32, 16 So. 379. That such a statute as the one under consideration in the case cited is valid where the switches are made entirely on the exclusive private property of the company is not so clear on principle, but the general trend of the decisions seems to warrant the conclusion that such a statute is valid, although there is conflict upon the general question.

<sup>55</sup> *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. ed. 107; *Georgia R. Co. v. Ivey*, 73 Ga. 499, 28 Am. & Eng. R. Cas. 392; *Georgia &c. R. Co. v. Miller*, 90 Ga. 571, 16 S. E. 939; *Pittsburgh &c. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 69 L. R. A. 75, 71 Am. St. 300; *Pittsburgh &c. R. Co. v. Hosea*, 152 Ind. 412, 53 N. E. 419; *Indianapolis Union R. Co. v.*

*Houlihan*, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787; *Missouri Pac. R. Co. v. Mackey*, 33 Kans. 298, 6 Pac. 291; *Herrick v. Minneapolis &c. R. Co.*, 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771, 11 Am. & Eng. R. Cas. 256; *Campbell v. Cook*, 86 Tex. 630, 26 S. W. 486, 40 Am. St. 878; *Austin Rapid Transit Co. v. Groethe*, 88 Tex. 262, 31 S. W. 197. See generally as to regulation of the relation of master and servant. *Ten-Hour Law*, In re, 24 R. I. 603, 54 Atl. 602, 61 L. R. A. 612; *Atchison &c. R. Co. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. ed. 909; *St. Louis &c. R. Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 491, 43 L. ed. 746. This subject is more fully considered in a subsequent volume.

<sup>56</sup> *Union Pacific R. Co. v. Porter*, 38 Nebr. 226, 56 N. W. 808, 55 L. R. A. 610. See also *McGuire v. Chicago &c. R. Co.*, 131 Iowa 340, 108 N. W. 902.

<sup>57</sup> *Illinois Central R. Co. v. People*, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119 (reversed, however,

stop their trains for five minutes at each station on the line of their roads has been upheld,<sup>58</sup> but it seems to us that the decisions upholding the statute are of doubtful soundness. The Supreme Court of Illinois holds that, under the police power,

in 163 U. S. 142, 16 Sup. Ct. 1096, 41 L. ed. 107); *People v. Louisville &c. R. Co.*, 120 Ill. 48, 10 N. E. 657; *Chicago &c. R. Co. v. Suffern*, 129 Ill. 274; *Chicago &c. R. Co. v. People*, 105 Ill. 657; *Ohio &c. R. Co. v. People*, 29 Ill. App. 561. See also *St. Louis &c. R. Co. v. B'Shears*, 59 Ark. 237, 27 S. W. 21, 61 Am. & Eng. R. Cas. 556; *State v. Chicago &c. R. Co.*, 239 Mo. 196, 143 S. W. 785; *Missouri Pac. R. Co. v. Kansas*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. ed. 472; *Chicago &c. R. Co. v. Oglesby*, 198 Fed. 153. The question as to whether a state may require interstate trains to stop at certain stations seems to depend largely upon the purpose and effect of the law, which in turn may depend largely upon whether the station has adequate service. If it has, such a law is held invalid, though it may be valid where there is no other adequate service and no reasonable facilities are furnished. *Herndon v. Chicago &c. R. Co.*, 218 U. S. 135, 30 Sup. Ct. 633, 54 L. ed. 970; *Chicago &c. R. Co. v. Wisconsin R. Co.*, 237 U. S. 220, 35 Sup. Ct. 560, 59 L. ed. 926; *St. Louis &c. R. Co. v. Langer*, 29 Okla. 691, 119 Pac. 126, 44 L. R. A. (N. S.) 478; *Chicago &c. R. Co. v. Railroad Com.*, 152 Wis. 654, 140 N. W. 296. The English cases hold that an agreement to stop trains at a particular station for a designated length of time is valid and enforceable. *Rigby*

*v. Great Western &c. R. Co.*, 14 M. & W. 811. See *Phillips v. Great Western &c. R. Co.*, L. R. 7 Ch. 409; *Greene v. West Cheshire Lines &c.*, L. R. 13 Eq. 44, 41 L. J. Ch. 17; *Raphael v. Thames Valley &c. R. Co.*, L. R. 2 Ch. 147; *Turner v. London & South Western &c. R. Co.*, L. R. 17 Eq. 561; *Burnett v. Great North &c. R. Co.*, L. R. 10 App. 147; *Price v. Bala &c. R. Co.*, 50 L. T. R. 787; *Flood v. North Eastern &c. R. Co.*, 21 L. T. R. 258. As the first and highest duty of a railroad company is to discharge its duties to the public there is, at least, fair reason for the conclusion that such contracts must yield to the public necessity. The rapid progress and the great changes wrought by time in this country must, as it seems to us, be influential considerations in cases such as are here under immediate mention, and these matters must be regarded as matters of which parties must take notice when they enter into contracts. A statute requiring railroad companies to stop at its intersections or crossings of other railroads and prescribing a penalty for failure to do so has also been held constitutional in *State v. Chicago &c. R. Co.*, 122 Iowa 22, 96 N. W. 904, 101 Am. St. 254.

<sup>58</sup> *Galveston &c. R. Co. v. La Gierse*, 51 Tex. 189. See also *Lake Shore &c. R. Co. v. State*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. ed. 702.

the construction of farm crossings may be compelled,<sup>59</sup> but this seems to us a great stretch of the police power, at least as to cases where the right of way was secured prior to the enactment of the statute; and the Illinois statute requiring all regular passenger trains to stop a sufficient time at all railroad stations and county seats to receive and discharge passengers has been held invalid as applied to a fast mail train engaged in interstate commerce, where the train was required to go three miles out of its way to stop at a station.<sup>60</sup> In Texas it is correctly held that, where the right of way was obtained prior to the enactment of the statute, there is no power to compel the construction of farm crossings.<sup>61</sup> The speed of trains through towns and cities

<sup>59</sup> *Illinois Central R. Co. v. Wilkenborg*, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862, 26 Am. & Eng. R. Cas. 358.

<sup>60</sup> *Illinois Cent. R. Co. v. State*, 163 U. S. 142, 16 Sup. Ct. 1096, 41 L. ed. 107.

<sup>61</sup> *Gulf &c. R. Co. v. Rowland*, 70 Tex. 298, 35 Am. & Eng. R. Cas. 286. In the case cited the court said: "The main case relied upon by the appellee, in order to sustain the constitutionality of the act in question, is *Thorpe v. Rutland &c. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625. That case maintained the validity of an act of the legislature requiring railroad companies to put in cattle-guards at farm crossings. It seems to us that requirements for fence and cattle-guards stand upon the same principle. They are necessary for the protection of such domestic animals as are likely to stray upon the track, and more especially for the safety of passengers and employes of the railroad companies. Farm crossings are for the sole convenience of the owners of the

land, and stand upon a different ground. Besides it does not appear in that case that the owner of the farm had been in any manner compensated for the expense of constructing his own crossings or cattle-guards. That decision, though it extends, as we think, the doctrine of the police power to its extreme limits, is not in conflict with the views expressed in this opinion. We think it would have been competent for the legislature, in providing for fences, to have required the companies to put in farm crossings, as a regulation of its undoubted power to require such fences. All subsequent rights of way would be presumed to have been acquired with reference to that law, and the land-owner would not have been presumed to have assumed the burden of their construction. We, therefore, think that, as in all subsequent acquisition of rights of way, in the absence of some express or implied agreement to the contrary, the railroad companies will be charged with the duty imposed by the stat-

may be regulated. The authorities are agreed that where the trains move upon or across highways their speed may be regulated, but there is a contrariety of opinion as to whether the speed of trains operating exclusively upon the private property of the company can be limited.<sup>62</sup> It is competent for the legislature to require railroad companies to keep tracks clear of weeds and

ute, and the measure of the compensation will be regulated accordingly; therefore, as to such future cases, in our opinion, the statute should be constitutional in so far as it applies to crossings without enclosures. *Smith v. New York &c. Railroad Co.*, 63 N. Y. 58." The opinion from which we have quoted justly discriminates between matters affecting public interest and matters of private concern. The distinction drawn in the opinion referred to is often lost sight of, and the result of losing sight of it is confusion and error. An exercise of the police power for purely private benefit can no more be defended than can the exercise of the right of eminent domain for a private purpose. But railroad commissioners may be authorized to compel the removal of a dangerous grade crossing. *New York &c. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. ed. 269. See also *Erie R. Co. v. Board*, 89 N. J. 57, 98 Atl. 13. But compare *Kansas City So. R. Co. v. Kaw Valley Drainage Dist.*, 233 U. S. 75, 34 Sup. Ct. 564, 58 L. ed. 857, where the particular order was held unreasonable; and frogs and switches may be required to be blocked. *St. Louis &c. R. Co. v. McNamare*, 91 Ark. 515, 122 S.

W. 102; and a block system installed. *Indiana R. Com. v. Grand Trunk &c. R. Co.*, 179 Ind. 255, 100 N. E. 852.

<sup>62</sup> *Gratitot v. Missouri Pacific R. Co.*, 116 Mo. 450, 21 S. W. 1094, 16 S. W. 384; *Toledo &c. R. Co. v. Deacon*, 63 Ill. 91; *Chicago &c. R. Co. v. Reidy*, 66 Ill. 43; *Whitson v. City of Franklin*, 34 Ind. 392; *Cleveland &c. R. Co. v. Harrington*, 131 Ind. 426; *Crowley v. Burlington &c. R. Co.*, 65 Iowa 658; *Mobile &c. R. Co. v. State*, 51 Miss. 157; *Merz v. Missouri Pac. R. Co.*, 88 Mo. 672; *State v. Jersey City*, 29 N. J. L. 170; *Clark v. Boston &c. R. Co.*, 64 N. H. 323, 31 Am. & Eng. R. Cas. 548; *Penna. R. Co. v. Lewis*, 79 Pa. St. 33; *Horn v. Chicago &c. R. Co.*, 38 Wis. 463; *Haas v. Chicago &c. R. Co.*, 41 Wis. 44. The speed of interstate trains may be reasonably regulated and signals and checking of speed required at crossings. *Southern R. Co. v. King*, 217 U. S. 524, 30 Sup. Ct. 594, 54 L. ed. 868; *Lasater v. St. Louis &c. R. Co.*, 177 Mo. App. 534, 160 S. W. 818. But an ordinance requiring speed to be limited to six miles an hour in a small town where tracks are graded and at a different level from the street has been held unreasonable. *Lusk v. Dora*, 224 Fed. 650.

other combustible material,<sup>63</sup> and a statute so providing, and making the company liable, in case of neglect to comply with it, for resulting damages, and reasonable attorney's fees, has been upheld.<sup>64</sup> But a statute providing that railroad companies failing to pay claims less than a certain sum for labor, overcharges on freight, or for stock killed, within thirty days after presentation, shall be liable for attorney's fees, has been held void as depriving the companies of the equal protection of the law.<sup>65</sup> Railroad companies may also be compelled to keep flagmen at crossings where the public safety or welfare requires the presence of flagmen.<sup>66</sup> So, an ordinance prohibiting whistling by locomotives, except when necessary for brake signals or to prevent injuries to persons or property, and prohibiting the escape of steam from cylinder cocks when the engine is running in the street, has been upheld as a valid exercise of the police power of the city.<sup>67</sup>

<sup>63</sup> *Diamond v. Northern Pac. R. Co.*, 6 Mont. 580, 13 Pac. 367. See upon the general subject, *Sioux City St. R. Co. v. Sioux City*, 138 U. S. 98, 11 Sup. Ct. 226, 34 L. ed. 898; *City &c. R. Co. v. Mayor &c. of Savannah*, 77 Ga. 731, 4 Am. St. 106; *State v. Nelson*, 52 Ohio St. 88, 39 N. E. 22, 26 L. R. A. 317, 10 Lewis' Am. & Corp. 771; *Pratt v. Atlantic &c. R. Co.*, 42 Maine 579; *State v. Hoskins*, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759; *Kent v. New York Central R. Co.*, 12 N. Y. 628; *Tombs v. Rochester &c. R. Co.*, 18 Barb. (N. Y.) 583; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454, 21 Am. St. 764, 4 Lewis' Am. R. & Corp. 199; *Branch v. Wilmington*, 77 N. Car. 347; *Nelson v. Vermont &c. R. Co.*, 26 Vt. 717; *Ditberner v. Chicago &c. R. Co.*, 47 Wis. 138, 2 N. W. 69. See also as to drainage, *Chicago &c. R. Co. v. Keith*, 67 Ohio St. 279, 65 N. E.

1020, 60 L. R. A. 525. And compare *Chicago &c. R. Co. v. Illinois*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. ed. 596.

<sup>64</sup> *Cleveland &c. R. Co. v. Hamilton*, 200 Ill. 633, 66 N. E. 389. See also *Peoria &c. R. Co. v. Duggan*, 109 Ill. 537, 50 Am. Rep. 619; *Atchison &c. R. Co. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. ed. 909. But compare *Wilder v. Railway Co.*, 70 Mich. 382, 38 N. W. 289; *Joliffe v. Brown*, 14 Wash. 155, 44 Pac. 149, 53 Am. St. 868.

<sup>65</sup> *Gulf &c. R. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. ed. 666.

<sup>66</sup> *Toledo &c. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Lake Shore &c. R. Co. v. Cincinnati &c. R. Co.*, 30 Ohio St. 604; *Erie v. Erie Canal Co.*, 59 Pa. St. 174.

<sup>67</sup> *Chicago &c. R. Co. v. Steckman*, 224 Ill. 500, 79 N. E. 602.

§ 783. **Regulations as to equipment held valid.**—Many and various statutory regulations as to equipment have been held valid. Thus there are cases affirming that railroad companies may be compelled to heat their cars in some other mode than by stoves,<sup>68</sup> to use headlights of a certain character on their locomotives;<sup>69</sup> and to equip their locomotives with automatic bells or bell ringers,<sup>70</sup> and their cars with grabirons.<sup>71</sup>

§ 784. **Regulations as to lighting tracks held valid.**—It is held by the Supreme Court of Ohio that railroad companies may be compelled to light their tracks situated within the limits of incorporated villages and cities,<sup>72</sup> and if this decision is to be understood as holding that companies may be compelled to light crossings and places to which the public have a right of access we think it is correct, but if it is to be understood as holding that railroad companies may be compelled to maintain lights at places where the members of the community have no right to go, that is, places owned by the companies, and to which they have an exclusive right, we cannot regard the decision as sound, for, while we believe that the legislature has power to provide for the safety and welfare of the public, we do not believe that the power

<sup>68</sup> *People v. New York &c. R. Co.*, 55 Hun 409, 8 N. Y. S. 672; *People v. Clark*, 14 N. Y. S. 642. See also *New York &c. R. Co. v. New York*, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. ed. 853. It has also been held that a railroad company may be required to light and heat its station buildings. *Texas &c. R. Co. v. Mayes (Tex.)*, 15 S. W. 43.

<sup>69</sup> *Atlantic Coast Line R. Co. v. State*, 135 Ga. 545, 69 S. E. 725, 32 L. R. A. (N. S.) 20, affirmed in 234 U. S. 285, 34 Sup. Ct. 829, 43 L. ed. 702.

<sup>70</sup> *State v. Louisville &c. R. Co.*, 177 Ind. 553, 96 N. E. 340. And to use an automatic block system. *Railroad Com. v. Grand Trunk R. Co.*, 179 Ind. 255, 100 N. E. 852.

<sup>71</sup> *Southern R. Co. v. Railroad Com.*, 179 Ind. 23, 100 N. E. 337. See also *Pittsburgh &c. R. Co. v. State*, 180 Ind. 245, 102 N. E. 25.

<sup>72</sup> *Cincinnati &c. R. Co. v. Sullivan*, 32 Ohio St. 152. In the case cited the court held that under the police power railroad companies may be compelled to light their tracks situated within the limits of incorporated villages and cities, and that in the event of the failure of a company to provide lights the municipality might do so at the expense of the company, but that the expense could not be regarded as an assessment or a tax, but must be enforced by an action against the company. But compare *Washington Terminal Co. v. Dist. of Columbia*, 265 Fed. 965.

extends to the control of private property, where no rights of the public are involved, although it is owned by a railroad company, nor do we believe that the legislature has arbitrary power to prescribe the particular or specific kind of light that shall be used.<sup>73</sup>

**§ 785 (669). The power to impose penalties in favor of private persons—Constitutional questions.**—There is some conflict of authority upon the question of the power of the legislature to impose penalties, in the form of double damages and the like, upon railroad companies, for the benefit of persons who have a cause of action against such companies. Many statutes give individuals a right to double damages and the like against railroad companies, and in so doing enact a law that can only apply to a single class and a particular kind of actions, namely, civil actions against railroad companies. It seems to us that many of the courts, in sustaining such statutes, have disregarded the constitutional provisions prohibiting special and local legislation. Where there are no constitutional provisions inhibiting the enactment of local and special laws there is less difficulty in sustaining such statutes, but where there are such prohibitions it seems to us that statutes making special rules for the government of railroad companies cannot be upheld except where the subject of the statute is peculiar to railroad companies. It has been held by the Supreme Court of the United States that a statute which gives a landowner a right of action against railroad companies which fail to fence their roads, for consequential damages, does not conflict with the provisions of the federal constitution, though conse-

<sup>73</sup> To hold that the legislature may arbitrarily and conclusively determine exactly what kind of a light should be used would be to confer upon it the absolute power to choose between different kinds of light, and make it the absolute arbiter of all questions of fact, such as the sufficiency of the light, its suitability for the purpose and like questions, thus denying a hearing upon such questions. We do not mean to say that the legisla-

ture may not provide that a general kind of light may be used, as, for instance, electric lights or gas lights, but what we mean is that the legislature can not arbitrarily require the use of a lamp or lamps of a particular pattern or description, regardless of circumstances. This general subject, however, is considered elsewhere. See also note to *Chicago v. Penna. Co.* (252 Ill. 185, 96 N. E. 833), in *Ann. Cas.* 1912D, 400, 407.

quential damages are not recoverable under the laws of the state against any other persons or corporations except railway companies.<sup>74</sup> The weight of authority is that legislation directed against railroad companies, and not against any other corpora-

<sup>74</sup> *Minneapolis &c. R. Co. v. Emmons*, 149 U. S. 364, 13 Sup. Ct. 870, 37 L. ed. 769. In the course of the opinion the court answering the contention of counsel that the statute denied to railroad companies the equal protection of the laws, said: "The answer to this is that there is no inhibition upon a state to impose such penalties for disregard of its police regulations as will insure prompt obedience to their requirements. For what injuries the party violating their requirements shall be liable, whether immediate or remote, is a matter of legislative discretion. The operating of railroads without fences and cattle-guards undoubtedly increases the danger which attends the operation of all railroads. It is only by such fences and guards that the straying of cattle running at large upon tracks can be prevented, and security had against accidents from that source; and the extent of the penalties which should be imposed by the state for any disregard of its legislation in that respect is a matter entirely within its control. It was not essential that the penalty should be confined to damages for the actual loss to the owner of cattle injured by the want of fences and guards. It was entirely competent for the legislature to subject the company to any incidental or consequential damages, such as loss of rent, the expenses of keeping watch to guard

cattle from straying upon the tracks, or any other expenditure to which the adjoining owner was subjected in consequence of failure of the company to construct the required fences and cattle guards. No discrimination is made against any particular railroad companies or corporations. All are treated alike and required to perform the same duty; and, therefore, no invasion was attempted of the equality of protection ordained by the fourteenth amendment." A state may require a railroad to furnish cars within a reasonable stipulated time for intrastate commerce not burdening interstate commerce. *Hampton v. St. Louis &c. R. Co.*, 227 U. S. 456, 33 Sup. Ct. 263, 57 L. ed. 596; *Oliver v. Chicago &c. R. Co.*, 89 Ark. 466, 117 S. W. 238. But not, ordinarily, for not furnishing cars to a shipper of interstate freight. *St. Louis &c. R. Co. v. Arkansas*, 217 U. S. 136, 54 L. ed. 698, 29 L. R. A. (N. S.) 802; *Chicago &c. R. Co. v. Hardwick Farmers' Elevator Co.*, 226 U. S. 426, 33 Sup. Ct. 174, 57 L. ed. 284, 46 L. R. A. (N. S.) 203. And since the Carmack amendment a state cannot impose a penalty for failure to pay a claim in time where the shipment is interstate. *Charleston &c. R. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 35 Sup. Ct. 715, 59 L. ed. 1137, Ann. Cas. 1916D, 333, and note. But statutes giving the consignee the right to collect



tions or persons, is not local or special, but on this point there is conflict of authority.<sup>75</sup> The reasoning of many of the cases is, we venture to say, not entirely satisfactory. It may be true that, as to matters peculiar to railroad companies which are not characteristics of any other corporation, a law applying to such companies exclusively is not special, but surely this is not true where the matter is a general one not peculiar to railroad companies. That some of the cases go too far is, as we believe, unquestionably true, but it must be said that it is not easy to draw a line between general and special statutes. So far as concerns the public duties of railroad companies there can, of course, be no reasonable controversy, for it is clear that as to such matters the legislature has power to enforce police regulations by imposing penalties for violations of law, but where the right exercised by railroad companies is a private right, and in its general character the same as that exercised by corporations generally, there is very great, if not insurmountable, difficulty in sustaining statutes which apply exclusively to railroad companies.

an attorney's fee on a claim for lost or damaged freight have been upheld. *Missouri &c. R. Co. v. Harris*, 234 U. S. 412, 34 Sup. Ct. 790, 58 L. ed. 1377, L. R. A. 1915E, 942.

<sup>75</sup> Affirming the validity of such statutes, *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. ed. 463; *Dow v. Beidelman*, 49 Ark. 455, 5 S. W. 297, 31 Am. & Eng. R. Cas. 14; *Jacksonville &c. R. Co. v. Prior*, 34 Fla. 271, 15 So. 760; *Peoria &c. R. Co. v. Duggan*, 109 Ill. 537, 50 Am. Rep. 619, 20 Am. & Eng. R. Cas. 489; *Burlington &c. R. Co. v. Dey*, 82 Iowa 312, 48 N. W. 98, 112 L. R. A. 436, 31 Am. St. 477, 45 Am. & Eng. R. Cas. 391; *Kansas Pac. R. Co. v. Mower*, 16 Kans. 573; *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280; *Perkins v.*

*St. Louis &c. R. Co.*, 103 Mo. 52, 15 S. W. 320, 11 L. R. A. 426; *Illinois Central R. Co. v. Crider*, 91 Tenn. 489, 19 S. W. 618, 56 Am. & Eng. R. Cas. 157; *Gulf &c. R. Co. v. Ellis*, 87 Tex. 19, 26 S. W. 985, 61 Am. & Eng. R. Cas. 357. Denying the validity of such statutes, *Zeigler v. South &c. R. Co.*, 58 Ala. 594; *South &c. R. Co. v. Morris*, 65 Ala. 193; *Smith v. Louisville &c. R. Co.*, 75 Ala. 449; *St. Louis &c. R. Co. v. Williams*, 49 Ark. 492; *Missouri &c. R. Co. v. State*, 92 Ark. 1, 121 S. W. 930, 31 L. R. A. (N. S.) 861, and other cases there cited in note; *Madison &c. R. Co. v. Whiteneck*, 8 Ind. 217; *Indiana &c. R. Co. v. Gapen*, 10 Ind. 292; *Wilder v. Chicago &c. R. Co.*, 70 Mich. 382, 38 N. W. 289; *Schut v. Chicago &c. R. Co.*, 70 Mich. 433, 38 N. W. 291; *Chicago*

§ 786 (670). **Regulating speed of trains.**—There is no doubt that the legislature has power to make reasonable regulations as to the speed at which railroad trains shall run, and that it may confer power upon the municipalities of the state to make and enforce such regulations. We think that municipal ordinances may be so unreasonable as to authorize the courts to adjudge them ineffective.<sup>76</sup> Upon the same principle on which schedules of rates fixed by railroad commissioners are held unreasonable and ineffective, ordinances of municipal corporations may be adjudged invalid if their effect is clearly and surely to practically disable a railroad company from properly discharging its public duties. But many ordinances prescribing a very low rate of speed have been upheld.<sup>77</sup>

§ 787 (670a). **Stopping trains at highway crossings.**—Statutes and municipal ordinances have been enacted in some jurisdictions requiring railroad trains to be brought to a full stop on approaching highway crossings. Of such enactments it has been said by one author: "It is believed that these statutes and ordinances cannot be upheld as valid police regulations unless in cases of crossings where the danger is exceptional. Railway trains could not be run at any considerable rate of speed if they were obliged to come to a full stop at every highway grade crossing. Such a statutory requirement, unless embodied in the charter of the company or in an applicatory statute existing at the time of its creation, would plainly have the effect of impairing the obligation of the contract created between the corporation and the state by

&c. R. Co. v. Moss, 60 Miss. 641; State v. Divine, 98 N. Car. 778, 4 S. E. 477. See generally Calder v. Bull, 3 Dall. (U. S.) 386, 388, 1 L. ed. 648; Gordon v. Winchester, 12 Bush. (Ky.) 110, 23 Am. Rep. 713; Van Zant v. Waddel, 2 Yerg. (Tenn.) 260; Wally's Heirs v. Kennedy, 2 Yerg. (Tenn.) 554, 24 Am. Dec. 511; Janes v. Reynolds, 2 Tex. 250; Bull v. Conroe, 13 Wis. 233, 244; Durkee v. Janesville, 28 Wis. 464, 9 Am. Rep. 500.

<sup>76</sup> Evison v. Chicago &c. R. Co., 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434; Meyers v. Chicago &c. R. Co., 57 Iowa 555, 10 N. W. 896, 42 Am. Rep. 50, 7 Am. & Eng. R. Cas. 406; Burg v. Chicago &c. R. Co., 90 Iowa 106, 57 N. W. 680, 48 Am. St. 419, 60 Am. & Eng. R. Cas. 159.

<sup>77</sup> See ante § 701, last note; post § 1431. See also generally as to power of municipality to pass such ordinances implied from general provisions. Cincinnati &c. Ry. Co.

the grant of its franchises by the state and their acceptance by the incorporators. It would be destructive of its business, and, as business is property, it would hence operate to deprive it of its property without due process of law. As applied to interstate trains, it would constitute such an embargo upon interstate commerce as the commerce clause of the Constitution of the United States, according to its interpretation by the Supreme Court of the United States, has placed outside the power of the states. Aside from this, it would be an intolerable burden upon the public entitled to the benefit of rapid transit. Such provisions are more apt to be found in local municipal ordinances, whose authorities, in enacting them, look primarily to the protection of the inhabitants of the particular municipality than in general statutes enacted by legislatures which may be supposed to have some regard to the general public interest."<sup>78</sup> In one case an ordinance requiring railroad companies crossing specified streets of the city to first come to a full stop was held to operate unreasonably against a particular company, where its road was the only one crossing these streets, and there were other streets more frequented by travelers which were crossed by the roads of other companies, and no similar restriction was placed on such roads.<sup>79</sup> But statutes requiring speed to be checked on approaching a crossing have been upheld.<sup>80</sup>

**§ 788 (670b). Fencing tracks.**—The cases show that railroad companies have frequently sought to avoid the additional burden

v. Commonwealth, 126 Ky. 712, 104 S. W. 771, 17 L. R. A. (N. S.) 561, and cases there cited in note. And see as to private action for violation of statute or ordinance as to speed, *Leathers v. Blackwell's &c. Co.*, 144 N. Car. 330, 57 S. E. 11, 9 L. R. A. (N. S.) 349, and cases there cited in note; *Sluder v. St. Louis Transit Co.*, 189 Mo. 107, 88 S. W. 648, 5 L. R. A. (N. S.) 186 and cases there cited in note.

<sup>78</sup> 2 Thomp. Neg. (2nd ed.) § 1899. But see as to stopping at

crossing or intersection of another road, *State v. Chicago &c. R. Co.*, 122 Iowa 22, 96 N. W. 904, 101 Am. St. 254.

<sup>79</sup> *Buffalo v. New York &c. R. Co.*, 152 N. Y. 276, 46 N. E. 496. See also *Staal v. Grand Rapids &c. R. Co.*, 57 Mich. 239, 23 N. W. 795.

<sup>80</sup> *Seaboard Air Line Ry. Co. v. Blackwell*, 143 Ga. 237, 84 S. E. 473, Ann. Cas. 1917A, 967, and note. Compare *Southern Ry. Co. v. King*, 217 U. S. 524, 30 Sup. Ct. 594, 54 L. ed. 868.

imposed upon them by statutes compelling them to fence their tracks, on the ground that their charters were contracts, the obligation of which the state legislature had no power to impair, unless the right to alter and amend was reserved. The courts have universally decided against this theory. As these statutes are in the nature of police regulations designed for the protection of the lives and property of the traveling public, there is no reason why an artificial person should not be subject to such an exercise of the police power of the sovereignty as well as natural persons.<sup>81</sup> Thus it was held in New York that a statute requiring railroad companies to construct and maintain fences with necessary and suitable gates at farm crossings was not inconsistent with the prior enactments of the charter of a company requiring it to fence its road, and permitting the adjoining landowner to erect gates at proper and convenient places, etc., and providing that they should "be kept in repair by the persons using the same;" and that, notwithstanding such charter, the company was liable for injuries consequent upon a defective

<sup>81</sup> *Missouri &c. R. Co. v. State*, 92 Ark. 1, 121 S. W. 930, 31 L. R. A. (N. S.) 861, and other authorities there cited in note; *Minneapolis &c. R. Co. v. Emmons*, 149 U. S. 364, 13 Sup. Ct. 870, 37 L. ed. 769; *Bernardi v. Northern Pac. R. Co.*, 18 Idaho 76, 27 L. R. A. (N. S.) 796, 108 Pac. 542; *Ohio &c. v. McClelland*, 25 Ill. 140; *Galena &c. R. Co. v. Crawford*, 25 Ill. 529; *Cairo &c. R. Co. v. Peoples*, 92 Ill. 97, 34 Am. Rep. 112; *Cairo &c. R. Co. v. Warrington*, 92 Ill. 157; *Indianapolis &c. R. Co. v. Townsend*, 10 Ind. 38; *Jeffersonville &c. R. Co. v. Applegate*, 10 Ind. 49; *New Albany &c. R. Co. v. Tilton*, 12 Ind. 3, 74 Am. Dec. 195; *New Albany &c. R. Co. v. Maiden*, 12 Ind. 10; *Indianapolis &c. R. Co. v. McKinney*, 24 Ind. 283; *Indianapolis &c. R. Co. v. Parker*, 29 Ind. 471; *Chicago &c. Ry. Co. v. Irons*, 38 Ind.

App. 196, 78 N. E. 207 (citing text and 3 Elliott R. R. §§ 1219, 1220); *Kansas &c. R. Co. v. Mower*, 16 Kans. 573; *Gilmore v. European R. Co.*, 60 Maine 237; *Wilder v. Maine &c. R. Co.*, 65 Maine 333; *Whittier v. Chicago &c. R. Co.*, 24 Minn. 394; *Gillam v. Sioux City &c. R. Co.*, 26 Minn. 268; *Gorman v. Pacific &c. R. Co.*, 26 Mo. 441, 72 Am. Dec. 220; *Clark v. Hannibal &c. R. Co.*, 36 Mo. 203; *Rhodes v. Utica &c. R. Co.*, 5 Hun (N. Y.) 344; *Suydam v. Moore*, 8 Barb. (N. Y.) 358; *Waldron v. Rensselaer &c. R. Co.*, 8 Barb. (N. Y.) 390; *Staats v. Hudson River R. Co.*, 4 Abb. App. Dec. (N. Y.) 287; *Nelson v. Vermont &c. R. Co.*, 26 Vt. 717, 62 Am. Dec. 614; *Thorpe v. Rutland &c. R. Co.*, 27 Vt. 141; *McCall v. Chamberlain*, 13 Wis. 640; *Blair v. Milwaukee &c. R. Co.*, 20 Wis. 254.

maintenance of the gates.<sup>82</sup> Courts generally construe these statutes to apply to corporations existing prior to their passage and as not objectionable as retrospective legislation affecting vested rights. In Massachusetts a statute clearly prospective in its terms has been held to apply only to roads thereafter to be constructed, and not to a road which had been located and partially graded before the passage of the act.<sup>83</sup>

**§ 789 (671). Grade crossings.**—The legislature of a state, in the exercise of the police power, may compel a railroad company to change a grade crossing.<sup>84</sup> It has been adjudged that a crossing

<sup>82</sup> *Staats v. Hudson River R. Co.*, 4 Abb. App. Dec. (N. Y.) 287.

<sup>83</sup> *Sterns v. Old Colony &c. R. Co.*, 1 Allen (Mass.) 493; *Baxter v. Boston &c. R. Co.*, 102 Mass. 383.

<sup>84</sup> *New York &c. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. ed. 269, citing *Woodruff v. Catlin*, 54 Conn. 277, 6 Atl. 849; *Westbrook's Appeal*, 57 Conn. 95, 17 Atl. 368; *Woodruff v. New York &c. R. Co.*, 59 Conn. 63, 20 Atl. 17; *Doolittle v. Selectmen*, 59 Conn. 402, 22 Atl. 336; *New York &c. R. Co. v. Waterbury*, 60 Conn. 1, 22 Atl. 439; *Middletown v. New York &c. R. Co.*, 62 Conn. 492, 27 Atl. 119. In the first of the cases cited the court said: "It is likewise thoroughly established in this court that the inhibitions of the constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process of law, or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals.

The governmental power of self-protection can not be contracted away, nor can the exercise of rights granted, nor the use of property be withdrawn from the implied governmental regulation in particulars essential to the preservation of the community from injury. *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. ed. 923; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. ed. 516; *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. ed. 247." See also upon the subject of the power to compel change of crossings, *Wabash R. Co. v. Defiance*, 167 U. S. 88, 17 Sup. Ct. 748, 42 L. ed. 87; *Chicago &c. R. Co. v. Nebraska*, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. ed. 948; *Boston &c. Co. v. County Commissioners*, 79 Maine 386, 10 Atl. 113; *Commonwealth v. Eastern R. Co.*, 103 Mass. 254, 4 Am. Rep. 555; *Mayor &c. of Worcester v. Norwich &c. R. Co.*, 109 Mass. 103;

at grade may be deemed a nuisance, and as such be subject to change or removal.<sup>85</sup> The cases to which we refer lay down the doctrine in very broad terms, but we suppose that, as it was not necessary in those cases to determine what limitations there are upon the power, these cases cannot be regarded as adjudging that the legislative judgment is conclusive in all cases, and entirely precludes the courts from deciding upon the validity of the statutory requirement.

§ 790 (671a). **Grade crossings, continued.**—It might seem, at first blush, that a statute requiring a railroad company to erect and maintain, at its own expense, a crossing, whenever a new highway shall be established across its tracks, would lay a burden upon the franchises conferred upon it for the public benefit without compensation, and hence impair the obligation of the contract created by the grant of its charter and its acceptance, and deprive it of its property without due process of the law. In conformity with this view, decisions are encountered to the effect that such statutes are not to be construed as applying to existing lines of road unless their language renders such a construction unavoidable;<sup>86</sup> and there are decisions to the effect that, where a highway is laid out so as to cross a railway already built, the railway company is entitled to damages for the taking of so much of its land, consisting of its right of way, for that public purpose, just as any other landlord would, under like circumstances, be entitled to damages.<sup>87</sup> But in Massachusetts and some other states a railroad company is not entitled to damages for the cost of operating the gates rendered necessary by a new crossing.<sup>88</sup>

Northampton, In re, 158 Mass. 299, 33 N. E. 568, 55 Am. & Eng. R. Cas. 31; Roxbury v. Boston &c. R. Co., 6 Cush. (Mass.) 424; State v. Wabash &c. R. Co., 83 Mo. 144, 25 Am. & Eng. R. Cas. 133; Erie R. Co. v. Board of Fire Comrs., 89 N. J. L. 57, 98 Atl. 13.

<sup>85</sup> New York &c. R. Co.'s Appeal, 58 Conn. 532, 20 Atl. 670.

<sup>86</sup> State v. Minneapolis &c. R.

Co., 39 Minn. 219, 39 N. W. 153; Tyler v. St. Joseph &c. R. Co., 43 Kans. 543, 23 Pac. 585. See also Perry Co. v. Fink, 65 Ark. 492, 47 S. W. 301. But see post § 1570.

<sup>87</sup> Chicago &c. R. Co. v. Chautauqua Co., 49 Kans. 763, 31 Pac. 736; Boston &c. R. Co. v. Cambridge, 159 Mass. 283, 34 N. E. 382.

<sup>88</sup> Boston &c. R. Co. v. Cambridge, 159 Mass. 283, 34 N. E. 382.

Opposed to the doctrine first stated is a class of decisions holding that the legislature may provide that an existing railroad company shall maintain so much of a highway, crossing its track at grade, as comes within its limits;<sup>89</sup> or that existing railroad companies shall construct and keep in repair suitable highway crossings; and this is not deemed unconstitutional as imposing a burden on the railway company that did not exist at its incorporation.<sup>90</sup> Under statutes requiring railroad companies to construct and keep in repair suitable highway crossings, it has been held the duty of the company to make such crossings with approaches, notwithstanding the highway was laid out after the railroad was built.<sup>91</sup>

**§ 791 (672). Requiring services and denying compensation.—**

It is quite clear that the legislature cannot compel a railroad company to render services without compensation. This is decided in the Railroad Commission cases and other cases referred to in the preceding section. The conclusion we affirm rests on elementary principles of constitutional law and is strongly fortified by decisions of analogous cases.<sup>92</sup> So, it has been held that a

<sup>89</sup> *Boston &c. R. Co. v. County Comrs.*, 79 Maine 386, 10 Atl. 113.

<sup>90</sup> *State v. Chicago &c. R. Co.*, 29 Nebr. 412, 45 N. W. 469.

<sup>91</sup> *State v. Chicago &c. R. Co.*, 29 Nebr. 412, 45 N. W. 469. *Chicago &c. R. Co. v. Taylor (Okla.)*, 192 Pac. 349. See also the chapter on Highway Crossings, where many other authorities are cited to the same effect, especially post § 1570, et seq. As to power of municipalities to require change of grade, see *Houston &c. R. Co. v. Dallas*, 98 Tex. 396, 84 S. W. 648, 70 L. R. A. 850, and note; also, post chapter on Railroads in Streets.

<sup>92</sup> *Georgia &c. R. Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. ed. 377; *Ruggles v. Illinois*, 108 U. S. 526, 2 Sup. Ct. 832, 27 L. ed.

812; *Roberts v. Northern Pacific R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. ed. 873; *Northern Pac. R. Co. v. North Dakota*, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. ed. 735, Ann. Cas. 1916A, 1; *Mercantile Trust Co. v. Texas &c. R. Co.*, 51 Fed. 529; *Connecticut &c. R. Co. v. County Comrs.*, 127 Mass. 50, 34 Am. Rep. 338; *Drury v. Midland &c. R. Co.*, 127 Mass. 571; *Wynehamer v. People*, 13 N. Y. 378. See *Rippe v. Becker*, 56 Minn. 100, 57 N. W. 331, 22 L. R. A. 857; *Van-horne v. Dorrance*, 2 Dall. (U. S.) 304, 1 L. ed. 391; *State v. Beackmo*, 8 Blackf. (Ind.) 246; *Evison v. Chicago &c. R. Co.*, 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434; *State v. Billings*, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. 524; *Eaton v.*

statute requiring railroad companies to furnish free transportation to shippers of livestock, without any compensation therefor, is void as a deprivation of property without due process of law, and as a denial of the equal protection of the laws.<sup>93</sup> Under the form of regulating the compensation for transporting freight and passengers the legislature cannot compel a railroad corporation to carry freight and passengers unless compensation is adequately provided. In our opinion the legislature has no power to require a railroad company to carry freight or passengers without compensation in money, and cannot substitute for money property or claims against some other company or person.<sup>94</sup> There may be, and probably is, an exception to the general rule that compensation must be made in money, and that is where the sovereign requires the services, for there is authority for holding that, where the sovereign takes property, it need not pay the compensation at the time.

**§ 792 (673). Federal corporation—State cannot transform into a domestic corporation.**—It is beyond the power of a state to transform a corporation created by the federal congress into a state corporation.<sup>95</sup> In the cases referred to in the note, the state

Boston &c. R. Co., 51 N. H. 504, 12 Am. Rep. 147; *Thompson v. Androscoggin &c. R. Co.*, 54 N. H. 545; *State v. Ravine &c. Com.*, 39 N. J. L. 665.

<sup>93</sup> *Atchison &c. R. Co. v. Campbell*, 61 Kans. 439, 59 Pac. 1051, 48 L. R. A. 251, 78 Am. St. 328; *Atlantic &c. Ry. Co. v. United States*, 76 Fed. 186 ("land grant" railroad). See also as to invalidity of statute compelling company to carry militia at the rate of one cent a mile, *In re Gardner*, 84 Kans. 264, 113 Pac. 1054, 33 L. R. A. (N. S.) 956. But compare *State v. Chicago &c. Ry. Co.*, 118 Minn. 380, 137 N. W. 2, 41 L. R. A. (N. S.) 524; *State v. Missouri &c. Ry. Co.*, 262 Mo. 507, 172 S. W. 35.

<sup>94</sup> The conclusion we affirm is fully sustained by the reasoning in *Attorney-General v. Old Colony R. Co.*, 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112. It certainly rests on solid principle. The decision in the case of *Reagan v. Farmers' Loan &c. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014, as it seems to us, declares the principle which we have asserted. In the case last cited the court adjudged that the decision in *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. ed. 247, did not assert a contrary doctrine.

<sup>95</sup> *Roberts v. Northern Pacific R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. ed. 873.



of Wisconsin had given its consent to a railroad company created by the United States to enter its territory, and it was held that the state had no power to enact a statute making the corporation a domestic one, and take away its status as a federal corporation, and that, notwithstanding such a statute, it remained a federal corporation, and, as such, derived its rights from the general government.<sup>96</sup> The Supreme Court of the United States, while professing to distinguish the decisions of the state court, practically denied their authority.<sup>97</sup>

<sup>96</sup> See *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. ed. 319; *Olcott v. Supervisors*, 16 Wall. (U. S.) 678, 21 L. ed. 382; *Osborn v. Bank*, 9 Wheat. (U. S.) 738, 817, 6 L. ed. 204; *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. ed. 195; *Johnson Co. v. Wharton*, 152 U. S. 252, 14 Sup. Ct. 608, 38 L. ed. 429.

<sup>97</sup> The case of *Ellis v. Northern*

*Pac. R. Co.*, 77 Wis. 114, 45 N. W. 811, was practically overruled. So also was *Whiting v. Sheboygan &c. Railroad Co.*, 25 Wis. 167, 3 Am. Rep. 30. And see further as to exemption of such corporations from state control; *California v. Cent. Pac. R. Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. ed. 150; *Barron v. Burnside*, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. ed. 915.

## CHAPTER XXVIII

### STATE RAILROAD COMMISSIONERS

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causes from state courts.

**§ 795 (674). Introductory.**—The system of governing and regulating railroads by commissions is, in most of the states, borrowed in the main from the English statutes.<sup>1</sup> The statutes enacted by the states are essentially different in matters of detail,<sup>2</sup> but all are directed to the attainment of the same general object, namely, the regulation of the duties of railroads as common carriers and the regulation of the management and control of railroads, so far as they are affected by a public interest. The power to establish such commissions is rested upon the general principle that the state has control over property and pursuits of a public nature.<sup>3</sup> It has been said that the statutes create no

<sup>1</sup> The reasons for giving the power to such a commission are well stated by Justice Brewer in *Chicago &c. Ry. Co. v. Day*, 35 Fed. 866. See also *Minneapolis &c. R. Co. v. Railroad Com., Wis.*, 116 N. W. 905, 17 L. R. A. (N. S.) 821.

<sup>2</sup> In some of these states the commissioners are little else than mere advisory officers, while in most states they have power to make orders which in their nature closely resemble judgments and to invoke the aid of the courts to compel obedience to their orders. *People v. New York &c. R. Co.*, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484, 29 Am. & Eng. R. Cas. 480; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. ed. 1047; *State v. Fremont &c. R. Co.*, 22 Nebr. 313, 35 N. W. 118; *McWhorter v. Pensacola &c. R. Co.*, 24 Fla. 417, 5 So. 129, 2 L. R. A. 504, 12 Am. St. 220,

37 Am. & Eng. R. Cas. 566; *State v. Chicago &c. R. Co.*, 38 Minn. 281, 37 N. W. 782; *Board v. Oregon &c. R. Co.*, 17 Ore. 65, 19 Pac. 702, 2 L. R. A. 195.

<sup>3</sup> *Chicago &c. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Peik v. Chicago &c. R. Co.*, 94 U. S. 164, 24 L. ed. 97; *Stone v. Farmers' &c. Trust Co.*, 116 U. S. 307, 6 Sup. Ct. 348, 388, 1191, 29 L. ed. 636; *Ruggles v. Illinois*, 108 U. S. 526, 2 Sup. Ct. 832, 27 L. ed. 812; *Stone v. Natchez &c. R. Co.*, 62 Miss. 646. See post, § 797. In *Wellman v. Chicago &c. R. Co.*, 83 Mich. 592, 47 N. W. 489, 45 Am. & Eng. R. Cas. 249, the question of the power of a state to establish a railroad commission received careful consideration. See also *Siler v. Louisville &c. R. Co.*, 213 U. S. 175, 29 Sup. Ct. 451, 53 L. ed. 753; *Cleveland City Ry. Co. v. Cleveland*, 94 Fed. 385; *Wallace v. Arkansas Cent. R. Co.*, 118 Fed.

new or additional duties,<sup>4</sup> but this statement, as applied to some of the state statutes, requires qualification. The principal and leading purpose of most of the statutes is to control and regulate the charges for the transportation of freight and passengers, but the provisions of the statutes generally go far beyond the regulation of charges for transportation and confer comprehensive powers over the maintenance, management and operation of railroads.<sup>5</sup> It is not our purpose in this chapter to treat very fully of the power of state railroad commissions to regulate the charges made by railroad companies in performing services and duties as common carriers, nor to treat of the power of the states to enact statutes relating to interstate railroads, although we shall incidentally discuss those subjects, since they naturally fall within the general scope of this chapter, but as those subjects will be considered in the part of our work devoted to a discussion of the rights, duties and liabilities of railroads as common carriers, we pass them without an extended or elaborate consideration.

§ 796 (675). **Nature of state railroad commissions.**—Governmental control of railroads in many of the states is exercised through the instrumentality of officers generally called railroad commissioners. These officers, of course, derive all their powers from the statute which creates the commission, and a railroad commission is a tribunal possessing naked statutory powers. It is not a court, although it may exercise powers of a judicial nature.<sup>6</sup> The fact that powers in their nature judicial are exer-

422; *Chicago Union Trac. Co. v. Chicago*, 199 Ill. 484, 65 N. E. 451; *Railroad Com. v. Houston &c. R. Co.*, 90 Tex. 340, 38 S. W. 750; *Atlantic Coast Line R. Co. v. Commonwealth*, 102 Va. 599, 46 S. E. 911.

<sup>4</sup> *Atchison &c. R. Co. v. Denver &c. R. Co.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. ed. 291, 16 Am. & Eng. R. Cas. 57.

<sup>5</sup> See *State v. Jacksonville Termi-*

*nal Co.*, 41 Fla. 377, 27 So. 221; *State v. Chicago &c. R. Co.*, 86 Iowa 641, 53 N. W. 323; *People v. Railroad Comrs.*, 53 App. Div. 61, 65 N. Y. S. 597, affirmed in 164 N. Y. 572, 58 N. E. 1091.

<sup>6</sup> *Interstate Commerce Com. v. Cincinnati &c. Co.*, 64 Fed. 981; *Kentucky &c. Bridge Co. v. Louisville &c. R. Co.*, 37 Fed. 567, 612. See also *Louisville &c. R. Co. v. Brown*, 123 Fed 946; *Southern Ind.*

cised by an officer, a board of officers, or by a body of officers, does not make the officer a judge, nor does it constitute the body or board a court.<sup>7</sup> The truth is that all officers who have discretionary duties to perform exercise quasi judicial power. A constable who takes a bond, a sheriff who levies a writ, or a governor who decides upon the validity of a requisition for a fugitive from justice exercises a power that is in its nature judicial, but it is not a judicial power in the same sense as the power of a court or judge. The functions and duties of railroad commissioners are administrative or ministerial, and neither legislative nor judicial. Their powers cannot be strictly legis-

R. Co. v. Railroad Com., 172 Ind. 113, 87 N. E. 966; In re Railroad Comrs., 15 Nebr. 679, 50 N. W. 276. The principle asserted in the text is laid down in the cases which hold that state tax boards and similar tribunals are not courts, although they are invested with quasi judicial power. *Langenberg v. Decker*, 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 108; *State v. Wood*, 110 Ind. 82, 10 N. E. 639; *Kuntz v. Sumption*, 117 Ind. 1, 19 N. E. 474, 2 L. R. A. 655. Compare *Commonwealth v. Atlantic &c. R. Co.*, 106 (Va.) 61, 55 S. E. 572. It is an administrative and not a judicial body. *Chicago &c. Ry. Co. v. Dougherty*, 39 S. Dak. 147, 163 N. W. 715.

<sup>7</sup> *Flournoy v. Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468; *Wilkins v. State*, 113 Ind. 514, 519, 16 N. E. 192; *Betts v. Dimon*, 3 Conn. 107; *Crane v. Camp*, 12 Conn. 463. The decisions recognize the constitutionality of the act of congress creating the federal interstate commerce commission and affirm that the powers of that tribunal are not judicial in the proper sense of the

term. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. ed. 1047. In the case last cited the decision in *Interstate Commerce Commission, Re*, 53 Fed. 476, was reversed, and it was held that the provision of the act of congress authorizing the commission to apply to the courts to punish a witness who refused to give testimony or produce documents was constitutional. The court cited the cases of *Smith v. Adams*, 130 U. S. 167, 9 Sup. Ct. 566, 32 L. ed. 895; *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, 6 L. ed. 204; *Cherokee Nation v. Southern Kans. &c. R. Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. ed. 295; *Gordon v. United States*, 117 U. S. appx. 697; *Sanborn, In re*, 148 U. S. 222, 13 Sup. Ct. 577, 37 L. ed. 429; *De Groot v. United States*, 5 Wall. (U. S.) 419, 18 L. ed. 700; *Anderson v. Dunn*, 6 Wheat. (U. S.) 204, 5 L. ed. 242; *Kilbourn v. Thompson*, 103 U. S. 168, 190, 26 L. ed. 377; *Whitcomb's Case*, 120 Mass. 118, and after commenting on those cases, said that: "The views we have expressed in the

lative, for legislative powers cannot be delegated,<sup>8</sup> nor can their powers be judicial in the proper sense of the term, for the judicial power can only be exercised by courts and judges.<sup>9</sup>

**§ 797 (676). The power to create railroad commissions.**—The power to create a board of railroad commissioners rests, as we

present case are not inconsistent with anything said or decided in those cases. They do not in any manner infringe upon the salutary principle that congress, excluding the special cases provided for in the constitution—as, for instance—in section 2 of article 2, may not impose upon the courts of the United States any duties that are not strictly judicial.” The court asserted by its line of reasoning that the commission was not a court nor its duties judicial in the proper sense of the term. See *Pacific R. Com.*, Re, 32 Fed. 241; *Interstate Commerce Com. v. Cincinnati &c. Co.*, 64 Fed. 981.

<sup>8</sup> *Cooley Const. Lim.* (6th ed.) 137; (7th ed.) 163. But see *Minneapolis &c. Co.*, In re, 30 N. Dak. 221, 152 N. W. 513. In *Chicago &c. R. Co. v. Dey*, 35 Fed. 866, the court adjudged that in creating a board of railroad commissioners and investing it with authority to regulate freight tariffs and the like the legislature did not delegate legislative powers. It is difficult to define with precision the line between legislative and ministerial power, but it is clear that where a law is enacted providing general rules for the government of officers charged with the administration of the law there is no delegation of legislative power although the officers may be invested with

authority to make rules and regulations. But see *Georgia &c. R. Co. v. Smith*, 70 Ga. 694, and see *Southern Pac. Co. v. Colorado &c. Co.*, 101 Fed. 779, to the effect that they can not fix a rate as that would be legislative. Nor can they change the rule as to the time when liability as a common carrier ceases and that of a warehouseman begins. *Jones Bros. v. Southern R. Co.*, 76 S. Car. 67, 56 S. E. 666.

<sup>9</sup> *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. ed. 1047; *United States v. Ferreira*, 13 How. (U. S.) 40, note, 14 L. ed. 42; *Hayburn's Case*, 2 Dall. (U. S.) 409, 1 L. ed. 436; *Gans*, Ex parte, 17 Fed. 471; *Allen*, In re, 19 Fed. 809; *Burgoyne v. Supervisors*, 5 Cal. 9; *Vandercook v. Williams*, 106 Ind. 345, 1 N. E. 619, 8 N. E. 113; *State v. Noble*, 118 Ind. 350, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. 143; *Van Slyke v. Trempealeau &c. Co.*, 39 Wis. 390, 20 Am. Rep. 50. See leading article in 62 Cent. L. J. 199, for a discussion of the nature of the powers of such commissioners. But compare *Interstate Com. Comrs. v. Cincinnati &c. R. Co.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. ed. 243; *Atlantic Exp. Co. v. Wilmington &c. R. Co.*, 111 N. Car. 463, 16 S. E. 393, 18 L. R. A. 393, 32 Am. St. 805.

believe, upon the principle that where rights or property are "affected with a public interest" they are subject to legislative control. Many of the cases which uphold statutes creating such boards, however, proceed upon the theory that such statutes rest upon the police power. But whatever may be the true theory as to the principle on which such statutes rest, there can be no doubt as to their validity. There is practically no diversity of judicial opinion upon the general question.<sup>10</sup>

<sup>10</sup> The federal courts have affirmed the validity of the act of congress establishing the interstate commerce commission, and the principle asserted applies to state railroad commissions. *Interstate Commerce Com. v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. ed. 1047; *Fargo v. Michigan*, 121 U. S. 230, 239, 7 Sup. Ct. 857, 30 L. ed. 890; *Kentucky &c. Co. v. Louisville &c. Co.*, 37 Fed. 567; *Interstate Commerce Com. v. Cincinnati &c. Co.*, 64 Fed. 981. The federal courts have also upheld state statutes creating boards of railroad commissioners. *Stone v. Farmers' Loan &c. Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 29 L. ed. 636; *Chicago &c. Co. v. Dey*, 35 Fed. 866, 875; *Tilley v. Savannah &c. R. Co.*, 5 Fed. 641. In the case of *Reagan v. Farmers' &c. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1015, the court said: "Passing from the question of jurisdiction to the act itself there can be no doubt of the general power of the statute to regulate the fares and freight which may be charged by railroads or other carriers, and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board created by the state for the purpose of carrying into

effect the will of the state as expressed by its legislation. *Railroad Commission Cases*, 116 U. S. 307, 6 Sup. Ct. 334, 29 L. ed. 636. No valid objection, therefore, can be made on account of the general features of this act—those by which the state has created a railroad commission and intrusted it with the duty of prescribing rates of freights and fares, as well as other regulations, for the management of the railroads of the state." In the case of *the Charlotte &c. R. Co. v. Gibbes*, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. ed. 1051, the court upheld a state statute creating a board of railroad commissioners, and, in the course of the opinion, in speaking of railroad companies, said: "Being the recipients of special privileges from the state to be exercised in the interest of the public, and assuming the obligations thus mentioned, their business is deemed affected with a public use, and to the extent of that use is subject to legislative regulation. *Georgia &c. Banking Co. v. Smith*, 128 U. S. 174, 179, 9 Sup. Ct. 47, 32 L. ed. 377" The state courts have uniformly adjudged such statutes to be valid. *State v. Chicago &c. R. Co.*, 38 Minn. 281, 37 N. W. 782; *Georgia*

§ 798 (677). Strictly judicial powers cannot be conferred upon administrative or ministerial officers.—We have elsewhere suggested that purely or strictly judicial power cannot be conferred upon railway commissioners, for they are administrative or ministerial officers. The constitutional provision relative to the separation of the departments of government is not a mere empty declaration, but is a part of the organic law, and is of great force and vigor. It forbids the blending of judicial duties and functions with those that are ministerial or administrative. In accordance with this fundamental principle it is held that the legislature has no power to invest railway commissioners with authority to define offenses and prescribe punishment.<sup>11</sup> So it has been held that a state railroad commission is not a court within the meaning of the statute forbidding the federal courts to enjoin proceedings in a state court.<sup>12</sup> It has, however, been held that a railroad commission may be constituted a court, and as such invested with judicial power.<sup>13</sup> The attention of the court

&c. R. Co. v. Smith, 70 Ga. 694, 9 Am. & Eng. R. Cas. 385; Chicago &c. R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. 278; Stone v. Yazoo &c. R. Co., 62 Miss. 607, 21 Am. & Eng. R. Cas. 6, 52 Am. Rep. 193; State v. Fremont &c. R. Co., 22 Nebr. 313, 35 N. W. 118, and 23 Nebr. 117, 36 N. W. 308; Board of R. Com. v. Oregon R. &c. Co., 17 Ore. 65, 19 Pac. 702, 2 L. R. A. 195, 35 Am. & Eng. R. Cas. 542; Charlotte &c. R. Co. v. Gibbes, 27 S. Car. 385, 4 S. E. 49, 31 Am. & Eng. R. Cas. 464; Norfolk &c. Co. v. Commonwealth, 103 Va. 289, 294, 49 S. E. 39; Winchester &c. R. Co. v. Commonwealth, 106 Va. 264, 55 S. E. 692. See also note in Ann. Cas. 1917A, 975. And this has been held even where the statute applies only to steam railroads or makes other classification. Consumers'

League v. Colorado &c. R. Co., 53 Colo. 54, 125 Pac. 577, Ann. Cas. 1914A, 1158, and other cases then cited in note; Chicago &c. R. Co. v. Railroad Com., 173 Ind. 469, 90 N. E. 1011; Southern R. Co. v. Railroad Com., 42 Ind. App. 90, 83 N. E. 721.

<sup>11</sup> State v. Gaster, 45 La. Ann. 636, 12 So. 739. The reasoning of Baxter, J., in Louisville &c. R. Co. v. Railroad Com., 19 Fed. 679, supports the doctrine of the text. See also Western Un. Tel. Co. v. Myatt, 98 Fed. 335. But, as will hereinafter appear, the general rule stated in the text has not been fully applied by some of the courts in some cases.

<sup>12</sup> Mississippi Railroad Com. v. Illinois Central R. Co., 203 U. S. 335, 27 Sup. Ct. 90, 51 L. ed. 209.

<sup>13</sup> Atlantic Express Co. v. Wilmington &c. R. Co., 111 N. Car.



in the case to which we refer does not seem to have been directed to the principle that the departments of government are separate, and that judicial power and administrative power cannot be blended and bestowed upon a board of public officers. It may possibly be that where the constitution of the state does not provide that the departments shall be separate, judicial and ministerial powers may be blended and bestowed upon a board or commission, but we believe that the principle that the departments of government are separate is fundamental and essential to the existence of a republican government,<sup>14</sup> and that no statute can be valid which violates that principle. It is, at all events, quite clear that where the state constitution requires that the departments shall be kept separate the legislature cannot unite the powers and bestow them upon a single tribunal.<sup>15</sup>

463, 16 S. E. 393, 32 Am. St. 805, citing *Durham &c. R. Co. v. Richmond &c. R. Co.*, 104 N. Car. 673, 10 S. E. 664; *Georgia R. &c. Co. v. Smith*, 70 Ga. 694. See also *State v. Wilmington &c. R. Co.*, 122 N. Car. 877, 29 S. E. 334, and an order of the commission, like a judgment, has been held binding upon the successor of the company. *Interstate Commerce Com. v. Western &c. R. Co.*, 82 Fed. 192. The cases cited do not, however, go to the question of the power to make a board of railroad commissioners a court, but to the general question of the right to regulate railroads because a public use is impressed upon them.

<sup>14</sup> *Calder v. Bull*, 3 Dall. (U. S.) 386, 1 L. ed. 648; *State v. Noble*, 118 Ind. 350, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. 143. *Sill v. Village of Corning*, 15 N. Y. 297, 303; *Alexander v. Bennett*, 60 N. Y. 204; *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567; *Mon-*

*tesquieu Spirit of the Laws*, book II, ch. 6; 1 Bryce Am. Com. 3; *Wilson Congressional Government*, 12, 36. See also 62 Cent. L. J. 199. But compare *Winchester &c. R. Co. v. Commonwealth*, 106 Va. 260, 55 S. E. 692; *Dreyer v. Illinois*, 187 U. S. 71, 23 Sup. Ct. 28, 32, 47 L. ed. 79; *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 26 Sup. Ct. 67, 53 L. ed. 150; *Minneapolis &c. R. Co.*, In re, 30 N. Dak. 221, 152 N. W. 513.

<sup>15</sup> *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377; *Randolph Ex parte*, 2 Brock. 447; *Pacific Railway Co.*, In re, 32 Fed. 241, 267; *Perkins v. Corbin*, 45 Ala. 103, 6 Am. Rep. 698; *Hawkins v. Governor*, The, 1 Ark. 570, 33 Am. Dec. 346; *Vaughn v. Harp*, 49 Ark. 160, 4 S. W. 751; *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565; *Missouri &c. Co. v. First National Bank*, 74 Ill. 217; *Wright v. Defrees*, 8 Ind. 298; *Smythe v. Boswell*, 117 Ind. 365, 20 N. E. 263, and authori-

**§ 799 (678). Granting authority to make regulations not a delegation of legislative power.**—It is sometimes difficult to clearly define the line between a delegation of legislative power and a grant of authority to perform acts which are in their nature quasi legislative, but not strictly so. The constitutional inhibition which prevents the delegation of legislative power does not prevent the grant of authority to make rules and regulations for the government of a particular subject. In creating a board of railroad commissioners and investing it with authority to make rules and regulations for the government of railroads, the legislature really enacts the law which governs the subject but intrusts to the board the execution of the law. For the law the statute must be looked to, as the commissioners cannot enact laws, although they may make reasonable rules and regulations where the authority to make such rules and regulations is expressly or impliedly conferred upon them by the statute.<sup>16</sup>

ties cited; *Turner v. Althaus*, 6 Nebr. 54; *People v. Albertson*, 55 N. Y. 50; *People v. Keeler*, 99 N. Y. 463, 52 Am. Rep. 49.

<sup>16</sup> In *Atlantic &c. Co. v. Wilmington &c. R. Co.*, 111 N. Car. 463, 16 S. E. 393, 18 L. R. A. 393, 32 Am. St. 805, the court quoted with approval from the opinion in *Georgia R. Co. v. Smith*, 70 Ga. 694, the following: "The difference between the power to pass a law and the power to adopt rules and regulations to carry the law into effect is apparent and great, and this we understand to be the distinction recognized strikingly by all the courts as the true rule in determining whether or not in such cases a legislative power is granted. The former would be unconstitutional whilst the latter would not." See *Storrs v. Pensacola R. Co.*, 29 Fla. 617, 11 So. 226; *Woodruff v. New York &c. R. Co.*, 59 Conn. 63, 20

Atl. 17; *Siler v. Louisville &c. R. Co.*, 213 U. S. 175, 29 Sup. Ct. 451, 53 L. ed. 753. In *Port Royal Min. Co. v. Hagood*, 30 S. Car. 519, 9 S. E. 686, 688, 3 L. R. A. 841, the general subject of delegation of legislative authority is considered, and it is said: "It is undoubtedly true that the legislative power can not be delegated, but it is not always easy to say what is or what is not legislative power in the sense of the principle. The Legislature is only in session for a short period each year, and during the recess can not attend to what might be called the business affairs of the state. From the necessity of the case, as well as the character of the business itself, that must be performed by agents for that purpose—such as the Railroad Commission, regents of the lunatic asylum, the state board of canvassers of elections, sinking fund commis-

**§ 800 (679). Legislature cannot authorize a railroad commission to make unjust discriminations.**—The decisions which declare that statutes are valid although they enact rules that apply only to the class of corporations known as railroad companies carry the doctrine quite as far as it can be done with reason, and, indeed, it may well be doubted if some of those decisions do not go too far. If they can be defended upon principle at all it must be upon the ground that railroad companies constitute a general distinctive class of corporations, and that for this reason there is a sufficient basis of classification. If there be no such basis of classification, and a mere naked arbitrary singling out of railway corporations and the imposition upon them of special burdens and penalties, there is, as it seems to us, an infraction of the federal constitution forbidding the denial to any person of the equal protection of the laws. For illustration, if a statute should provide that all contracts of railroad companies for the purchase or sale of lands should be stamped with a government stamp of a particular value, and should not require such a stamp from other persons, it seems to us that the constitutional provision would be violated. So, too, such a statute would, as we believe, transgress the constitutional provisions incorporated in the constitution of most of the states prohibiting the enactment of special or local laws. All things being equal, a railroad commission must, as we suppose, place all railroad companies under like con-

sion, etc. The numerous authorities cited in the argument show conclusively that while it is necessary that the law should be full and complete, as it comes from the proper law-making body, it may be, indeed, must be left to agents in one form or another to perform the acts of executive administration, which are in no sense legislative. Without incumbering this opinion with the authorities, we think the view is well stated in *Lock's Appeal*, 72 Pa. 491, 13 Am. Rep. 716. 'Then the true distinction, I conceive, is

this: the Legislature can not delegate its power to make a law, but it can make a law to delegate its power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which can not be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation.' "

ditions upon an equality and not unjustly discriminate between them.<sup>17</sup> Doubtless there may be cases where the commission may make a difference between railroad companies,<sup>18</sup> but to authorize such a course there must, in our opinion, be some substantial basis for the discrimination, for surely neither the caprices of the commissioners nor their mere arbitrary conclusions can be permitted to control where to permit such a thing would result in an unjust and groundless discrimination. In a strongly-reasoned case it is held that the legislature cannot delegate to a railroad commission the power to prescribe penalties for acts not defined and declared offenses by the legislature,<sup>19</sup> nor can

<sup>17</sup> *Chicago &c. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. ed. 841; *Dow v. Beidelman*, 49 Ark. 325, 5 S. W. 718; *Little Rock &c. R. Co. v. Hanniford*, 49 Ark. 291, 5 S. W. 294. But see *Wadley Southern R. Co. v. Georgia*, 235 U. S. 651, 35 Sup. Ct. 214, 59 L. ed. 405.

<sup>18</sup> *Louisville &c. R. Co. v. Railroad Com.*, 19 Fed. 679. See also ante § 714, n. 10.

<sup>19</sup> *Louisville &c. R. Co. v. Railroad Commission*, 19 Fed. 679, 683. It was said by Baxter, J., that: "We think the property of a citizen—and a railroad corporation is, in legal contemplation, a citizen—can not be thus imperiled by such vague, uncertain, and indefinite enactments. The corporations and persons against whom this act is directed can do nothing under it with reasonable safety. They may take counsel of the commission, act upon their advice, and honestly endeavor to conform to the statute. But if a jury before whom they may be subsequently arraigned shall, in their judgment and upon such arbitrary basis as

they are at liberty to adopt, conclude that the commissioners misadvised or that the managers of the accused railroad corporation made a mistake in regulating their charges upon a 5 per cent., instead of a 4 per cent. basis, the honesty and good faith of the accused will go for nothing, and penalty upon penalty may be added until the defendants' property shall be gradually transferred to the public. This can not be permitted. Penalties can not be thus inflicted at the discretion of a jury. Before the property of a citizen, natural or corporate, can be thus confiscated, the crime for which the penalty is inflicted must be defined by the law-making power. The legislature can not delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a 'fair and just return' on its investments, it must, in order to the validity of the law, define with reasonable certainty what would constitute such 'fair and just return.' The act under review does not do this, but leaves it to the jury to supply the omission."

the power be committed to the unlimited discretion of a jury. It has also been held that the legislature cannot lawfully authorize a commission to take entire control of the business and operation of a railroad company.<sup>20</sup>

**§ 801 (680).** Members of railroad commission are public officers.—A member of a railroad commission created by the state, whether elected by the voters of the state, or by the legislature, or appointed by the governor, is a public officer. The general rules which apply to the term, tenure, and duties of public officers apply to members of a state board of railway commissioners so far as the statute does not otherwise provide. Thus it is held that where there is a failure to elect a railroad commissioner at the time prescribed by statute the incumbent under a prior election will hold over under the general law providing that officers shall hold until their successors are elected and qualified.<sup>21</sup> The statute, it is barely necessary to suggest, governs, and to the statute recourse must be had to ascertain what are the particular rights, powers and duties of railway commissioners, but where there is no statutory provision to the contrary the general rules of law are of controlling influence.<sup>22</sup>

<sup>20</sup> Louisville &c. R. Co. v. Railroad Com., 19 Fed. 679.

<sup>21</sup> Eddy v. Kincaid, 28 Ore. 537, 41 Pac. 156; Badger v. United States, 93 U. S. 599, 23 L. ed. 991; People v. Tilton, 37 Cal. 614; Mayor v. Horn, 2 Harr. (Del.) 190; Gosman v. State, 106 Ind. 203, 6 N. E. 349; State v. Harrison, 113 Ind. 434, 16 N. E. 384, 3 Am. St. 663; Scott County v. Ring, 29 Minn. 398, 13 N. W. 181; State v. Kurtzborn, 78 Mo. 98; State v. Wells, 8 Nev. 105; Charman v. Daniel, 5 Jones (N. Car.) 444; State v. Howe, 25 Ohio St. 588, 18 Am. Rep. 321; citing State v. Simon, 20 Ore. 365, 26 Pac. 170.

<sup>22</sup> Where the statute creating a

board of railroad commissioners expressly provides that the executive council may remove members of the board from office and appoint others to fill their places and does not provide for assigning causes for the removal, the executive council may, at its discretion, remove a commissioner from office. The discretion so vested in the council can not be controlled by the courts. State v. Mitchell, 50 Kans. 289, 33 Pac. 104, 20 L. R. A. 306. As to whether a suit against the commission is a suit against the state, see Louisville &c. R. Co. v. Burr, 63 Fla. 491, 58 So. 543, 44 L. R. A. (N. S.) 189, and cases there reviewed in note.

**§ 802 (681). Qualifications of commissioners.**—The legislature, within constitutional limits, may prescribe the qualifications of the members of railway commissions. It is to the statute that recourse must be had to determine what qualifications are made requisite. The constitutional principle that no man can be a judge in his own case forbids a person who has a substantial and direct interest in questions before the commission from sitting as a member when those questions are under consideration.<sup>23</sup> There is authority, however, to the effect that the interest of one of the commissioners as a shipper of a commodity, on which the rate is reduced, will not invalidate the decision reducing the rate where the vote of this commissioner was not necessary to the decision.<sup>24</sup> It has also been held that the fact that a member of the commission had pledged himself before his election to make a certain rate will not affect the validity of a rate made in accordance with this pledge, since the real question on an inquiry of this character is solely as to the reasonableness of rates fixed.<sup>25</sup>

**§ 803 (682). Powers of railroad commissioners—Illustrative cases.**—As the powers of railroad commissioners are statutory<sup>26</sup> it is not possible to determine what effect a given decision may have in any other state than that in which it is rendered except when general principles are involved. But while the effect of a given decision cannot be accurately ascertained without an examination of the statute upon which it is based, still, the deci-

<sup>23</sup> *Dimes v. Grand Junction &c. Co.*, 3 H. L. C. 759; *Elliott Gen. Prac.* § 210. As to the nature of the interest which will disqualify, see *Sauls v. Freeman*, 24 Fla. 209, 4 So. 525, 12 Am. St. 190; *Northampton v. Smith*, 11 Metc. (Mass.) 390; *Gregory v. Cleveland &c. R. Co.*, 4 Ohio St. 675; *Sjöberg v. Nordin*, 26 Minn. 501, 5 N. W. 677; *Elliott Gen. Prac.* § 212. See also *State v. Wilson*, 121 N. Car. 425, 28 S. E. 555; and compare *Woodruff v. New York &c. R. Co.*, 59 Conn. 63, 20 Atl. 17.

<sup>24</sup> *Southern Pacific Co. v. Railroad Commissioners*, 78 Fed. 236.

<sup>25</sup> *Southern Pacific Co. v. Railroad Commissioners*, 78 Fed. 236.

<sup>26</sup> And it is held that their authority must affirmatively appear. *Railroad Com'rs v. Oregon &c. R. Co.*, 17 Ore. 65, 19 Pac. 702, 2 L. R. A. 195. That railroad commissioners have such powers only as are expressly or impliedly conferred on them by statute, see *State v. Atlantic &c. R. Co.*, 51 Fla. 578, 40 So. 875.

sions almost always illustrate some general principle or enforce some rule of statutory construction. With these prefatory suggestions we direct attention to some of the decided cases. It has been held that where there is statutory power to order a relocation of tracks near a station as the public interest may require, the board has authority in ordering one company to take the tracks of another to make it a condition of the taking of such tracks that the company taking the track shall permit the company from which they are taken to use its tracks.<sup>27</sup> The statutes usually grant to the board of commissioners power to order the location and relocation of stations,<sup>28</sup> and the decision of the board in such matters cannot be overthrown unless it is affirmatively

<sup>27</sup> *Providence &c. R. Co. v. Norwich &c. R. Co.*, 138 Mass. 277, 22 Am. & Eng. R. Cas. 493. So companies have been compelled to carry loaded cars from other lines over their own lines, *Chicago &c. R. Co. v. Iowa*, 233 U. S. 334, 34 Sup. Ct. 592, 58 L. ed. 988. And to make physical connections, *Wisconsin &c. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. ed. 194; *Grand Trunk R. Co. v. Michigan R. Co.*, 231 U. S. 457, 34 Sup. Ct. 152, 58 L. ed. 310; *Washington v. Fairchild*, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. ed. 863; *Pittsburgh &c. R. Co. v. Railroad Com.*, 171 Ind. 189, 86 N. E. 328; note in Ann. Cas. 1917E, 794. But compare *Pacific Tel. Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652.

<sup>28</sup> *State v. Railroad Comrs.*, 56 Conn. 308, 15 Atl. 756; *State v. Des Moines &c. R. Co.*, 84 Iowa 419, 49 Am. & Eng. R. Cas. 186; *State v. Kansas &c. R. Co.*, 47 Kans. 497, 28 Pac. 208, 49 Am. & Eng. R. Cas. 176; *State v. Alabama &c. R. Co.*, 67 Miss. 647, 7 So. 502; *State v.*

*Chicago &c. R. Co.*, 19 Nebr. 476, 27 N. W. 434; *State v. Fremont &c. R. Co.*, 22 Nebr. 313, 35 N. W. 118, 32 Am. & Eng. R. Cas. 426; *Board v. Oregon &c. R. Co.*, 17 Ore. 65, 19 Pac. 702, 2 L. R. A. 195, 35 Am. & Eng. R. Cas. 542; *State v. Chicago &c. R. Co.*, 12 S. Dak. 305, 81 N. W. 503, 47 L. R. A. 569. The Minnesota court has held the orders of the board conclusive. *State v. Chicago &c. R. Co.*, 38 Minn. 281, 37 N. W. 782; *Railroad &c. Co. v. Railroad &c. Com.*, 39 Minn. 231; *State v. Minneapolis &c. R. Co.*, 40 Minn. 156, 39 N. W. 150. But in so holding the court was in error. See *State v. Chicago &c. R. Co.*, 86 Iowa 304, 53 N. W. 323, 53 N. W. 253; *State v. Alabama &c. R. Co.*, 68 Miss. 653, 7 So. 502. Compare also *Louisiana &c. Ry. Co. v. State*, 85 Ark. 12, 106 S. W. 960. And the Alabama statute does not give the commission authority to order a change of location of a station. *State v. Nashville &c. R. Co.* (Ala.), 39 So. 984; *Nashville &c. R. Co. v. State*, 137 Ala. 439, 34 So. 401.

shown that it proceeded in violation of some provision of the constitution or the statute, or grossly abused the power conferred upon it. Very important powers in relation to the matter of requiring railroad companies to construct and maintain crossings are generally granted to the commissioners.<sup>29</sup> It is held that jurisdiction of applications to condemn lands may be conferred upon railroad commissioners in cases where the land is required for a depot.<sup>30</sup> Jurisdiction to compel companies to resume or continue operation of lines of railroad may be conferred upon the commissioners.<sup>31</sup> But it is held that the commissioners cannot make a palpably unreasonable requirement of a railroad company in

<sup>29</sup> *State v. Des Moines &c. R. Co.*, 84 Iowa 419, 51 N. W. 38, 49 Am. & Eng. R. Cas. 186; *Smith v. New Haven &c. R. Co.*, 59 Conn. 203, 22 Atl. 146; *Doolittle v. Selectmen*, 59 Conn. 402, 22 Atl. 336; *New York &c. R. Company's Appeal*, 62 Conn. 527, 26 Atl. 122; *Railroad Commissioners, In re*, 83 Maine 273, 22 Atl. 168; *State v. Shardlow*, 43 Minn. 524, 46 N. W. 74; *Detroit &c. R. Co. v. Probate Judge*, 63 Mich. 676, 30 N. W. 598, 28 Am. & Eng. R. Cas. 285; *State v. Chicago &c. R. Co.*, 29 Nebr. 412, 45 N. E. 469. See *Cambridge v. Railroad Commissioners*, 153 Mass. 161, 26 N. E. 241; *Fort Street &c. Co. v. State &c. Board*, 81 Mich. 248, 45 N. W. 973; *Guggenheim v. Lake Shore &c. R. Co.*, 66 Mich. 150, 33 N. W. 161, 32 Am. & Eng. R. Cas. 89. And to put in switches and interchange cars where the track of one company crosses or intersects that of another. *State v. Wrightsville &c. R. Co.*, 104 Ga. 437, 30 S. E. 891; *Burlington &c. R. Co. v. Dey*, 82 Iowa 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. 477; *Jacobson v. Wis-*

*consin &c. R. Co.*, 71 Minn. 519, 74 N. W. 893, 40 L. R. A. 389, 70 Am. St. 358. And to establish reasonable rules and rates for switching. *Railroad Com. v. Vandalia R. Co.*, 258 Ill. 397, 101 N. E. 600, Ann. Cas. 1914B, 363, and cases cited in note. An order as to rates and facilities is held valid in a recent case though made in a spirit of retaliation and though it compelled operation in part at a loss, but invalid in so far as it was unreasonable in requiring impossible facilities as to seats. *Puget Sound Trac. &c. Co. v. Reynolds*, 223 Fed. 371.

<sup>30</sup> *Jager v. Dey*, 80 Iowa 23, 45 N. W. 391, 42 Am. & Eng. R. Cas. 683. And see generally as to such statutes giving the railroad commission power in eminent domain cases. *George v. Consolidated Lighting Co.*, 87 Vt. 411, 89 Atl. 635, 52 L. R. A. (N. S.) 850, and cases cited.

<sup>31</sup> See *Winsford &c. Board v. Cheshire &c.*, L. R. 24 Q. B. D. 456; *Dickson v. Great Northern &c. R. Co.*, L. R. 18 Q. B. D. 176. See also *Hocking Val. R. Co. v. Public Utilities Com.*, 92 Ohio St. 9, 110



respect to change of stations or tracks.<sup>32</sup> Commissioners are authorized in some of the states to make and enforce orders requiring railroad companies to provide suitable reception rooms<sup>33</sup> and bulletin boards<sup>34</sup> at stations, to place flagmen at crossings,<sup>35</sup> and to require railroad companies to fence their tracks.<sup>36</sup> Authority conferred upon a board of commissioners to regulate rates does not, however, empower it to compel the opening of offices for public accommodation.<sup>37</sup> But general authority to require all common carriers to establish and maintain such public service and facilities as may be reasonable and just, and over rates of freight and passenger tariffs, has been held to authorize the regulation of the manner of using mileage tickets.<sup>38</sup>

N. E. 521, Ann. Cas. 1917B, 1154 and note. And compare *State ex rel. v. Public Service Commission*, 270 Mo. 429, 192 S. W. 958, 198 S. W. 872; *State ex rel. Corporation Com. v. Seaboard Air Line Ry. Co.*, 173 N. Car. 413, 92 S. E. 150; *State Public Utilities Com. ex rel. Cameron v. Lake Erie & W. R. Co.*, 277 Ill. 574, 115 N. E. 519.

<sup>32</sup> *State v. Des Moines &c. R. Co.*, 87 Iowa 644, 54 N. W. 461; *State v. Chicago &c. R. Co.*, 86 Iowa 304, 53 N. W. 253. See also *Louisiana &c. Ry. Co. v. State*, 85 Ark. 12, 106 S. W. 960; *Kansas City So. R. Co. v. Kaw Valley Drainage Dist.*, 233 U. S. 75, 34 Sup. Ct. 564, 58 L. ed. 857.

<sup>33</sup> *Stone v. Yazoo &c. R. Co.*, 62 Miss. 607, 52 Am. Rep. 193; *Railroad Com. Cases*, 116 U. S. 307, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191, 29 L. ed. 638.

<sup>34</sup> *Stone v. Yazoo &c. R. Co.*, 62 Miss. 607, 52 Am. Rep. 193.

<sup>35</sup> *Guggenheim v. Lake Shore &c. R. Co.*, 66 Mich. 150, 33 N. W. 161, 32 Am. & Eng. R. Cas. 89.

<sup>36</sup> *Davidson v. Michigan &c. R. Co.*, 49 Mich. 428, 13 N. W. 804, 13 Am. & Eng. R. Cas. 650. See also as to various other orders: *State Public Utilities Com. v. Atchison, T. & S. F. Ry. Co.*, 279 Ill. 194, 116 N. E. 696 (detention and disinfection of cars); *Hewitt Logging Co. v. Northern Pac. R. Co.*, 97 Wash. 597, 166 Pac. 1153; *Chicago & N. W. Ry. Co. et al. v. Dougherty*, 39 S. Dak. 147, 163 N. W. 715; *State v. Chicago, M. & St. P. Ry. Co.*, 37 N. Dak. 98, 163 N. W. 730; *Railroad Com. of Alabama v. St. Louis & S. F. R. Co.*, 195 Ala. 527, 70 So. 645; cases and notes in Ann. Cas. 1916C, 420, 1916D, 1034, 1153; 1916E, 299, 1917A, 973, 1917C, 50, L. R. A. 1916E, 748, L. R. A. 1918E, 342.

<sup>37</sup> *State v. Western Union Tel. Co.*, 113 N. Car. 213, 18 S. E. 389, 22 L. R. A. 570.

<sup>38</sup> *Railroad Com. v. Louisville &c. R. Co.*, 140 Ga. 817, 80 S. E. 327, Ann. Cas. 1915A, 1018.

§ 804 (682a). **Powers of commissioners—Other cases.**—We have not enumerated, nor shall we attempt to enumerate, all the powers granted to railroad commissioners under the various statutes. But in the last preceding section, and others which follow, are mentioned those most often granted. A few others, however, will be referred to in this section. In a very recent case it is held that the state railroad commission, under the North Carolina statute, has authority to require a railroad company to place track scales at points where the business justifies the same.<sup>39</sup> And in another case the same court held that the commission had power to require a railroad company to have a train arrive at a certain station at a certain time, so as to connect with a train on another road.<sup>40</sup> In a Louisiana case the general proposition is laid down that the authority of the commissioners is not limited to public safety or health, but extends also to matters concerning the public comfort and convenience, and they may thus require a depot to be erected at a place where the

<sup>39</sup> *North Carolina &c. Comn. v. Atlantic Coast Line R. Co.*, 139 N. Car. 126, 51 S. E. 793. But under such a statute it has been held that the commission may refuse if such scales are not reasonably necessary, and that the burden is upon the shipper petitioning for them to show such reasonable necessity. *New Mexico Wool Growers' Assn. v. Atchison &c. Ry. Co.*, 20 N. Mex. 33, 145 Pac. 1077. See also *State v. Fairchild*, 224 U. S. 510, 32 Sup. Ct. 538, 56 L. ed. 863.

<sup>40</sup> *North Carolina &c. Comn. v. Atlantic Coast Line R. Co.*, 137 N. Car. 1, 49 S. E. 191, affirmed in 27 Sup. Ct. 585. The court cited, among other cases as more or less in point, the following: *Cantrell v. Railroad*, 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656; *Gladson v. Minnesota*, 166 U. S. 430, 17 Sup. Ct. 627, 628, 41 L. ed. 1065; *Wis-*

*consin v. Jacobson*, 179 U. S. 287, 297, 21 Sup. Ct. 115, 45 L. ed. 194; *Morgan's &c. R. Co. v. Louisiana*, 109 La. Ann. 247, 33 So. 214. See also *Commonwealth v. Louisville &c. R. Co.*, 27 Ky. 497, 85 S. W. 712. The North Carolina statute is very broad, however, and the North Carolina court has been inclined to go at least as far as the law justifies upon this general subject in several cases. Orders of the commission to furnish adequate service in various respects have been upheld in many cases, and the commission has very broad powers over the subject. See *Hocking Val. R. Co. v. Public Utilities Com.*, 92 Ohio St. 9, 110 N. E. 521, Ann. Cas. 1917B, 1154 and note reviewing cases and referring to other notes. Compare also *State v. Great Northern Ry. Co.*, 130 Minn. 57, 153 N. W. 247, Ann. Cas. 1917B, 1201 and

public convenience demands it, even though the business may not be remunerative to the company at such place.<sup>41</sup> The same court has also held that the commission has power to prevent the abandonment of a spur in the use of which the public are interested.<sup>42</sup> But it is held, under the Alabama statute, the commission had no authority to order a railroad company to locate a station at a certain point, and what kind of a depot to build.<sup>43</sup> In South Dakota the statute seems to authorize the commission to compel companies connecting by intersection to so unite and connect their tracks as to permit the transfer of cars from the track of one to that of the other, but it is held that the order must not be too indefinite, and that in an action by the commission to enforce it the complaint must allege the performance of every condition precedent in the proceeding before the commission.<sup>44</sup> The equal protection of the laws is not denied by a statute prohibiting companies in the state from charging more for a shorter than for a longer haul except by permission of the railroad commissioners after special investigation, nor is the guaranty of due process of law violated by such a statute giving the commission power to make such exceptions after special investigation, and a possible interference with interstate commerce under such a statute is too remote and indirect to be regarded as an unconstitutional interference therewith.<sup>45</sup> And so, where a

note (compelling running of Sunday trains); *In re Minneapolis & C. R. Co.*, 30 N. Dak. 221, 152 N. W. 513, Ann. Cas. 1917B, 1205 and note (as to when running of daily or additional trains may be compelled).

<sup>41</sup> *Morgan's & C. R. Co. v. Railroad Com.*, 109 La. Ann. 247, 33 So. 214. See also *St. Louis & C. R. Co. v. State*, 97 Ark. 473, 134 S. W. 970; *North Carolina Corp. Com. v. State*, 151 N. Car. 447, 66 S. E. 427; *Minneapolis & C. R. Co. v. Railroad Com.*, 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821, and cases cited in note.

<sup>42</sup> *Railroad Commission v. Kan-*

*sas City & C. R. Co.*, 111 La. Ann. 133, 35 So. 487. See also *St. Louis & C. R. Co. v. State*, 99 Ark. 1, 136 S. W. 938; *Corporation Com. v. Southern R. Co.*, 153 N. Car. 559, 69 S. E. 621; *State v. Public Service Com.*, 77 Wash. 529, 137 Pac. 1057.

<sup>43</sup> *Nashville & C. R. Co. v. State*, 137 Ala. 439, 34 So. 401.

<sup>44</sup> *State v. Chicago & C. R. Co.*, 16 S. Dak. 517, 94 N. W. 406.

<sup>45</sup> *Louisville & C. R. Co. v. Kentucky*, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. ed. 298. See also *Minneapolis & C. R. Co. v. Minnesota*, 193 U. S. 53, 24 Sup. Ct. 396, 48 L. R. A. 614.

railroad company has been notified, has appeared, and has contested the matter, it has been held that the company cannot afterwards urge that an order of the commission requiring it to stop certain trains at a station deprived it of its property without due process of law.<sup>46</sup> An order of a railroad commission compelling through mail trains to stop at county seat points has been held an interference with interstate commerce where it appeared that the county seats interested were supplied with proper and adequate railway passenger facilities by means of other trains.<sup>47</sup> The Kansas statute, giving the commissioners power to hear and determine an application of a railroad company to cross the tracks of another company, is held inapplicable to a case where the applicant seeks to cross the track of a company whose line is operated entirely by electricity.<sup>48</sup> The Vermont statute authorizes the commission to investigate railroad accidents on notice, and to direct changes in the manner of operating the road where the evidence shows the necessity therefor, but the hearing to determine this matter cannot go beyond the grounds set out in the notice to the railroad company.<sup>49</sup> The railroad commissioners of Florida have been held without power to require a railroad company to transport freight from any point on its own line within the state to a destination on a connecting line, where it did not appear that it held itself out to the public to perform such services.<sup>50</sup>

**§ 805 (683). Jurisdiction of railroad commissioners.**—A board of railroad commissioners is, as we have said, a tribunal invested with quasi judicial power, so that it is not improper to apply to it the term jurisdiction. In ascertaining the jurisdiction of such a

<sup>46</sup> *Railroad Commissioners v. Atlantic &c. R. Co.*, 71 S. Car. 130, 50 S. E. 641.

<sup>47</sup> *Mississippi Railroad Commission v. Illinois Cent. R. Co.*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. ed. 209. See also post, § 2543, and compare *Hutchison v. Southern R. Co.*, 140 N. Car. 123, 52 S. E. 263.

<sup>48</sup> *Kansas City &c. R. Co. v. Rail-*

*road Commissioners*, 73 Kans. 168, 84 Pac. 755.

<sup>49</sup> *Rutland R. Co., In re*, 79 Vt. 53, 64 Atl. 233.

<sup>50</sup> *State v. Louisville &c. R. Co.*, 51 Fla. 311, 40 So. 885. See also *Northern Pac. R. Co. v. North Dakota*, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. ed. 735, Ann. Cas. 1916A, 1.

tribunal the statute creating it must always, it is obvious, be consulted, since the only jurisdiction it possesses is such as the statute confers.<sup>51</sup> We suppose that the ordinary rules which govern quasi judicial tribunals created by statute and invested with naked statutory powers govern boards of railroad commissioners, and that nothing can be intended to be within their jurisdiction which is not placed there by the statute. It is not necessary, as we believe, that the statute should expressly and explicitly define the jurisdiction of the commissioners, but it is sufficient if jurisdiction is conferred in general terms. If jurisdiction over a general subject is conferred, then authority over branches and details of that subject is conferred by necessary implication. Statutes creating railroad commissions are to be construed according to the general rules laid down for the construction of statutes, and the cardinal rule that the intention of the legislature is to be sought and enforced prevails in cases where such statutes are under consideration.<sup>52</sup> The courts will not, if their assistance is prop-

<sup>51</sup> *Railroad Comrs. v. Oregon &c. R. Co.*, 17 Ore. 65, 19 Pac. 702, 2 L. R. A. 195.

<sup>52</sup> This general rule was applied to a statute, creating a board of railroad commissioners by the supreme court of Maine in *Canadian Pacific R. Co. In re*, 87 Maine 247, 32 Atl. 863. In the course of the opinion there given it was said: "To place all railroad crossings within the limits of the state under the control of the railroad commissioners has manifestly been the paramount object of the legislation on this subject since the enactment of 1878. The several provisions in regard to the right of application, and the apportionment of the expense, enacted in different years, are of a subordinate character, and of secondary importance. They are not all conditions precedent to

the jurisdiction of the railroad commissioners in unincorporated places. The fact that all the provisions of the statute respecting the right of application, and the adjustment of the expense in the case of cities and towns, are not also applicable to unincorporated places, can not take away the jurisdiction of the railroad commissioners over the latter while there is an express provision, applicable to all crossings, authorizing an application by the railroad company, and also placing upon the company the burden of the expense. In the case of cities or towns, either the municipal officers or the railroad companies may invoke the jurisdiction of the railroad commissioners; and thereupon the expense of building the way within the limits of the railroad

erly invoked, permit a railroad commission to deal with matters not within its jurisdiction, for such tribunals are not above the law nor beyond judicial control.<sup>53</sup> Where, however, the matter is one entirely within the jurisdiction of the commission, and it is invested with discretionary powers in relation to the subject, the courts will not control the exercise of such powers although they will interfere where there is a clear abuse of those powers resulting in injury to the complainant. It has been held that a statute giving railroad commissioners supervision over railroads operated by steam impliedly denies them power over railroads operated only by electricity.<sup>54</sup>

**§ 806 (684). Jurisdiction of commission not extended by implication—General rule.**—The general rule is that the jurisdiction of a statutory tribunal will not be extended by implication except in cases where the implication necessarily arises from a consideration of the objects or language of the statute.<sup>55</sup> The rule that,

may all be imposed on the railroad company, or be apportioned between the railroad company and the town as the commissioners may determine. But with respect to ways in unincorporated places, where there are no municipal officers, the application can only be made by the parties owning or operating the railroad; and inasmuch as there is no provision for the payment or apportionment of the expense applicable to such a case, except that which places this burden on the railroad company, 'the expense of building and maintaining so much thereof as is within the limits of such railroad shall be borne by such railroad company.'"

<sup>53</sup> *Toomer v. London &c. R. Co.*, L. R. 2 Exch. Div. 450; *Southeastern R. Co. v. Railway Com.*, L. R. 6 Q. B. D. 586. See *Hall v. Lon-*

*don &c. Co.*, L. R. 17 Q. B. D. 230. In *Georgia R. Co. v. Smith*, 70 Ga. 694, the court said: "While we hold the act of October 14, 1879, constitutional and the orders of the commission valid and binding, yet we are not to be understood as holding that their powers are unlimited or beyond the legal control by the proper authorities of the state. On the contrary, we hold that the powers which have been conferred upon them are to be exercised within the legal and constitutional limitations and in such a way as not to invade the rights of others."

<sup>54</sup> *Kansas City &c. Electric R. Co. v. Railroad Com.*, 73 Kans. 168, 84 Pac. 755.

<sup>55</sup> *Beekman Street, Matter of*, 20 Johns. (N. Y.) 269; *Thatcher v. Powell*, 6 Wheat. (U. S.) 119, 5 L. ed. 221; *School Inspectors v. Peo-*

where new rights are created and new remedies prescribed, the construction of the statute creating such rights and prescribing such remedies shall be strict, is an influential one.<sup>56</sup> The Supreme Court of Oregon adjudged that the jurisdiction of the commission could not be extended by implication, but must be confined to the cases clearly placed within its jurisdiction by the statute.<sup>57</sup>

**§ 807 (685). Incidental powers of a railroad commission.**—A railroad commission, although it is a statutory tribunal, with naked statutory powers, necessarily possesses some incidental or implied powers. The implied powers are such as by necessary implication result from the principal powers granted by the statute creating the commission. It is held in accordance with this general principle that the power to make rates carries, by necessary implication, the power to ascertain what corporation

ple, 20 Ill. 525; *Keitler v. State*, 4 Greene (Iowa) 291; *Shivers v. Wilson*, 5 Harr. & John. (Md.) 130, 9 Am. Dec. 497; *Kansas City &c. R. Co. v. Campbell*, 62 Mo. 585; *Beebe v. Scheidt*, 13 Ohio St. 406; *Thompson v. Cox*, 8 Jones L. (N. Car.) 311; *Pringle v. Carter*, 1 Hill L. (S. Car.) 53; *Ryan v. Commonwealth*, 80 Va. 385. See authorities cited Elliott Gen. Prac. § 256, note. See also *Traders &c. Un. v. Philadelphia &c. R. Co.*, 1 Int. Com. Rep. 371; *Sprigg v. Baltimore &c. R. Co.*, 8 Int. Com. Rep. 443; *Transportation of Fruit, Re*, 10 Int. Com. Rep. 360.

<sup>56</sup> *Keller v. Corpus Christi*, 50 Tex. 614, 32 Am. Rep. 613; *Walker v. Burt*, 57 Ga. 20; *Willard v. Fralick*, 31 Mich. 431; *Staples v. Fox*, 45 Miss. 667; *Dent v. Ross*, 52 Miss. 188; *Bloom v. Burdick*, 1 Hill (N. Y.) 130, 37 Am. Dec. 299; *Anness v. Providence*, 13 R. I. 17; *Monk v. Jenkins*, 2 Hill Ch. (S. Car.) 9.

<sup>57</sup> *Board v. Oregon &c. Co.*, 17 Ore. 65, 19 Pac. 702, 2 L. R. A. 195. It was said by the court that: "It has for a very long time been considered the safer and better rule, in determining questions of jurisdiction of boards and officers exercising powers delegated to them by the legislature, to hold that their authority must affirmatively appear from the commission under which they claim to act. There is too strong a desire in the human heart to exercise authority, and too much of a disposition on the part of those intrusted with it to extend it beyond the design for which, and the scope within which, it was intended it should be exercised, to leave the question of its extent to inference. Should it be so left serious disturbances might arise, involving a conflict of jurisdiction, which would be highly detrimental to the community. It is not, it seems to me, requiring too much of the legislative branch of the

is in control of the line.<sup>58</sup> So, where general powers are given, they may sometimes be granted in terms broad enough to include other powers than those specifically enumerated.<sup>59</sup>

**§ 808 (686). Right of railroad companies to a hearing.**—The fundamental rule is that there is not due process of law unless a party is given an opportunity to be heard before he is subjected to a burden or deprived of property rights, and this principle applies to the proceedings of a state railroad commission. The right of a railroad company to receive reasonably remunerative

government to exact that when it creates a commission and clothes it with important functions, it shall define and specify the authority given it so clearly that no doubt can reasonably arise in the mind of the public as to its extent." See generally *Railroad Comrs.*, In re, 83 Maine 273, 22 Atl. 168; *Cambridge v. Railroad Comrs.*, 153 Mass. 161, 26 N. E. 241. And there are many other cases to the effect that the powers of a railroad commission are statutory and cannot be extended by implication beyond what may be necessary for their just and reasonable execution. *Northern Cent. R. Co. v. Laird*, 124 Md. 141, 91 Atl. 768, Ann. Cas. 1916D, 1030, and cases there cited; *New York &c. R. Co. v. Willcox*, 200 N. Y. 423, 94 N. E. 212.

<sup>58</sup> *State v. Western Union &c. Co.*, 113 N. Car. 213, 18 S. E. 389, 22 L. R. A. 570; *State v. Mason City &c. R. Co.*, 85 Iowa 516, 52 N. W. 490. In the case first cited the court held, citing *Mayo v. Western &c. Co.*, 112 N. Car. 342, 16 S. E. 1006; and *Atlantic Express Co. v. Wilmington &c. R. Co.*, 111 N. Car. 463, 16 S. E. 393, 18 L. R. A. 393, 32 Am. St. 805; that the

commission is a court, but we very much doubt the soundness of this conclusion. We do not believe that ministerial and strictly judicial duties can be conferred upon a single tribunal, nor do we believe that the legislature can make such a board or body of officers as a railroad commission a court of record, although it may confer upon such a board, as upon any board, quasi judicial powers. See, ante, § 798. As to power to investigate and require information generally, see *Railroad Commission cases*, 116 U. S. 307, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191, 29 L. ed. 636; *Chicago &c. R. Co. v. Dey*, 38 Fed. 656; *Atlantic Exp. Co. v. Wilmington &c. R. Co.*, 111 N. Car. 463, 16 S. E. 393, 18 L. R. A. 393, 32 Am. St. 805. But compare *State v. United States Express Co.*, 81 Minn. 87, 83 N. W. 465, 50 L. R. A. 607, 83 Am. St. 366.

<sup>59</sup> *State v. Atlantic Coast Line R. Co.*, 61 Fla. 799, 54 So. 900; *Commonwealth v. Louisville &c. R. Co.*, 140 Ga. 817, 80 S. E. 327, Ann. Cas. 1915A, 1018 (regulation of manner of using mileage tickets under general power).



compensation for carrying property and passengers is a property right of which it cannot be deprived, and hence it is entitled to a hearing upon the question whether rates fixed by the commission are reasonable. If there is no opportunity for a hearing before the final decision of that question there is not due process of law.<sup>60</sup> The legislature may fix the rate without a hearing before it, but it cannot take away the right to have the courts determine the reasonableness of the rate.<sup>61</sup>

**§ 809 (687). Orders of commissioners not contracts.**—The orders of a board of railroad commissioners are not contracts within the meaning of the provisions of the federal constitution prohibiting the states from enacting laws impairing the obligation of a contract. In accordance with the doctrine stated it was held by the Supreme Court of the United States that the approval of the board of commissioners of the application of a railroad company to discontinue a station did not constitute a contract, although the statute authorized the company to discontinue stations in cases where the board directed it.<sup>62</sup> Where, however, the legislature authorizes the board of commissioners to enter into a contract with a railroad company, and a contract is entered into, a consideration being yielded by the company, the state cannot by a subsequent statute impair the obligation of the contract. The state may, it seems clear, authorize a board of commissioners to make contracts, but by simply authorizing

<sup>60</sup> *Chicago &c. R. Co. v. State*, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. ed. 970; reversing *State v. Chicago &c. R. Co.*, 38 Minn. 281, 37 N. W. 782; citing *Stone v. Farmers' Loan &c. Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. ed. 636; *Minneapolis &c. R. Co. v. State*, 134 U. S. 467, 10 Sup. Ct. 473, 33 L. ed. 985; *Chicago &c. R. Co. v. State*, 134 U. S. 418, 10 Sup. Ct. 702, 33 L. ed. 970; reversing *State v. Minneapolis &c. R. Co.*, 40 Minn. 156, 41 N. W. 465; *Richmond &c. R. Co. v. Trammel*, 53 Fed.

196. See also *State v. Chicago &c. R. Co.*, 16 S. Dak. 517, 94 N. W. 406; *Wadley Southern R. Co. v. Georgia*, 235 U. S. 651, 35 Sup. Ct. 214, 217, 59 L. ed. 405, and numerous cases cited in opinion.

<sup>61</sup> *State v. Maine Cent. R. Co.*, 77 N. H. 425, 92 Atl. 837.

<sup>62</sup> *New Haven &c. R. Co. v. Hammersley*, 104 U. S. 1, 26 L. ed. 629, 2 Am. & Eng. R. Cas. 418. Compare also *Minneapolis &c. Ry. Co. v. Menasha &c. Co.*, 159 Wis. 130, 150 N. W. 411.

a board to make orders regulating charges for transporting freight and passengers, or regulating the operation of the road, the legislature does not empower the board to enter into contracts with railroad companies.

§ 810 (688). **Certificates of commissioners that rates are reasonable—Effect of.**—It has been held that the provisions of a statute making the certificate of the commissioners *prima facie* evidence that the maximum rate fixed by them is reasonable are valid.<sup>63</sup> It was also held in the case referred to that, as the statute related to matters of procedure, it took effect immediately and governed pending cases. But, as the authorities referred to

<sup>63</sup> *Chicago &c. Co. v. Jones*, 149 Ill. 361, 24 L. R. A. 141, 146, 37 N. E. 247. In the course of the opinion the court said: "It is argued that the provision of the statute making the schedule of the commissioners *prima facie* evidence that the rates therein fixed are reasonable maximum rates of charges is unconstitutional and void, not only as depriving the carriers of their property without due process of law, but as infringing upon the right of trial by jury. We do not think that this objection should be sustained. In the first place the act does not deprive the railroad corporations of the right to have a judicial determination of the reasonableness of the rates, if they are not satisfied with the schedule made by the commission. The courts are open to them for a review of the acts of the commissioners in fixing the rates of charges. In the next place, the provision is an exercise by the legislature of its undoubted power to prescribe the rules of evidence. *Commonwealth v. Williams*, 6

*Gray (Mass.)* 1; *State v. Hurley*, 54 Maine 562. Such provisions are not unusual. Cases have arisen in this state under a statute making the fact of injury caused by sparks from a locomotive passing along the road *prima facie* evidence of negligence, and no question has ever been raised as to the validity of the statute. *Pittsburgh &c. R. Co. v. Campbell*, 86 Ill. 443; *St. Louis &c. R. Co. v. Funk*, 85 Ill. 460; *Toledo &c. R. Co. v. Larmon*, 67 Ill. 68; *Rockford &c. Co. v. Rogers*, 62 Ill. 346; *Chicago &c. R. Co. v. Clam-pit*, 63 Ill. 95; *Chicago &c. R. Co. v. Quaintance*, 58 Ill. 389. Acts making tax deeds *prima facie* evidence of the regularity of the proceedings antecedent to the deed have been held to be valid. *Hand v. Ballou*, 12 N. Y. 541; *Dela-plaine v. Cook*, 8 Wis. 44; *Allen v. Armstrong*, 16 Iowa 508; *Wright v. Dunham*, 13 Mich. 414; *Gage v. Caraher*, 125 Ill. 447. See also *Williams v. German Mut. F. Ins. Co.*, 68 Ill. 387. Cases referred to by counsel, which involve the

in the preceding section show, the legislature cannot confer upon the commission power to finally fix the charges to be made for carrying freight and passengers without giving the parties a right to be heard.<sup>64</sup>

**§ 811 (689). Regulation of charges for transporting property and passengers.**—The field in which the power of railroad commissioners is best displayed and most strongly developed is that of regulating charges of railroad companies in their capacity of common carriers. Over the matter of regulating charges for the transportation of passengers and property the powers of

validity of acts providing for references to auditors or referees, and making the finding of facts by them in their reports prima facie evidence of the facts in trials before juries, will be found to be clearly distinguishable from the case at bar. The supreme court of Iowa has decided that a provision making the schedule of the commission prima facie evidence of the reasonableness of the rates of charges, as contained in the statute of that state similar to the said act of 1873, was not obnoxious to the objections here urged against it, saying: 'The provision of the statute that the rates fixed by the commissioners shall be regarded as prima facie reasonable is not of an unusual character, and was enacted in the exercise of the undoubted power of the state to prescribe rules of evidence in all proceeding under the laws of the state. The law presumes the acts of officers of the state to be rightfully done, and gives them faith accordingly. This rule is not unlike the provision of the statute complained of by the plaintiff.' *Burlington &c. R.*

*Co. v. Dey*, 82 Iowa 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. 477. See also *Chicago &c. R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599." See also *Richmond &c. R. Co. v. Trammel*, 53 Fed. 196; *State v. Minneapolis &c. R. Co.*, 80 Minn. 191, 83 N. W. 60, 89 Am. St. 514.

<sup>64</sup> *Richmond &c. R. Co. v. Trammel*, 53 Fed. 196; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014. See also *Public Service &c. Gas Co. v. Board*, 87 N. J. L. 597, 94 Atl. 634, L. R. A. 1918A, 421. And provision is usually made for giving notice of the time and place of fixing the rate. *Stone v. Farmers' &c. Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. ed. 636; *Burlington &c. R. Co. v. Dey*, 82 Iowa 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. 477. Legislation imposing outrageous penalties for failing to obey its provisions while an appeal is pending by the party to the courts to set it aside as unconstitutional is invalid. *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 715.

railway commissioners are very broad and full.<sup>65</sup> The principal restraint upon their power over that subject is that imposed by the commerce clause of the federal constitution, for that firmly prohibits any regulation of commerce between the states.<sup>66</sup> There are, of course, other constitutional restraints, some of which have already been considered, and others that will be hereafter discussed. But, as we have said, we do not intend in this chapter to do much more than incidentally treat of the power to regulate charges for transporting property and passengers, and we pass the subject without further comment except in so far as we may touch upon the subject in speaking of domestic or interstate commerce and matters therewith connected. It may be

<sup>65</sup> *Georgia Railroad & Banking Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. ed. 377; *Reagan v. Trust Co.*, 154 U. S. 413, 14 Sup. Ct. 1060, 38 L. ed. 1028, and cases cited; *Chicago &c. R. Co. v. Dey*, 38 Fed. 656; *Winsor Coal Co. v. Chicago &c. Co.*, 52 Fed. 716; *State Public Utilities Com. v. Chicago &c. R. Co.*, 275 Ill. 555, 114 N. E. 325, Ann. Cas. 1917C, 50, and note, reviewing many cases upholding statutes giving commissions power to fix rates as against various alleged constitutional objections; *Burlington &c. R. Co. v. Dey*, 82 Iowa 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. 477. See also *Charlotte &c. R. Co. v. Gibbes*, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. ed. 1051; *Matthews v. Corp. Comrs.*, 97 Fed. 400; *Coyle v. Southern R. Co.*, 112 Ga. 121, 37 S. E. 163; *Railroad Comrs. v. Wabash R. Co.*, 123 Mich. 669, 82 N. W. 526; *Railroad Comrs. v. Railroad Co.*, 22 S. Car. 220. As to charter exemption, see *Georgia Railroad & Banking Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. ed. 377; *Stone v. Yazoo*

*&c. R. Co.*, 62 Miss. 607, 52 Am. Rep. 193; *Mississippi R. Com. v. Gulf &c. R. Co.*, 78 Miss. 750, 29 So. 789.

<sup>66</sup> Among the great number of cases bearing upon this question are the following: *Cunningham v. Macon &c. R. Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 27 L. ed. 992; *Lord v. Steamship Co.*, 102 U. S. 541, 26 L. ed. 224; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. ed. 158; *Reagan v. Farmers' Loan &c. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014; *Chicago &c. Ry. Co. v. State Public Utilities Com. of Ill.*, 242 U. S. 333, 37 Sup. Ct. 173; *Pacific &c. Co. v. Board of Railroad Com.*, 18 Fed. 10; *Cutting v. Florida &c. Co.*, 46 Fed. 641; *Cuban &c. Co. v. Fitzpatrick*, 66 Fed. 63; *Council Bluffs v. Kansas City &c. R. Co.*, 45 Iowa 338, 24 Am. Rep. 773; *Bangor v. Smith*, 83 Maine 422, 22 Atl. 379; *Railroad Comrs. v. Railroad Co.*, 22 S. Car. 220; *Sternberger v. Cape Fear &c. R. Co.*, 29 S. Car. 510, 7 S. E. 836, 2 L. R. A. 105.

well, in this connection, however, to call attention to a recent case in which a company which had reorganized and reincorporated was compelled by mandamus to reduce its rates in accordance with the schedule provided in the new act, under which it was incorporated, although the old company was authorized to charge higher rates. The state court, at the suit of the railroad commission, awarded a writ of mandate on the ground that the company was estopped to question the law under which it had incorporated, and the Supreme Court of the United States affirmed the decision of the Supreme Court of the state.<sup>67</sup>

**§ 812 (690). Domestic commerce.**—The power to regulate domestic or intrastate commerce resides in the states. The states may make such regulations as they deem expedient or politic for the government of commerce within their own borders, provided that the regulations do not violate some constitutional provision. If the places from which the passengers or property are transported are within the state, and the places to which they are carried are also within the limits of the same state, the transportation being wholly therein, the commerce is domestic, and not interstate commerce, and, as domestic commerce, is subject to state control.<sup>68</sup> It has also been held that if the place from which passengers and property are transported, and the place to which they are carried, are both within the territorial limits of the state, and the carriage is continuous, then the transportation is intrastate commerce, although in course of carriage passengers or property may, on the line of transportation, pass beyond the

<sup>67</sup> *Grand Rapids &c. R. Co. v. Osborn*, 193 U. S. 17, 24 Sup. Ct. 310, 48 L. ed. 598, affirming *Comrs. of Railroads v. Grand Rapids &c. R. Co.*, 130 Mich. 248, 89 N. W. 967.

<sup>68</sup> Interstate commerce is "commerce which concerns more states than one." *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 6 L. ed. 23; *Georgia Railroad & Banking Co. v.*

*Smith*, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. ed. 377; *Louisville &c. R. Co. v. Mississippi*, 133 U. S. 587, 10 Sup. Ct. 348, 33 L. ed. 784; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. ed. 1035; *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 14 Sup. Ct. 1060, 38 L. ed. 1028; *Interstate Commerce Com. v. Cincinnati &c. R. Co.*, 4 Int. Com. Rep. 582.

borders of the state,<sup>69</sup> but this doctrine seems to be denied by the Supreme Court of the United States in a recent decision upon the subject.<sup>70</sup> To the rule that where both the place where the passengers or property are received, and the place of destination, are within the territorial limits of the same state, the commerce is usually intrastate, and subject to state regulation, there is an exception, and that exception is this: If the carriage is over the high seas, although from place to place in the same state, it is interstate commerce, and cannot be regulated by the state.<sup>71</sup> If the property has begun to move from one state to another, then commerce between the states as to that property

<sup>69</sup> *Campbell v. Chicago &c. R. Co.*, 86 Iowa 587, 53 N. W. 351, 17 L. R. A. 443; *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. ed. 672; *Seawell v. Kansas City &c. R. Co.*, 119 Mo. 224, 24 S. W. 1002. See *State v. Chicago &c. R. Co.*, 40 Minn. 267, 41 N. W. 1047, 3 L. R. A. 238; *Pacific &c. R. Co. v. Board of Railroad Comrs.*, 9 Sawy. (U. S.) 253; *Kieffer, Ex parte*, 40 Fed. 399; *Harmon v. Chicago*, 140 Ill. 374, 26 N. E. 697, 29 N. E. 732, 43 Alb. L. J. 375; *Chicago &c. R. Co. v. Jones*, 149 Ill. 361, 41 Am. St. 278, 37 N. E. 247, 24 L. R. A. 141; *Scammon v. Kansas City &c. R. Co.*, 41 Mo. App. 194; *State v. Stilsing*, 52 N. J. L. 517, 20 Atl. 65; *State v. Western &c. Co.*, 113 N. Car. 213, 18 S. E. 389, 22 L. R. A. 570, 44 Am. & Eng. Corp. Cas. 377, 18 S. E. 389; *Commonwealth v. Lehigh Valley &c. R. Co.* (Pa. St.), 17 Atl. 179; *Fort Worth &c. R. Co. v. Whitehead*, 6 Tex. Civ. App. 595, 26 S. W. 172. The business of soliciting freight and passengers for interstate railroads is interstate commerce. *McCall v. California*,

136 U. S. 104, 10 Sup. Ct. 881, 34 L. ed. 391, 42 Alb. L. J. 42. The case of *Sternberger v. Cape Fear &c. R. Co.*, 29 S. Car. 510, 7 S. E. 836, 2 L. R. A. 105, has been thought to be overruled by the decision in *Lehigh Valley Co. v. Pennsylvania*, *supra*, in so far at least as it holds that where there is continuous carriage from point to point within the same state, the commerce is interstate if in course of transit the goods or passengers are temporarily on the soil of another state. But it is cited with approval in the case referred to in the next following note.

<sup>70</sup> *Hanley v. Kansas City &c. R. Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. ed. 333, and see post § 2550.

<sup>71</sup> *Lord v. Steamship Co.*, 102 U. S. 541, 26 L. ed. 224. See the *City of Salem*, 37 Fed. 846. The decision of the Supreme Court referred in the preceding note occurs to broaden the exception and makes the transaction interstate commerce if the goods move through another state even though their final destination is in the same state from which they started.

has commenced.<sup>72</sup> And it does not cease to be interstate when the goods finally enter the state of destination, but ordinarily continues to be an interstate shipment until delivered;<sup>73</sup> so that an attempt by that state to regulate shipping charges to the consignee seems to be a regulation of interstate commerce.<sup>74</sup> It has also been held that the time and place of making transfers of articles of commerce from one interstate carrier to another cannot be regulated by a state.<sup>75</sup>

§ 813 (691). Reasonableness of freight and fare tariff of rates—How far a judicial question.—The question as to the power of the courts to set aside a schedule of charges for the transportation of property and passengers, framed either by a state legislature directly or by a board of commissioners acting under authority of a state statute, can no longer be regarded as an open one, for the power has been adjudged to exist by many decisions of the court of last resort. The question may be presented in opposing an application to enforce an order of the board, by an injunction to restrain the enforcement of an order, and in other modes. In a comparatively recent case the Supreme Court of

<sup>72</sup> *The Daniel Ball*, 10 Wall. (U. S.) 557, 19 L. ed. 999; *State v. Indiana &c. Co.*, 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579, 30 Cent. L. J. 179, 41 Alb. L. J. 187. See *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. ed. 715; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Corson v. Maryland*, 120 U. S. 502, 7 Sup. Ct. 655, 30 L. ed. 699; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 161, 31 L. ed. 790; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. ed. 346; *Greene, In re*, 52 Fed. 104; *Woodruff &c. Co. v. State*, 114 Ind. 155, 15 N. E. 814; *Delaware &c. Co. v. Commonwealth (Pa.)*, 17 Atl. 175.

<sup>73</sup> *State v. Southern Ry. Co. (Tex. Civ. App.)*, 49 S. W. 252. See also

*Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. ed. 1088.

<sup>74</sup> *McNeill v. Southern Ry. Co.*, 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. 722. See also *Interstate Stock Yd. Co. v. Indianapolis Union Ry. Co.*, 99 Fed. 472; *Central Stock Yds. Co. v. Louisville &c. R. Co.*, 118 Fed. 113.

<sup>75</sup> *Council Bluffs v. Kansas City &c. R. Co.*, 45 Iowa 338, 24 Am. Rep. 773. See *State v. Chicago &c. R. Co.*, 33 Fed. 391; *Hart v. Chicago &c. R. Co.*, 69 Iowa 485. And compare *Chicago &c. R. Co. v. Hardwick Farmers' Elevator Co.*, 226 U. S. 426, 33 Sup. Ct. 174, 57 L. ed. 284, 46 L. R. A. (N. S.) 203; note in *Ann. Cas.* 1917A, 985, 986, 992, 993.

the United States held that a railroad company, in defending an action to recover a penalty, might show that the rate fixed by the commissioners was an unreasonable one.<sup>76</sup> In the case to which we refer the railroad company was defeated, not, however, because the defense that the rate fixed was an unreasonable one might not be interposed, but because the company did not satisfactorily prove that the rate was unreasonable. The courts will decide whether the rate prescribed is or is not a reasonable one,<sup>77</sup>

<sup>76</sup> *St. Louis &c. R. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567. In that case it was said: "This court has declared in several cases that there is a remedy in the courts for relief against legislation establishing a tariff of rates, which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, especially may the courts of the United States treat such a question as a judicial one and hold such acts of legislation to be in conflict with the constitution of the United States, as depriving them of the equal protection of the laws." The court referred to the fact that in some of the states commissions were established, and said: "But there are other cases, and the present is one, where the legislature chooses to act directly on the subject by themselves establishing a tariff of rates, and prescribing penalties. In such cases there is no opportunity of resorting to a compendious remedy, such as a proceeding in equity, because there is no public functionary or commission, which can be made to respond, and, therefore, if the companies are to have any relief, it must be found in a right to raise the question of the reasonableness

of the statutory rates by way of defense to an action for the collection of the penalties." See also *Burlington &c. R. Co. v. Dey*, 82 Iowa 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. 477.

<sup>77</sup> *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. ed. 841; *Railroad Commission Cases*, 116 U. S. 307, 6 Sup. Ct. 334, 29 L. ed. 636; *Chicago &c. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. ed. 970; *Chicago &c. R. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. ed. 176; *Reagan v. Farmers' Loan &c. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014; *St. Louis &c. R. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567; *Southern Pac. Co. v. Railroad Comrs.*, 78 Fed. 236; *Dow v. Beidelman*, 49 Ark. 325, 5 S. W. 718, 31 Am. & Eng. R. Cas. 14; *Penna. R. Co. v. County of Philadelphia*, 220 Pa. St. 100, 68 Atl. 676, 15 L. R. A. (N. S.) 108; *State v. Central Vt. Ry. Co.*, 81 Vt. 463, 71 Atl. 194, 130 Am. St. 1065. But before the courts will restrain the execution of the order it must clearly appear that the rates fixed are unreasonable or unlawful. *Pennsylvania R. Co. v. Towers*, 126 Md. 59, 94 Atl. 330, Ann. Cas. 1917B, 1144.



but they will not fix the rate.<sup>78</sup> The question as to how far the courts can go is not free from difficulty, but it is quite clear that they have no power to make a tariff of rates. For this conclusion there are, at least, two reasons: (1) The power to fix rates is by law conferred upon a tribunal composed of administrative or ministerial officers; (2) The power to fix rates is a ministerial and not a judicial power, and hence cannot be exercised by the courts. The legislature cannot directly, or through the medium of commissioners, make rates so low as to deprive a railroad company of a fair and reasonable remuneration, for while there is power to regulate there is no power to deprive the company of the right to tolls, freights or fares.<sup>79</sup> It is to be understood, of course, that a state cannot enact a statute, which, within the meaning of the constitution, is a regulation of interstate commerce.

<sup>78</sup> In *St. Louis &c. R. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567, the court, after reviewing the cases, said of the case of *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1037, 38 L. ed. 1015, that: "The opinion of this court on appeal was that while it was within the power of the court of equity in such case to decree that the rates so established by the commission were unreasonable and unjust, and to restrain their enforcement it was not within its power to establish rates itself, or to restrain the commission from again establishing rates." See also *Southern Pac. Co. v. Colorado &c. Co.*, 101 Fed. 779; *Interstate Commerce Commission v. Cincinnati &c. R. Co.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. ed. 243; *Interstate Commerce Commission v. Alabama &c. R. Co.*, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. ed. 414; *St. Paul Book*

*&c. Co. v. St. Paul Gaslight Co.*, 130 Minn. 71, 153 N. W. 262, L. R. A. 1918A, 384. But see last chapter on Rate Regulation and Interstate Commerce.

<sup>79</sup> *Stone v. Farmers' Loan &c. Co.*, 116 U. S. 307, 6 Sup. Ct. 339, 388, 1191, 29 L. ed. 636; *Attorney-General v. Germantown &c. Road*, 55 Pa. St. 466; *Miller v. New York &c. R. Co.*, 21 Barb. (N. Y.) 513; *Koehler, Ex parte*, 30 Fed. 867, 21 Am. & Eng. R. Cas. 52. See also *Reagan v. Farmers' &c. Co.*, 154 U. S. 362, 367, 14 Sup. Ct. 1047, 38 L. ed. 1015; *Chicago &c. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. ed. 970; *Clyde v. Richmond &c. R. Co.*, 57 Fed. 436; *Seaboard Air Line Ry. Co. v. Railroad Com.*, 155 Fed. 792. See *Stone v. Natchez &c. R. Co.*, 62 Miss. 646; *Tilley v. Savannah &c. Co.*, 5 Fed. 641; *State v. Maine Cent. R. Co.*, 77 N. H. 425, 92 Atl. 837.

§ 814 (692). **Regulation of charges—Test of reasonableness.**—The courts have, as is evident from their opinions, been perplexed by the question as to the tests which shall be employed in determining whether tariffs of rates established by a state legislature directly, or through the instrumentality of a board of railroad commissioners, are so unreasonable as to require judicial condemnation. The matter cannot, as yet, be regarded as fully settled,<sup>80</sup> although some general principles and rules were stated by the Supreme Court in several leading cases a number of years ago, and recent cases have added others and made particular applications of them. That a tariff of rates so unreasonable as to deprive a company of fair and just remuneration is invalid has been clearly and unequivocally adjudged, but we can find no case which satisfactorily and precisely defines what constitutes an unreasonable rate. In our opinion no precise definitions can be framed, nor can any rules of much value be formulated that will fitly apply to or govern all cases. Outlines may be sketched, and general directions given, but exact rules or precise definitions cannot be safely stated. Some tests have been suggested, and, so far as concerns the particular case, they are well enough, but in some instances when it is attempted to carry the tests beyond particular cases confusion arises, and error is almost certain to result. It is safe to say that if the rates established are such as to prevent a company from making any net earnings, the act establishing such rates is invalid.

§ 815 (693). **Tariff of rates—Tests of reasonableness.**—In the preceding section we said that as yet no satisfactory test by which the question of the reasonableness of a tariff of rates can always be solved has been constructed or formulated by the courts, but there are cases which directly bear upon the general question. It has been adjudged by the Supreme Court of the United States that, whether a tariff of rates is or is not a reasonable one, is to be ascertained by its effect upon the entire system

<sup>80</sup> In the case of *Ames v. Union Pacific R. Co.*, 64 Fed. 165, Mr. Justice Brewer said: "What is the test by which the reasonableness of rates is determined? This has

not yet been fully settled. Indeed, it is doubtful whether any single rule can be laid down applicable to all cases."

or line of road, and not merely upon part of it.<sup>81</sup> The language employed in the opinion given in the case referred to is very broad, and seems to deny that the effect of a tariff of rates upon part of a road can be considered as unreasonable in any case, if the entire line within the state can, under the tariff, earn remunerative freights and fares. So, it has been held that it is not beyond the power of the commission to reduce the freight upon a particular article so long as the company is able to earn a fair profit upon the entire business, and that the burden is upon the company to impeach the action of the commission.<sup>82</sup> We venture to suggest that there may be cases where a tariff, although

<sup>81</sup> In *St. Louis &c. R. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567, the court said: "It, therefore, appears that the allegations made and the evidence offered did not cover the company's railroad as an entirety, even in the state of Arkansas, but were made in reference to that portion of the road originally belonging to the St. Louis, Arkansas and Texas Railway Company and extending from the northern boundary of Arkansas to Fayetteville in said state. In this state of facts, we agree with the supreme court of Arkansas, as disclosed in the opinion contained in the record, and which was to the effect that the correct test was the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company can not claim the right to earn a net profit from every mile, section or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some part would be unremunerative; that it would be practically

impossible to ascertain in what proportion the several parts would share with others in the expenses and receipts in which they participated; and, finally, that to the extent that injustice is to be determined by the effect of the act of the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act within the limits of the state of Arkansas." See also *Chesapeake &c. Ry. Co. v. Public Service Com.*, 242 U. S. 603, 37 Sup. Ct. 234; *Interstate Commerce Commission v. Louisville &c. R. Co.*, 118 Fed. 613; *Pensacola &c. R. Co. v. Florida*, 25 Fla. 310, 5 So. 833; *Cantrell v. Railroad*, 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656.

<sup>82</sup> *Minneapolis &c. R. Co. v. Minnesota*, 186 U. S. 257, 261, 22 Sup. Ct. 900, 902, 46 L. ed. 1151; *Southern R. Co. v. Atlanta Stove Works*, 128 Ga. 207, 57 S. E. 429; *State v. Northern Pac. R. Co.*, 19 N. Dak. 45, 120 N. W. 869, 25 L. R. A. (N. S.) 1001. But under several of the state statutes it has been held that the company must be allowed a

affecting part only of a road, might be so palpably unjust and unreasonable as to make it the duty of the courts to adjudge it ineffective. If the traffic between two towns of the same state is the principal intrastate traffic, we do not believe that the state legislature could fix the rate for transporting passengers and property so low that the company must suffer a serious loss on every passenger and all freight that it transports, even though the rates fixed for carriage on other parts of the road should be such as to leave the company reasonable net earnings, yet there are intimations in some of the decisions that render this doubtful. In the case suggested one or the other of the rates would surely be unreasonable and probably discriminatory, but we do not mean that it is necessary that the remuneration should be such as will make every "mile or section" of the road yield net earnings. To us it seems that the question must be determined largely upon the facts of each particular case and that broad general rules cannot be safely laid down. The court cannot even say that in every instance a rate which deprives investors of profit is necessarily an unreasonable one. There cannot be a rigid general rule making the fact that no profits can be realized the universal, or, indeed, even the uniform test,<sup>83</sup> although, ordinarily, the company should be allowed a fair return. It has

fair return on the state business without regard to its interstate business. *Northern Pac. R. Co. v. Keyes*, 91 Fed. 47; *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; *Interstate Commerce Commission v. Louisville &c. R. Co.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. ed. 431; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418; *State v. Seaboard Air Line R. Co.*, 48 Fla. 129, 37 So. 314. All the intrastate business, however, is to be considered even in such case. *Southern R. Co. v. McNeill*, 155 Fed. 756. Compare *Seaboard Air Line R. v.*

*Florida*, 203 U. S. 261, 27 Sup. Ct. 109, 51 L. ed. 175.

<sup>83</sup> In *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 14 Sup. Ct. 1060, 38 L. ed. 1028, the court said: "It is unnecessary to decide, and we do not wish to be understood as laying down an absolute rule, that in every case a failure to produce some profit, to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without injury to others." As a general rule

always been the rule that common carriers cannot make unreasonable charges,<sup>84</sup> and to permit them to make such charges would be to depart from long-settled law and enable such carriers to injure others; on the other hand, to compel them to do business without reaping a profit seems palpably unjust. It is no easy matter to escape from the dilemma which naturally arises from a consideration of the conflicting rights and interests. There may be, as pointed out by a distinguished federal judge,<sup>85</sup> changes of such a radical character as to make it unsafe and unjust to take as a test the right to reap profits from the business conducted by a railroad company. But a rate fixed by a state railroad commission for a particular article carried over specified railroads

the rates should be such as to allow the company a fair return on the value of what it employs for the public. *Southern Pac. R. v. Railroad Comrs.*, 78 Fed. 236; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 419, 42 L. ed. 819. But this certainly does not mean that the rate must be such as to enable every company to make a profit regardless of the amount wasted in the construction of the road or its management or the like. And it has been held that intrastate rates established for all may be reasonable and enforceable as to some of the roads and unreasonable and unenforceable as to others. *St. Louis &c. R. Co. v. Hadley*, 168 Fed. 348.

<sup>84</sup> *Chicago &c. R. Co. v. Osborne*, 52 Fed. 912.

<sup>85</sup> In *Ames v. Union Pacific R. Co.*, 64 Fed. 165, 177, Mr. Justice Brewer used this language: "If it be said that the rates be such as to secure to the owners a reasonable per cent. on the money invested it will be remembered that many things have happened to make the investment far in excess of the

actual value of the property, injudicious contracts, poor engineering, unusually high cost of material, rascality on the part of those engaged in the construction or management of the property. These and many other things, as is well known, are factors which have largely entered into the investments with which many railroad properties stand charged. Now, if the public was seeking to take title to the railroad by condemnation, the present value of the property and not the cost is that which they would have to pay. In like manner, it may be argued that, when the legislature assumes the right to reduce, the rates so reduced can not be adjudged unreasonable if, under them, there is earned by the railroad company a fair interest on the actual value of the property. It is not easy to always determine the value of railroad property, and if there is no other testimony in respect thereto, than the amount of stocks and bonds outstanding, or the construction account, it may be fairly assumed that one or the

will not be held a deprivation of the property of such railroads without due process of law, even if the total receipts from local freight rates are insufficient to meet what can properly be cast as a burden upon that particular form of transportation, where, so far as evidence shows, the regulations can have no other effect than to make the rates the same as those obtaining generally in the state.<sup>86</sup> A railroad company claiming that a rate violates the fourteenth amendment of the Constitution must show the cost of transportation, the amount of the specified article transported, and the effect which the rate established by the commission will have upon its income.<sup>87</sup> A rate which is not sufficient to pay the costs of service seems an unreasonable one,<sup>88</sup> yet under some of the decisions of the Supreme Court of the United States this may not render it invalid if from its total receipts the company will get a fair return above operating and

other of these represents it, and computation as to the compensatory quality of rates may be based on such amounts. In the cases before us, however, there is abundant testimony that the cost of reproducing these roads is less than the amount of the stock and bond account, or the cost of construction and that the present value of the property is not accurately represented by either the stocks and bonds, or the original construction account. Nevertheless, the amount of money that has gone into the railroad property—the actual investment, as expressed, theoretically, at least, by the amount of stocks and bonds—is not to be ignored, even though such sum is far in excess of the present value.”

<sup>86</sup> *Seaboard Air Line R. Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. 109, 51 L. ed. 175.

<sup>87</sup> *Seaboard Air Line R. Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. 108, 51 L. ed. 175.

<sup>88</sup> In the case of *Clyde v. Richmond &c. R. Co.*, 57 Fed. 436, 440, this language was used: “The question in the case under discussion is, is this rate recently established by the respondents, be it a change of rate or a new classification, just and reasonable? Mr. Justice Brewer, while on the circuit bench, defines what are just and reasonable rates, or rather states what rates are not just and reasonable. ‘A schedule of rates, when the rates prescribed do not pay the costs of service, can not be enforced.’” *Chicago &c. v. Becker*, 35 Fed. 883. In another case (*Chicago &c. R. Co. v. Dey*, 35 Fed. 866) he enters into an elaborate illustration of those terms. “When the rates prescribed will not pay some compensation to the owners, then it is the duty of the courts to interfere, and protect the companies from such rates.” He defines “compensation” to mean, enough to pay costs of service, fixed charges of interest,

other reasonable expenses and charges.<sup>89</sup> The state cannot require any person, artificial or natural, to render service without receiving in return the cost of the service, since that would be to deprive such person of property without compensation, but it may be that this principle does not prevent an unremunerative rate as to a particular part of the service where the service is properly remunerative as an entirety, and, in any event, we suppose that if the company, by its own fault or wrong, increases the costs of service beyond that which, if there were no wrong, would be the actual cost, it cannot be heard to say that the rate established is unreasonable because less than the cost of service. We think that when the courts speak of the costs of the service they must mean such costs as are incurred in the good faith conduct and management of the business. If, for instance, extravagant and unreasonable salaries are paid to officers they could not, as we conceive, be justly considered in determining the costs of service, but if the salaries were paid in good faith, and were not palpably beyond reason, they may justly be regarded as part of

and a dividend however small. See *Interstate Commerce Commission v. Union Pac. R. Co.*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. ed. 308; *Northern Pac. R. Co. v. North Dakota*, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. ed. 735, Ann. Cas. 1916A, 1; *Norfolk &c. R. Co. v. Conley*, 236 U. S. 605, 35 Sup. Ct. 437, 59 L. ed. 745; *Chicago &c. R. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417; *Tilley v. Savannah &c. R. Co.*, 5 Fed. 641; *Chicago &c. R. Co. v. Becker*, 35 Fed. 883; *Chicago &c. R. Co. v. Dey*, 38 Fed. 656; *Mercantile &c. Co. v. Texas &c. R. Co.*, 51 Fed. 529; *Public Service Com. v. Northern Cent. R. Co.*, 122 Md. 355, 90 Atl. 105; *Penna. R. Co. v. County of Philadelphia*, 220 Pa. St. 100, 68 Atl. 676, 15 L. R. A. (N. S.) 108.

<sup>89</sup> *Minneapolis &c. R. Co. v.*

*Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151; *Interstate Consolidated R. Co. v. Massachusetts*, 207 U. S. 79, 28 Sup. Ct. 26, 52 L. ed. 111; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. ed. 382. But compare *West Virginia Rate Cases*, 236 U. S. 605, 35 Sup. Ct. 437, 59 L. ed. 745; *North Dakota Lignite Coal Rate Cases*, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. ed. 735. It has also been held that sleeping car service may be compelled over a branch line even if the patronage thereon does not pay the cost of such service, unless it is shown that the patronage received after the car reaches the main line does not make up the deficiency. *State ex rel. Missouri Pac. R. Co. v. Atkinson*, 269 Mo. 634, 192 S. W. 86, L. R. A. 1918A, 46.

such costs. Here, again, we come to the point where general rules cannot be safely laid down, for it is manifest that what is or is not a palpably unreasonable salary must be determined from the facts of the particular case. The question as to the elements to be considered in determining the reasonableness of rates will be further considered when we come to treat of rate regulation and the interstate commerce law.<sup>90</sup>

**§ 816 (693a). Tariff of rates—Discrimination in intrastate rates.**—State railroad commissions have the power to prevent discrimination in rates by making the rate in favor of certain shippers of a commodity, in a proper case, the rate to all shippers of the same article. In a case where a low rate to a point in the state was given shippers of a certain city, receiving grain from points outside the state, and the state railroad commission had made this rate a flat rate to all shippers of grain between the two points, the Supreme Court of the United States, in a decision sustaining this action, said: "Even if a state may not compel a railroad company to do business at a loss, and conceding that a railroad company may insist, as against the power of the state, upon the right to establish such rates as will afford reasonable compensation for the services rendered, yet, when it voluntarily establishes local rates for some shippers, it cannot resist the power of the state to enforce the same rates for all. The state may insist upon equality as between all its citizens, and that equality cannot be defeated in respect to any local shipments by arrangements made with or to favor outside companies."<sup>91</sup>

<sup>90</sup> A valuable decision upon the subject of the reasonableness and basis for determining it in regard to intrastate rates, is found in the recent *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, where prior decisions of the same court are carefully reviewed, and the question as to when such legislation interferes with interstate commerce is also considered. See also notes in 15 L. R. A. (N. S.)

108, 25 L. R. A. (N. S.) 1001, and 48 L. R. A. (N. S.) 1196.

<sup>91</sup> *Alabama &c. R. Co. v. Mississippi Railroad Commission*, 203 U. S. 496, 27 Sup. Ct. 163, 51 L. ed. 289. See also *Seaboard Air Line Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. 109, 51 L. ed. 175. And compare *Texas &c. R. Co. v. U. S.*, 205 Fed. 380 (holding an intrastate rate invalid as discriminating in favor of the state and as against



**§ 817 (694). Stations—Power to order company to provide.**

—The question as to the power of a railroad commission to order a railroad company to provide new or additional stations is not free from difficulty. It is undoubtedly within the power of the legislature to authorize the commission to require railroad companies to provide reasonable facilities for receiving or discharging traffic, as well as reasonable accommodations for passengers.<sup>92</sup> But we do not believe that the commission can be invested with power to arbitrarily require a company to provide stations wherever the commission may deem necessary, where it is not in fact necessary and would not pay, although

cities of other states). Before an order for joint rates should be made under the Indiana statute, it must be shown that it will benefit the shipping public and not merely the railroad. *Indiana Harbor & C. R. Co. v. Public Service Com. (Ind.)*, 121 N. E. 540; *Chicago & C. R. Co. v. Public Service Com. (Ind.)*, 121 N. E. 276.

<sup>92</sup> *Southeastern & C. R. Co. v. Railroad Comrs.*, 3 Nev. & Mac. 464, L. R. 6 Q. B. D. 586; *Commonwealth v. Eastern R. Co.*, 103 Mass. 254, 4 Am. Rep. 555; *Railroad Commissioners v. Portland & C. R. Co.*, 63 Maine 269, 18 Am. Rep. 208; *State v. Kansas City & C. R. Co.*, 32 Fed. 722. See *Northern Pacific & C. R. Co. v. Territory*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. ed. 1092, 48 Am. & Eng. R. Cas. 475; *Texas & C. R. Co. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. ed. 385, 42 Am. & Eng. R. Cas. 637; *St. Louis & C. Ry. Co. v. Bellamy*, 113 Ark. 384, 169 S. W. 322, L. R. A. 1915D, 91, and note; *People v. Chicago & C. R. Co.*, 130 Ill. 175, 22 N. E. 857; *Mobile & C. R. Co. v.*

*People*, 132 Ill. 559, 24 N. E. 643, 22 Am. St. 556, 42 Am. & Eng. R. Cas. 671; *State v. Alabama & C. Co.*, 68 Miss. 653, 9 So. 469, 50 Am. & Eng. R. Cas. 14; *Town of Emery v. Chicago & C. Ry. Co.*, 39 S. Dak. 334, 164 N. W. 108. And compare *State v. Wabash & C. R. Co.*, 83 Mo. 144, 25 Am. & Eng. R. Cas. 133; *State v. Kansas City & C. R. Co.*, 32 Fed. 722; *State v. New Haven & C. R. Co.*, 43 Conn. 351; *Florida & C. Co. v. State*, 31 Fla. 482, 13 So. 103, 20 L. R. A. 419, 56 Am. & Eng. R. Cas. 306; *Cunningham v. Board of Railroad Comrs.*, 158 Mass. 104, 32 N. E. 959, 56 Am. & Eng. R. Cas. 301. See also ante, § 775. The public service commission in Oklahoma may prescribe, where the order is reasonable and just, the kind of material to be used in the construction of a depot. *Chicago & C. R. Co. v. State (Okla.)*, 168 Pac. 239, L. R. A. 1918C, 492, P. U. R. 1918A, 587. See also *State v. Great Northern R. Co.*, 135 Minn. 19, 159 N. W. 1089, P. U. R. 1917B, 41; *Gulf & C. R. Co. v. State (Tex. Civ. App.)*, 167 S. W. 192.

some of the decisions go almost to that extent.<sup>93</sup> We believe that the decisions which adjudge that the legislature cannot fix rates so low as to deprive railroad companies of reasonable remuneration for carrying freight and passengers support our conclusion. We do not believe that railway commissioners can rightfully be invested with the control of a railroad, and this would be the practical effect of holding that railroad commissioners may compel railroad companies to provide stations at all points the commissioners might select. Our judgment is that the only power that the legislature can bestow upon a commission is the power to regulate, and that it cannot, under the guise of conferring power to regulate, take the control of a railroad from its owner and vest it in a board of commissioners. If it be affirmed that a railway commission may, at its own uncontrolled pleasure, order a company to provide stations, the result will be that the commission may so burden a company as to destroy its ability to earn reasonable compensation for the duties and services it performs. We do not mean to be understood as affirming that broad and comprehensive powers may not be conferred upon a railway commission, nor that such a body may not be empowered to compel railroad companies to provide stations where they are required by the public interest, but we do believe that an arbitrary power to compel railroad companies to establish stations wherever it may be the pleasure of the commissioners to locate them cannot be rightfully conferred upon a railway commission. It seems to us that there is a limit to the right to regulate, and that this limit cannot be passed without violating the constitution. It seems to us, also, that there must be a reasonable necessity for the establishment of a station in order to warrant the commission in compelling a railroad company to establish it.<sup>94</sup> Whether there is such a necessity is a matter to be determined after a hearing, and not summarily or arbitrarily. Doubtless the courts would be reluctant to overthrow the decision of the commission as to the necessity for a station, but, nevertheless, if it clearly and satis-

<sup>93</sup> See also ante, § 804.

and authorities cited in next fol-

<sup>94</sup> See *Louisiana &c. R. Co. v. State*, 85 Ark. 12, 106 S. W. 960, following note.

factorily appears that there was no such necessity, the courts would not hesitate to review, and, if need be, reverse the decision of the commissioners.<sup>95</sup> Thus, in a recent decision, the Supreme Court of Mississippi held that the statute authorizing the railroad commission to designate the location of station houses, in cases where the site selected by the railroad was inconvenient, did not give the commission power to maintain in one town two detached depôts, one for freight and one for passengers.<sup>96</sup>

**§ 818. Naming stations.**—Railroad commissioners are generally given authority in regard to most matters relating to railroad stations and their orders, while reviewable, will not be set aside unless clearly unreasonable or unjust.<sup>97</sup> Among other things, they often have authority over the naming of stations and may require the name to be changed in a proper case, but the naming of a station by the railroad company should not be interfered

<sup>95</sup> *State v. Des Moines &c. R. Co.*, 87 Iowa 644, 54 N. W. 461. In the case cited the court reversed the order of the commissioners, saying, among other things: "There is nothing in the case which tends to show that the managers of the road had any intention to deprive any one of proper facilities for transacting business with the company. The income of the road did not warrant the maintenance of extensive stations, but demanded the strictest economy. It was thought by the management that, by establishing two stations at points nearer the junction of the other roads named, the defendant would be able to control more traffic, by being nearer to the inhabitants residing in the vicinity of Osceola and Van Wert. It appears to us that the owners of the road should not be interfered with in the management of their property,

including the location of their stations, where, as in this case, there is no competent evidence that any patron of the road has been deprived of reasonable facilities for transacting business with the defendant."

<sup>96</sup> *State v. Yazoo &c. R. Co.*, 87 Miss. 679, 40 So. 263. See also *Chicago &c. R. Co. v. Nebraska State R. Com.*, 85 Nebr. 818, 124 N. W. 477, 26 L. R. A. (N. S.) 444, and note, to the effect that the question as to whether it will pay is to be considered and the order will not be upheld if unreasonable, but the cost is not the sole consideration. For order to construct new passenger depot held unreasonable, see *State ex rel. Wabash Ry. Co. v. Public Service Com.*, 271 Mo. 155, 196 S. W. 369.

<sup>97</sup> *Railroad Com. of Ala. v. North Ala. R. Co.*, 182 Ala. 357, 62 So. 749.

with when the public good does not require such interference, and an unreasonable order in that respect will not be sustained by the courts.<sup>98</sup>

**§ 819. Switching charges.**—Railroad companies as carriers engaged in a public service are subject to regulation in regard to switching charges as well as in other respects,<sup>99</sup> and it is held that when a company assumes to perform such switching services it is subject to such regulations even though the particular switching service is one which the carrier would not be bound to perform.<sup>1</sup> Thus, the Illinois railroad and warehouse commission has been held to have jurisdiction over the charges of a common carrier for switching cars, “regardless of whether it can compel a carrier to perform a service without compensation or whether the law compels a carrier to send its cars upon the tracks of another road.”<sup>2</sup> Such charges are generally made by a flat rate per car and the services are local and usually independent, and it has been held that they are to be considered by themselves in determining their reasonableness rather than in connection with the through charge.<sup>3</sup> But it has also been held that a switching company, though operating locally, is an instrumentality of interstate commerce when switching cars containing freight in interstate transit.<sup>4</sup>

**§ 820 (695). Procedure before the commissioners.**—The procedure in matters brought before a board of commissioners is so much a matter of statutory or local regulation that general rules cannot be safely stated. It seems to us that, even in the absence of statutory provisions requiring it, the board should

<sup>98</sup> *Missouri &c. R. Co. v. State*, 25 Okla. 437, 106 Pac. 858; *State v. Railroad Com.*, 69 Wash. 523, 125 Pac. 953, Ann. Cas. 1914A, 830.

<sup>99</sup> *Railroad &c. Com. v. Vandalia R. Co.*, 258 Ill. 397, 101 N. E. 600, Ann. Cas. 1914B, 363; *Kansas City So. R. Co. v. Rosebrook &c. Grain Co.* (Tex. Civ. App.), 114 S. W. 436.

<sup>1</sup> *State v. Atlantic Coast Line R. Co.*, 59 Fla. 612, 52 So. 4; *Norfolk*

*&c. R. Co. v. Commonwealth*, 103 Va. 289, 49 S. E. 39.

<sup>2</sup> *Railroad &c. Com. v. Vandalia R. Co.*, 258 Ill. 397, 101 N. E. 600, Ann. Cas. 1914B, 363.

<sup>3</sup> *Interstate Commerce Com. v. Stickney*, 215 U. S. 98; 30 Sup. Ct. 66, 54 L. ed. 112.

<sup>4</sup> *United States v. Union Stock Yds. &c. Co.*, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. ed. 226. A general

make a record of its proceedings, since it is implied in the manner of its organization and the object for which it was organized that it shall act as a board and put its proceedings on record.<sup>5</sup> It is probably not necessary unless so required by statute to keep a regular and formal record, such as is kept by a court, but there should be such a written record of the proceedings as can be used as an instrument of evidence. It has been held that the commissioners may proceed without a petition or complaint, and this, we suppose, is true where there is no statute requiring the filing of a written petition, application, or complaint.<sup>6</sup> It is competent for the commissioners to make reasonable rules and regulations governing matters of procedure, but they cannot, of course, rightfully adopt rules or regulations which are in conflict with the rules of law.<sup>7</sup> Authority to adopt and enforce rules and regulations is implied from the grant of power to hear and determine. The object and purpose being specified, the authority to effect that object and carry into effect that purpose necessarily carries the incidental authority to adopt appropriate and reasonable means for accomplishing the object for which the board was created. It seems to us that there must be notice, at least as to some matters, for without notice the interested parties are deprived of their right without such a hearing as due process of

regulation of switching charges by a state railroad commission will usually be construed, however, as applying only to cars in intrastate transit. *Chicago &c. R. Co. v. Railroad Com.*, 175 Ind. 630, 95 N. E. 364.

<sup>5</sup> *State v. Chicago &c. R. Co.*, 86 Iowa 642, 53 N. W. 323; *Boston &c. Co. v. Nashua &c. Co.*, 157 Mass. 258, 31 N. E. 1067.

<sup>6</sup> *State v. Chicago &c. R. Co.*, 86 Iowa 642, 53 N. W. 323, 55 Am. & Eng. R. Cas. 487. But see *Boston &c. Co. v. Nashua &c. Co.*, 157 Mass. 258, 31 N. E. 1067. Strictness of pleading is not required and the commission may frame its or-

ders as the case may require, irrespective of the relief asked for in the petition. *Southern R. Co. v. Railroad Com.*, 42 Ind. App. 90, 83 N. E. 721. And the rules of evidence are not strictly applied as they are in actions between private parties. *Interstate Com. Com. v. Baird*, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. ed. 860.

<sup>7</sup> *Atlantic &c. Co. v. Wilmington &c. R. Co.*, 111 N. Car. 463, 16 S. E. 393, 18 L. R. A. 393, 32 Am. St. 805, 55 Am. & Eng. R. Cas. 498. See also *Southern Ind. R. Co. v. Railroad Com.*, 172 Ind. 113, 87 N. E. 966.

law requires that they should have.<sup>8</sup> It has been held that notice of the official action of the board of commissioners, given by its secretary in response to a telegram of a party interested in and affected by its decision, is binding upon the board.<sup>9</sup> We suppose, however, that, as a rule, the board is not bound by the action of its secretary or by any individual action, but that it is bound where the facts or circumstances are sufficient to authorize the inference that he acted as its representative. It is held in an English case that commissioners have no authority to compel a railroad company to pay costs of a petitioner whose petition is denied.<sup>10</sup>

**§ 821 (696). Effect of the decision of the commissioners that a company has not committed an act authorizing a forfeiture.—** It has been held by the Court of Appeals of New York that, as

<sup>8</sup> See *State v. Chicago &c. R. Co.*, 16 S. Dak. 517, 94 N. W. 406; *Interstate Com. Com. v. Louisville &c. R. Co.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. ed. 431; *Farmers Elevator Co. v. Chicago &c. Ry. Co.*, 266 Ill. 567, 107 N. E. 841; *Business Men's Assn. v. Chicago &c. R.*, 2 Int. Com. Rep. 48; *Central of Georgia Ry. v. Georgia R. R. Com.*, 215 Fed. 421; *Oregon R. &c. Co. v. Fairchild*, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. ed. 863. It is said, however, that in rate regulation "the notice and hearing essential in judicial proceedings, and, for peculiar reasons, in some forms of taxation, would not seem to be indispensable." *Home T. &c. Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 54, 53 L. ed. 176. Compare also *Manufacturers Light &c. Co. v. Ott*, 215 Fed. 940.

<sup>9</sup> *Chicago &c. R. Co. v. Dey*, 35 Fed. 866, 1 L. R. A. 744. In the case cited it was said: "It is insisted by the defendants that this

action was taken, not by the board, but by one commissioner acting independently, the others not consenting or being aware of the action. Upon this matter there was considerable discussion, both as to the sufficiency of the notice, the number of times publication was required, the fact of the two publications of the notice, the power of one commissioner to make the change, etc. I deem it unnecessary to consider these, nor do I express any opinion upon the rights of any other corporations than the four who united in the telegram to defendants. An official board acts through its secretary. This complainant, with others, addressed an official communication to the board. It received an answer in the regular way, one signed by the secretary as secretary. Equity and good faith forbid going behind such notification."

<sup>10</sup> *Foster v. Great Western &c. R. Co.*, L. R. 8 Q. B. D. 515.

against the state, the certificate of the board of railroad commissioners that the public interests do not require the extension of a road is conclusive, and constitutes a complete defense to an action to forfeit the charter for failure to build the road.<sup>11</sup> The decision goes very far, and seems to trench upon the rule that ministerial officers cannot be clothed with judicial power. There is, however, force and vigor in the reasoning of the court.

**§ 822 (697). Enforcing the orders of the commissioners—Generally.**—Where the commissioners have jurisdiction to make an order, and they do make a valid order upon due process of law, the courts will, upon proper application, compel compliance with it. The legislature, in conferring authority upon railroad

<sup>11</sup> *People v. Ulster &c. R. Co.*, 128 N. Y. 240, 28 N. E. 635. The court said in the course of the opinion that: "By this enactment the state has indicated in the most imperative form its will in respect to such actions. It thereby declared that the certificate of the railroad commissioners to the effect that no public interests were involved should thereafter be a conclusive answer to any attempt to annul the existence of a reorganized railroad corporation for a failure to make an extension of its road. By this act the state devolved upon the railroad commissioners the duty, previously performed by its attorney-general, of inquiring whether the public interests required it to enforce an alleged forfeiture against a reorganized railroad corporation, and necessarily thereby deprived other departments of the government of the power of determining the preliminary question upon which the action of the state in instituting and prosecuting such actions must

be founded. By leaving to another department of the state the determination of a question upon which its own action was thereafter to be controlled, it neither delegated legislative power to, or conferred judicial functions upon, such department. It simply institutes an *ex parte* inquiry to determine its own future action, as had been the uniform practice of the state government for many previous years. The question whether the public interests are involved is always a condition precedent to the right of maintaining any action by the attorney-general for the forfeiture of corporate rights, and the state by this act says that it will hereafter leave this question in certain cases to railroad commissioners to determine, instead of to the attorney-general, by whom it had theretofore been decided. In other words it has made the railroad commissioners' certificate conclusive evidence of the non-existence of any sufficient ground of forfeiture."

commissioners, impliedly grants, as we believe, a right to successfully invoke the aid of the courts to make the order effective. To hold otherwise would be, in effect, to adjudge that the orders of the commissioners are mere empty declarations, without force or effect. If the statute gives a right there must be a remedy, for the existence of a right implies the existence of a remedy. If a right is given, and no specific remedy is provided, then the courts will enforce the right by the appropriate remedy. A statute does not stand alone, detached and isolated from other statutes, or other rules of law, but takes its place as part of a uniform system of law.<sup>12</sup> It is aided by other statutes and by the recognized rules of law, and to give it force and effect other statutes and the general rules of law may be considered and applied. The general rule is that where a new right is created and no remedy provided the courts will enforce the right by means of the appropriate remedy. If the remedy be in equity, then the right may be enforced by the appropriate suit in equity; if the remedy be at law, then by the proper action.<sup>13</sup> The constitution of Louisiana has been held to give the commissions of that

<sup>12</sup> *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788; *Rushville &c. Co. v. Rushville*, 121 Ind. 206, 213, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. 388, and cases cited; *Hyland v. Brazil &c. Co.*, 128 Ind. 335, 341, 26 N. E. 672.

<sup>13</sup> This principle is strikingly illustrated by the cases which hold that where a state statute creates a right the federal courts will enforce it by means of the remedy which, by the rules of those courts, is the appropriate one. *Fitch v. Creighton*, 24 How. (U. S.) 159, 16 L. ed. 596; *Clark v. Smith*, 13 Pet. (U. S.) 195, 10 L. ed. 123; *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. ed. 52. See also *Tift v. Southern R. Co.*, 123 Fed. 789. But compare *Knapp v. Lake Shore &c. R. Co.*, 197 U. S. 536, 25 Sup. Ct.

*R. 538*, 49 L. ed. 870. While railroads are under federal control as a war measure, the state courts would not attempt to enforce an order of the state railroad commissioners requiring the construction of a connecting track. *Commercial Club v. Chicago &c. Ry. Co. (S. Dak.)*, 170 N. W. 149. And it has been held that there is no remedy by mandamus or other judicial proceedings where the statute makes no provision for enforcing the order of the commission. *State v. Missouri Pac. R. Co.*, 55 Kans. 708, 41 Pac. 964, 29 L. R. A. 444; *People v. New York*, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484. Nearly all, if not all, statutes now provide for enforcement of the order by the courts.



state authority to impose a penalty for a violation of its orders, subject, of course, to review by the courts.<sup>14</sup>

§ 823 (698). **Enforcing the orders of the commissioners—Mandamus.**—Where there is no other remedy provided by statute and no other adequate common law remedy, we can see no reason why the valid and imperative orders of a board of railroad commissioners may not be enforced by mandamus. The grant of authority to the commissioners to make orders gives to their orders a legal force and effect sufficient to impose upon the railroad company a specific and imperative duty. There must, of course, be jurisdiction, the order must be made in due course of law, and must be specific and mandatory.<sup>15</sup> It has been held that where the railroad commissioners have jurisdiction to order the location of a station, and an imperative order is made locating a

<sup>14</sup> *Railroad Commission v. Kansas City &c. R. Co.*, 111 La. 133, 35 So. 487.

<sup>15</sup> Mandamus will lie to enforce obedience to the requirements of the ordinances of the governing bodies of municipal corporations, county supervisors or commissioners, and the like, and it seems to us that the principles which are declared in cases of the class mentioned require the conclusion that mandamus will lie to compel obedience to the orders of railroad commissioners. *State v. Janesville &c. R. Co.*, 87 Wis. 72, 57 N. W. 970, 22 L. R. A. 759, 41 Am. St. 23; *Union Pacific R. Co. v. Hall*, 91 U. S. 343, 23 L. ed. 428; *People v. Chicago &c. R. Co.*, 67 Ill. 118; *People v. Chicago &c. R. Co.*, 130 Ill. 175, 22 N. E. 857; *Indianapolis &c. R. Co. v. State*, 37 Ind. 489; *People v. Boston &c. R. Co.*, 70 N. Y. 569; *State v. Northeastern &c. R. Co.*, 9 Rich. (S. Car.) 247, 67 Am. Dec. 551; *Railroad Comrs.*

*v. Atlantic &c. R. Co.*, 71 S. Car. 130, 50 S. E. 641. In granting power to a board of railroad commissioners to make orders, the legislature authorizes the board to do what the legislature had it so elected might have directly done, so that the orders of the board have all the force and effect that a statute could put into the orders of any board of public officers. See, generally, as to mandamus being the proper remedy, *Railroad Comrs. v. Wabash R. Co.*, 123 Mich. 669, 82 N. W. 526; *Chicago &c. R. Co. v. Becker*, 32 Fed. 849; *Woodruff v. New York &c. R. Co.*, 59 Conn. 63, 20 Atl. 17; *State v. Jacksonville Terminal Co.*, 41 Fla. 377, 27 So. 225; *State v. Atlantic Coast Line R. Co.*, 51 Fla. 578, 40 So. 875; *State v. Minneapolis &c. R. Co.*, 80 Minn. 191, 83 N. W. 60, 89 L. R. A. 514; *State v. Fremont &c. R. Co.*, 22 Nebr. 313, 35 N. W. 118; *Railroad Comrs. v. Atlantic &c. R. Co.*, 71 S. Car. 130, 50 S. E. 641.

station, the order may be enforced by mandamus.<sup>16</sup> So, upon the same general principle, it has been held that, where the commissioners have authority to order a railroad company to construct a crossing, mandamus will lie to enforce obedience to the order.<sup>17</sup> The enforcement of an order made by a board of commissioners requiring a railroad company to conform to a schedule of rates established by the commissioners, is a matter of public interest, and hence an action is properly brought in the name of the state.<sup>18</sup>

**§ 824 (699). Mandamus—Enforcing orders of commissioners—Illustrative cases.**—In addition to the cases referred to in discussing the general question of enforcing the orders of railroad commissioners, we refer to other cases which illustrate the general doctrine. In a Florida case it was held that mandamus was the appropriate remedy to compel a railroad company to comply with the order of the commissioners requiring schedules to be posted, but it was held that the court could not, in the absence of an order of the commissioners specifically prescribing the kind and size of type that should be used, specifically direct what kind and size of type the company should use.<sup>19</sup> In one of the reported

<sup>16</sup> *Railroad Comrs. v. Portland R. Co.*, 63 Maine 269, 18 Am. Rep. 208. The statute involved in the case cited provided that the commissioners might apply to the courts for the enforcement of its orders.

<sup>17</sup> *State v. Chicago &c. R. Co.*, 29 Nebr. 412, 45 N. W. 469, 42 Am. & Eng. R. Cas. 248.

<sup>18</sup> *Campbell v. Chicago &c. R. Co.*, 86 Iowa 587, 53 N. W. 351, 17 L. R. A. 443. See generally as to enforcement of such orders and what is a sufficient compliance, *Michigan R. R. Com. v. Detroit &c. R. Co.*, 182 Mich. 234, 148 N. W. 385, 184 Mich. 242, 150 N. W. 861; *Detroit &c. Ry. Co. v. Mich. R. R. Com.*, 171 Mich. 335, 137 N. W. 329. The commission is

generally a proper party to institute mandamus proceedings to enforce its orders. Note in L. R. A. 1918E, 304, and illustrative cases already cited in this section; but in Indiana it is held that the commission is not the real party in interest and cannot institute such an action in its own name or on relation of the state, but may enforce its orders by bringing a suit in equity. *State ex rel. Public Service Com. v. Vandalia R. Co.*, 183 Ind. 49, 108 N. E. 97, P. U. R. 1915B, 981, citing as to the right to enforce the order by suit in equity, *Wabash R. Co. v. Railroad Com.*, 176 Ind. 428, 95 N. E. 673.

<sup>19</sup> *State v. Pensacola &c. R. Co.*, 27 Fla. 403, 9 So. 89, 46 Am. & Eng. R. Cas. 704. In this case the

cases the relator asked for a writ to compel the railroad company to locate a station at a place where by contract it had agreed with the relator that it should be located, but the court denied the writ, holding that a private obligation of the nature of the one relied upon by the relator could not be enforced by mandamus.<sup>20</sup> If the duties required are discretionary, performance can not be coerced by mandate.<sup>21</sup> Where the charter of a railroad company expressly requires it to build and maintain its line to a designated point, the duty created is a specific and imperative one, and its performance may be coerced by mandamus,<sup>22</sup> and we can see no reason why the rule laid down does not apply to specific and imperative orders made by railroad commissioners under legislative authority. It was held that, under the Iowa statute, which conferred authority upon the courts to enforce the orders of the board of commissioners by "equitable actions" in the "name of the state," mandamus is not the exclusive remedy.<sup>23</sup> We do not,

court decided that schedules "must be kept continuously posted."

<sup>20</sup> *Florida Central &c. R. Co. v. State*, 31 Fla. 482, 20 L. R. A. 419, 34 Am. St. 30, 56 Am. & Eng. R. Cas. 306, citing *State v. Paterson &c. R. Co.*, 43 N. J. L. 505; *Parrott v. City*, 44 Conn. 180, 26 Am. Rep. 439.

<sup>21</sup> *People v. New York &c. R. Co.*, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484; *Northern Pacific R. Co. v. Territory*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. ed. 1092, 48 Am. & Eng. R. Cas. 475, overruling *Northern Pacific &c. R. Co. v. Territory*, 3 Wash. Ter. 303, 13 Pac. 604.

<sup>22</sup> *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 23 L. ed. 428. See *State v. Hartford &c. R. Co.*, 29 Conn. 538; *New Orleans &c. R. Co. v. Mississippi*, 112 U. S. 12, 5 Sup. Ct. 19, 28 L. ed. 619; *People v. Boston &c. Railroad Co.*, 70 N. Y. 569. In

*Northern Pacific &c. R. Co.*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. ed. 1092, 48 Am. & Eng. R. Cas. 475, the court approves the cases of *York &c. R. Co. v. Queen*, 1 El. & Bl. 858; *Commonwealth v. Fitchburg R. Co.*, 12 Gray (Mass.) 180; *State v. Southern &c. R. Co.*, 18 Minn. 40; *Atchison &c. R. Co. v. Denver &c. R.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. ed. 291; *South Eastern R. Co. v. Commissioners*, 6 Q. B. Div. 586, and denied the doctrine of *State v. Republican &c. R. Co.*, 17 Nebr. 647, 24 N. W. 329, 52 Am. Rep. 424. Mandamus is also held an appropriate remedy in *Michigan R. R. Co. v. Detroit &c. Ry. Co.*, 182 Mich. 234, 148 N. W. 385.

<sup>23</sup> *State v. Mason City R. Co.*, 85 Iowa 516, 52 N. W. 490, 55 Am. & Eng. R. Cas. 73. See also *Campbell v. Chicago &c. R. Co.*, 86 Iowa 587, 53 N. W. 351, 17 L. R. A. 443.

however, understand the case referred to as deciding that mandamus is not an appropriate remedy, but we understand it as simply deciding that mandamus is not the only remedy, although it is an appropriate one.<sup>24</sup> It is held that although a penalty is prescribed for disobeying the orders of the commissioners, mandamus will lie,<sup>25</sup> but other cases assert a different doctrine.<sup>26</sup> We think that the mere fact that a penalty is prescribed is not sufficient to defeat an application for mandamus, for the recovery of a penalty may not afford adequate relief.<sup>27</sup> Where mandamus is brought to enforce an order of the railroad commissioners, it should appear on its face to be within their authority, and if the order contains a material provision which does not appear from the alternative writ to be within their powers, and such writ commands a compliance forthwith a demurrer thereto should be sustained.<sup>28</sup>

<sup>24</sup>In the case referred to the court said: "It was held in *Boggs v. Chicago &c. R. Co.*, 54 Iowa 435, 6 N. W. 744, that mandamus was a proper remedy to such a right, and other cases have been prosecuted by such a proceeding, but it is not held that such a remedy is exclusive. It should not be claimed that but a single remedy can be available to a party. The doctrine of the election of remedies is old and familiar." But the rule is that where there is another adequate remedy parties can not resort to the extraordinary remedy of mandamus.

<sup>25</sup>*State v. Chicago &c. R. Co.*, 79 Wis. 259, 48 N. W. 243, 12 L. R. A. 180. The same court has held that a mandatory injunction will be awarded. *Jamestown v. Chicago &c. R. Co.*, 69 Wis. 648, 34 N. W. 728; *Oshkosh v. Milwaukee &c. R. Co.*, 74 Wis. 534, 43

N. W. 489, 17 Am. St. 175. See *People v. Mayor &c.*, 10 Wend. (N. Y.) 393. Objection to the remedy must be taken by answer or demurrer, or on the trial, or it will be unavailing. *Buffalo &c. Co. v. Delaware &c. R. Co.*, 130 N. Y. 152, 29 N. E. 121; *Elliott App. Proc.*, §§ 658, 679.

<sup>26</sup>*State v. Mobile &c. R. Co.*, 59 Ala. 321; *Railroad Comrs. v. Railroad Co.*, 26 S. Car. 353, 2 S. E. 127. To authorize recovery of penalty, order must be specific in directing what the company shall do. *State v. Alabama &c. R. Co.*, 67 Miss. 647, 7 So. 502. See generally *United States v. Delaware &c. R. Co.*, 40 Fed. 101.

<sup>27</sup>*Rex v. Barker*, 3 Burr. 1265. For additional illustrative cases as to mandamus, see note in L. R. A. 1918E, 304, et seq.

<sup>28</sup>*State v. Atlantic &c. R. Co.*, 51 Fla. 578, 40 So. 875.

§ 825 (700). Suits against railroad commissioners are not ordinarily suits against the state.—The settled general rule is that a suit can not be successfully prosecuted against a state except by its consent. This rule applies to actions against officers if the result will be to create a claim against the state. If the action is actually against the state, although nominally against its officers, the suit cannot be maintained.<sup>29</sup> In one of the reported cases it was held that so far as the suit against the commissioners sought to enjoin them from formulating a schedule it was not a suit against the state, but that so far as it sought to enjoin the commissioners from bringing a suit in the name of the state to collect penalties it was a suit against the state.<sup>30</sup> The general rule, however, as affirmed by the federal courts, and it is one resting on sound principle, is that suits against railroad commissioners are not suits against the state.<sup>31</sup>

§ 826 (701). Remedies for illegal acts of railroad commissioners.—It seems to us to be clear, on principle, that where railroad commissioners exceed their jurisdiction, or by wrongful

<sup>29</sup> *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. ed. 448; *Cunningham v. Macon &c. R. Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 609, 27 L. ed. 992; *Virginia Coupon Cases*, 114 U. S. 270, 5 Sup. Ct. 903, 923, 925, 928, 931, 932, 962, 1020, 29 L. ed. 185; *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. ed. 805; *Ayers, In re*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. ed. 216; *Printup v. Cherokee R. Co.*, 45 Ga. 365; *State v. Burke*, 33 La. Ann. 498; *Weston v. Dane*, 51 Maine 461; *Moore v. Tate*, 87 Tenn. 725, 11 S. W. 935, 10 Am. St. 712; *Marshall v. Clark*, 22 Tex. 23; *Houston &c. R. Co. v. Randolph*, 24 Tex. 317. See generally *Baltzer v. State*, 104 N. Car. 265, 10 S. E. 153; *Lincoln County v. Luning*, 133 U. S. 529, 10 Sup. Ct. 363, 33 L. ed. 766.

<sup>30</sup> *McWhorter v. Pensacola &c. R. Co.*, 24 Fla. 417, 5 So. 129, 2 L. R. A. 504, 12 Am. St. 220.

<sup>31</sup> *Reagan v. Farmers' Loan &c. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014, 9 Am. R. & Corp. Rep. 641; *Tindal v. Wesley*, 167 U. S. 204, 220, 17 Sup. Ct. 770, 42 L. ed. 137; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 423, 42 L. ed. 819; *Railroad Co. v. Tennessee*, 101 U. S. 337, 25 L. ed. 960; *Mississippi Railroad Commission v. Illinois Central R. Co.*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. ed. 209; *Prout v. Starr*, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. ed. 584; *Louisville &c. R. Co. v. Burr*, 63 Fla. 491, 58 So. 543, 44 L. R. A. (N. S.) 189 (reviewing the authorities upon the general subject in note).

acts invade the rights of others, the parties may resort to the appropriate remedies for a vindication of their rights, whether those remedies be legal or equitable. If a right be established and its wrongful invasion shown, the courts will apply the appropriate remedy.<sup>32</sup> The proper remedy is, of course, to be determined from the nature of the case and the character of the relief sought; but, given a case where remediable rights are shown, the courts will find a remedy. If an exclusive statutory remedy is given, that remedy must be pursued.<sup>33</sup> The complainant who seeks to recover under the statute must plead such facts as bring his case fully within the statutory provisions.<sup>34</sup>

**§ 827 (702). Specific statutory remedy—Federal rule.**—The general rule is that where a statute creates a new right the remedy specifically provided must be pursued.<sup>35</sup> The federal courts do not, however, give full effect to this rule, but maintain

<sup>32</sup> *Murray v. Chicago &c. R. Co.*, 62 Fed. 24; *Chicago &c. R. Co. v. Osborne*, 52 Fed. 912.

<sup>33</sup> *Winsor &c. Co. v. Chicago &c. R. Co.*, 52 Fed. 716; *Young v. Kansas City &c. R. Co.*, 33 Mo. App. 509. It is held in the first of the cases cited that the remedy given by statute to recover extortionate charges supersedes the common law remedy. It was also held that unless the carrier charges more than the maximum rate fixed by statute, no action will lie, citing *Burlington &c. R. Co. v. Dey*, 82 Iowa 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. 477; *State v. Fremont &c. R. Co.*, 22 Nebr. 313, 35 N. W. 118; *Sorrell v. Central R. Co.*, 75 Ga. 509; *Chicago &c. R. Co. v. People*, 77 Ill. 443. But see *Little Rock &c. R. Co. v. East Tennessee &c. R. Co.*, 47 Fed. 771, where it is held that the statutory remedy is cumulative.

<sup>34</sup> *Winsor &c. Co. v. Chicago &c. R. Co.*, 52 Fed. 716, citing *Kenney v. Railroad Co.*, 45 Mo. 255; *Bayard v. Smith*, 17 Wend. (N. Y.) 88; *King v. Dickenson*, 1 Saund. 135.

<sup>35</sup> *Chandler v. Hanna*, 73 Ala. 390; *Janney v. Buell*, 55 Ala. 408; *Indiana &c. R. Co. v. Oakes*, 20 Ind. 9; *Dickinson v. Van Wormer*, 39 Mich. 141; *Dudley v. Mayhew*, 3 N. Y. 9; *Hollister v. Hollister Bank*, 2 Keyes (N. Y.) 245; *McIntire v. Western &c. R. Co.*, 67 N. Car. 278; *Carolina &c. R. Co. v. McKaskill*, 94 N. Car. 746. In *Minneapolis &c. R. Co. v. State Board of Ry. Comrs.*, 30 N. Dak. 221, 152 N. W. 513, it is held that an appeal to the Supreme Court will lie from the order of the board although ministerial or legislative and although such an appeal is not provided for in the particular statute. But see *Illinois Cent. R. Co.*

that the procedure of the federal tribunals cannot be regulated by state statutes.<sup>36</sup> We do not understand the federal courts to hold that rights given by state statutes will not be enforced; on the contrary, our understanding is that such rights will be enforced, but the remedy and procedure will be such as prevail in the courts of the nation. In a case in one of the United States circuit courts the railroad commissioners had made an order classifying the railroads of the state and fixing a tariff of charges. The railroad company insisted that the rates fixed by the commissioners were unreasonable and sued for an injunction, the commissioners contended that the federal court had no jurisdiction because there existed an adequate remedy by petition to the supreme court of the state, but the court denied the contention of the commissioners and held that it had jurisdiction.<sup>37</sup>

v. Dodd, 105 Miss. 23, 61 So. 743, 49 L. R. A. (N. S.) 565, where other cases are reviewed, and the whole subject of appeals in such cases is considered in note.

<sup>36</sup> Clark v. Smith, 13 Pet. (U. S.) 195, 10 L. ed. 119; Fitch v. Creighton, 24 How. (U. S.) 159, 16 L. ed. 45; Orvis v. Powell, 98 U. S. 176, 178, 25 L. ed. 238; Mills v. Scott, 99 U. S. 25, 25 L. ed. 294; Van Norden v. Morton, 99 U. S. 378, 25 L. ed. 453; Cummings v. National Bank, 101 U. S. 153, 25 L. ed. 903; Connecticut &c. Ins. Co. v. Cushman, 108 U. S. 51, 2 Sup. Ct. 236, 27 L. ed. 648; Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. ed. 52; Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. ed. 733; Davis v. Jones, 2 Fed. 618; Flash v. Wilkerson, 22 Fed. 689; Fechheimer v. Baum, 37 Fed. 167; Borland v. Haven, 37 Fed. 394.

<sup>37</sup> Ames v. Union Pacific R. Co., 64 Fed. 165, 172. In the course of the opinion of the court prepared

by Mr. Justice Brewer, it was said: "It is further insisted by defendants that this court has no jurisdiction over these actions. First, because, in the act itself, an adequate legal remedy is provided by petition to the supreme court of the state and courts of equity may not interfere when adequate legal remedies are provided; secondly, because the rates are prescribed by a direct act of the legislature, and not fixed by any commission. I am unable to assent to either of these contentions. The remedy referred to is found in section 5, which authorizes any railroad company, believing the rates prescribed to be unreasonable and unjust, to bring an action in the supreme court of the state, and that if that court is satisfied that the rates are, as claimed, unjust and unreasonable to such company, it may make an order directing the board of transportation to permit the railroad to raise its rates to any sum in the discretion of the board, pro-

### § 828 (703). Parties to suits against railroad commissioners.

—The complainant in a suit to enjoin a board of railroad commissioners from establishing a schedule of rates cannot, it has been held, succeed unless he shows an interest in the controversy peculiar to himself and not common to the public.<sup>38</sup> The fact that a state ships goods over a railroad does not make it a party

vided that the rates so raised shall not be higher than were those charged by such railroad on the first day of January, 1893. But this comes very far short of being an adequate legal remedy." The court also said: "An adequate legal remedy is one which secures, absolutely and of right, to the injured party relief from the wrong done. But even if it were a full and complete legal remedy, it is one which can be secured only in a single court, and that a court of the state. And, as was held in the case of *Reagan v. Farmers' Loan & Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014, it is not within the power of the state to tie up citizens of other states to the courts of that state for the redress of their rights, and for the protection against wrong. The laws of congress, passed under the authority of the constitution of the United States, open the doors of the federal courts to citizens of other states to suits and actions for the prevention or redress of wrong, and the state can not close those doors. Whatever the effect such legislation may have upon the courts of the state, the courts of the United States are as open now as they were to actions for the protection of citizens of other states in their property rights within the

state of Nebraska." This case is affirmed in *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819.

<sup>38</sup> *Board of Railroad Comrs. v. Symms & Co.*, 53 Kans. 207, 9 Am. R. & Corp. Rep. 676, citing *Scofield v. Railway Co.*, 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846; *Commissioners v. Smith*, 48 Kans. 331, 29 Pac. 565. The court discriminated the case before it from the cases of *Chicago & C. R. Co. v. Dey*, 35 Fed. 866; *Chicago & C. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. ed. 970; *Budd v. People*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. ed. 247, saying: "We are cited to cases where injunction was maintained by the railroad company against the enforcement of the order of such a board, but in these cases it was held to be maintainable because the rates proposed to be put in force were so unreasonable as to be confiscatory. The railroad company, being a public carrier and obliged to transport commodities offered for shipment, and use their property in so doing, it was held that a provision requiring the carriage of a person or property without reward amounted to the taking of private property for a public use without just compensation, or without due process of law, and hence a court of equity



to a suit to determine the validity of rates of freight established by the commissioners.<sup>39</sup> Railroad commissioners who grant authority to one railroad company to cross the tracks of another are held to be mere nominal parties to a suit to enjoin the commissioners from rehearing the case upon the application of the company whose road the other company was granted a right to cross.<sup>40</sup>

**§ 829 (704). Review by certiorari—Other modes of review.**—In jurisdictions where the practice of bringing before the court for review the proceedings, of an inferior court tribunal, or officer exercising judicial authority, whose proceedings are summary or in a course different from the common law<sup>41</sup> by a writ of certiorari prevails, we suppose that in many instances the appropriate mode of reviewing the proceedings of a board of railroad commissioners would be by certiorari. The board of commissioners is an inferior tribunal invested, in some instances at least, with powers in their nature judicial, so that it would seem that in the proper case their proceedings are reviewable by certiorari. In a Massachusetts case it was assumed that certiorari was a proper remedy, but it was held that the petition must be dismissed for the reason among others that the petitioners were not parties to the proceedings.<sup>42</sup> Other ways in which a review may be obtained, either directly or indirectly, have been mentioned in preceding sections and still others will be considered

might prevent the enforcement of such a provision." See *State v. Chicago &c. R. Co.*, 86 Iowa 304, 53 N. W. 253.

<sup>39</sup> *Clyde v. Richmond &c. R. Co.*, 57 Fed. 436.

<sup>40</sup> *Union &c. R. Co. v. Board of Railroad Comrs.*, 52 Kans. 680, 35 Pac. 224.

<sup>41</sup> *Farmingham &c. Co. v. County Comrs.*, 112 Mass. 206; *Elliott Roads and Streets*. (3d ed., § 425, et seq.).

<sup>42</sup> *Cunningham v. Board*, 158 Mass. 104, 32 N. E. 959, 56 Am. &

Eng. R. Cas. 301. See also *Pacific &c. Tel. Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652 (by writ of review under statute enlarging scope of writ of certiorari). Certiorari is held not to be the proper remedy to secure the reduction of a rate, since the court could do no more in such a proceeding than set aside the order. *Public Service Gas Co. v. Board of Public Utility Comrs.*, 87 N. J. L. 597, 94 Atl. 634, L. R. A. 1918A, 421.

in the following section, but the most common direct method provided in many instances are by appeal or proceedings to set aside the order.<sup>43</sup>

<sup>43</sup> As to right to appeal depending on statute, construction of such statutes and power of court on review, see generally the Illinois Cent. R. Co. v. Dodd, 105 Miss. 23, 61 So. 743, and decisions reviewed in note to that case as reported in 49 L. R. A. (N. S.) 565. Under the Indiana law providing an appeal from the commission to the circuit court, such court hears the case de novo and not on review, and passes on the weight of the evidence as heard by it without being bound by the finding of the commissioners. Public Service Com. v. Cleveland &c. R. Co. (Ind.), 121 N. E. 116 (also holding that a petition by a railroad company for a joint rate with another company should not be granted unless it will benefit the shipping public, as it is not sufficient that it will merely benefit the petitioning railroad). Under a statute providing that a railroad company aggrieved by an order of the Public Service Commission may institute proceedings to set aside such order on the ground that it is unreasonable or unlawful, an unreasonable order must be considered by the court as unlawful, and an order forbidding the company to delay local trains to permit the passage of delayed through trains is unreasonable where the evidence shows that local trains are never delayed more than ten minutes and that, unless so delayed, the through trains are delayed more than half an hour.

Northern Cent. R. Co. v. Laird, 124 Md. 141, 91 Atl. 768, Ann. Cas. 1916D, 1030. The statute may make the commission's finding of fact prima facie true and its orders are not to be set aside unless clearly against the evidence, or beyond the scope of the commission's authority or an infringement upon some constitutional right. Chicago Motor Bus Co. v. Chicago Stage Co., 287 Ill. 320, 122 N. E. 477; Public Utilities Com. v. Chicago &c. Ry. Co., 275 Ill. 555, 114 N. E. 325, Ann. Cas. 1917C, 50; State Public Utilities Com. v. Toledo &c. R. Co., 267 Ill. 93, 107 N. E. 774; Interstate Commerce Com. v. Union Pac. R. Co., 222 U. S. 541, 32 Sup. Ct. 108, 56 L. ed. 308. See also State v. Great Northern Ry. Co., 130 Minn. 57, 153 N. W. 247, Ann. Cas. 1917B, 1201; People v. McCall, 219 N. Y. 84, 113 N. E. 795, Ann. Cas. 1916E, 1042; Settle v. Public Utilities Com., 94 Ohio St. 417, 114 N. E. 1036; State ex rel. Tacoma E. Ry. Co. v. Northern Pac. Ry. Co., 104 Wash. 405, 176 Pac. 530 (order will not be disturbed unless an arbitrary and wrongful exercise of discretion). See also as to appeals and matters considered thereon State Public Utilities Com. v. Chicago &c. R. Co., 275 Ill. 555, 114 N. E. 325, Ann. Cas. 1917C, 50; State ex rel. Missouri Pac. R. Co. v. Atkinson, 269 Mo. 634, 192 S. W. 86, L. R. A. 1918A, 46; Hocking Valley Ry. Co. v. Public Utilities Com., 92 Ohio St. 9, 110 N. E. 521, L. R. A. 1918A, 267.

**§ 830 (705). Injunction against commissioners—Generally.—**

The illegal and unauthorized acts of a board of railroad commissioners may be restrained in a proper case by injunction. Where a state statute is unconstitutional, the board of commissioners will be enjoined from enforcing orders assumed to be made by authority of such statute.<sup>44</sup> But, it is held here, as in other cases, that injunction will not lie if there is an adequate remedy at law.<sup>45</sup> The earlier English statute recognized the power of the courts to enjoin the proceedings of railway commissioners in cases where they assumed powers they did not possess or violated settled rules of law, but the courts of England reluctantly interfere with the decisions of the commissioners, and will do so only in clear cases.<sup>47</sup> In this country courts have jurisdiction over the proceedings of railroad commissioners, although there may be no statute specifically or expressly conferring it. Granting to railroad commissioners power to make orders does not necessarily take away the jurisdiction of the courts. The general rule is that jurisdiction once granted is not divested unless there is a clear statutory provision divesting it. But the power of the court rests on higher grounds. The legislature does not create or vest the judicial power of the commonwealth; that is done by the constitution; the legislature simply distributes the power. The legislature has no judicial power, for its power is exclusively

<sup>44</sup> *Chicago &c. R. Co. v. Dey*, 35 Fed. 866, 1 L. R. A. 744; *Piek v. Chicago &c. R. Co.*, 6 Biss. (U. S.) 177; *Reagan v. Farmers' Loan &c. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014; *Louisville &c. R. Co. v. Railroad Com.*, 19 Fed. 679; *Farmers' Loan &c. Co. v. Stone*, 20 Fed. 270; *Chicago &c. R. Co. v. Dey*, 35 Fed. 866, overruling *Chicago &c. R. Co. v. Becker*, 32 Fed. 883; *McWhorter v. Pensacola &c. R. Co.*, 24 Fla. 417, 5 So. 129, 2 L. R. A. 504, 12 Am. St. 220; *Seawell v. Kansas City &c. R. Co.*, 119 Mo. 224, 24 S. W. 1002, 9 Am. R. &

Corp. Rep. 606. A temporary injunction may be granted against enforcement by a state railroad commission of a rate for intrastate transportation which will not permit the railroad company from all sources to pay reasonable operating expenses. *Bellamy v. Missouri &c. R. Co.*, 215 Fed. 18, L. R. A. 1915A, 1.

<sup>45</sup> *Louisville &c. R. Co. v. Burr*, 63 Fla. 491, 58 So. 543, 44 L. R. A. (N. S.) 189.

<sup>47</sup> *Barret v. Great Northern &c. R. Co.*, 1 C. B. (N. S.) 423, 28 L. T. 254, 38 Eng. L. & Eq. 218.

legislative, and as it has no judicial power, it cannot, in the proper sense, delegate such power.<sup>49</sup>

**§ 831 (706). Where commissioners exceed their jurisdiction injunction will lie.**—If railway commissioners exceed their jurisdiction, and their acts are more than mere fugitive or transient trespasses, injunction will lie. The rule that where a tribunal, such as a board of railroad commissioners, transcends its powers, injunction is the appropriate remedy, is a familiar one. The difficulty in practically applying the rule stated is in determining whether the commissioners have exceeded their jurisdiction. As their jurisdiction is wholly statutory, they exceed it whenever they do an act not authorized by the statute from which they derive their powers.<sup>50</sup>

**§ 832 (707). Vacating orders of commissioners on the ground of fraud.**—A board of railroad commissioners is subject to the equity jurisdiction of the courts.<sup>51</sup> If it makes an order which is

<sup>49</sup> *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567; *Perkins v. Corbin*, 45 Ala. 103, 6 Am. Rep. 698; *Vandercook v. Williams*, 106 Ind. 345; *Smythe v. Boswell*, 117 Ind. 365, 20 N. E. 268. Authorities cited, *Elliott App. Proc.* §§ 1, 2, 3 and notes. Mr. Bryce says: "But in America a legislature is a legislature and nothing more. The same instrument which creates it creates also the executive, governor and the judges. They hold by a title as good as its own. If the legislature should pass a law depriving the governor of an executive function conferred by the constitution, that law would be void. If the legislature attempted to interfere with the courts, their action would be even more palpably illegal and ineffectual." Bryce *Am. Com.* 429. It is not to be understood, how-

ever, that the legislature may not interfere with the courts, so far as concerns matters of procedure, but judicial powers resident in courts legislative action is ineffective to take away or bestow upon administrative or ministerial officers.

<sup>50</sup> *South Eastern &c. R. Co. v. Railway Comrs.*, L. R. 6 Q. B. D. 586, per Lord Selborne, vide, p. 591; *Great Western R. Co. v. Railroad Comrs.*, L. R. 7 Q. B. D. 182; *South Eastern R. Co. v. Railroad Comrs.*, L. R. 5 Q. B. D. 217; *Regina v. Railway Comrs.*, L. R. 22 Q. B. D. 642. See *Caterham &c. R. Co. v. London &c. R. Co.*, 1 C. B. (N. S.) 410; *Bennet v. Manchester &c. R. Co.*, 6 C. B. (N. S.) 707, 714; *Pelsall &c. R. Co. v. London &c. R. Co.*, L. R. 23 Q. B. D. 536; *Tift v. Southern R. Co.*, 123 Fed. 789.

<sup>51</sup> *Clyde v. Richmond &c. R. Co.*, 57 Fed. 436.

fraudulent in its nature, the order may be vacated by a decree of a court of chancery.<sup>52</sup> To entitle a party to a decree vacating or annulling an order upon the ground of fraud it must be made to appear that there was actual fraud in obtaining the order, and if there be no fraud the order will not be vacated, although the parties who obtained it were influenced by corrupt motives.

§ 833 (708). **Federal question—Removal of causes from state courts.**—It has been held that where a state board of railroad commissioners brings an action to enforce obedience to its orders the case cannot be removed to the federal court, although it appears that a federal question is involved.<sup>53</sup> The court suggested that the proper course was to put in a pleading presenting the federal question, and in the event of an adverse decision by the highest court of the state, carry the case to the Supreme Court of the United States by a writ of error. In another case,<sup>54</sup> however, the doctrine of the case referred to is denied, and it is asserted that the case may be removed. The case last referred to holds that if the petition for removal<sup>55</sup> shows that a federal question is involved, a removal will be ordered, but in so holding it seems to us that the court was in error. The law as declared by the Supreme Court of the United States is, that a cause is not

<sup>52</sup> *Coe v. Aiken*, 61 Fed. 24. In the case cited the court said: "With reference to the second objection there is no doubt in my mind that a court of equity may set aside the action of a tribunal of this character, if it is fraudulent in its nature or essence, or was fraudulently obtained. It may even go further, and for the same reasons, set aside the judgments of a judicial tribunal. This is a fundamental principle of law."

<sup>53</sup> *Dey v. Chicago &c. R. Co.*, 45 Fed. 82. See also *North Carolina Corp. Com. v. Southern R. Co.*, 151 N. Car. 447, 66 S. E. 427.

<sup>54</sup> *State v. Coosaw &c. Co.*, 45 Fed. 804.

<sup>55</sup> The court, in the case referred to, *State v. Coosaw &c. Co.*, 45 Fed. 804, 811, cited in support of its conclusion, *Metcalf v. Watertown*, 128 U. S. 589, 9 Sup. Ct. 173, 32 L. ed. 544; *State v. Illinois &c. R. Co.*, 33 Fed. 721; *Austin v. Gagan*, 39 Fed. 626; *McDonald v. Salem &c. Co.*, 31 Fed. 577; *Johnson v. Accident Ins. Co.*, 35 Fed. 374, but as appears from the cases referred to in the following note those cases were wrongly decided.

removable as involving a federal question unless the facts making it removable appear from the plaintiff's statement of his claim.<sup>56</sup>

<sup>56</sup> Chappell v. Waterworth, 155 U. S. 102, 15 Sup. Ct. 34, 39 L. ed. 85; East Lake Land Co. v. Brown, 155 U. S. 488, 15 Sup. Ct. 357, 39 L. ed. 233; Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. ed. 511. See also Williams v. First Nat. Bank, 216 U. S. 582, 30 Sup. Ct. 441, 54 L. ed. 625; State v. Louisville & R. Co., 104 Miss. 413, 61 So. 425.

## CHAPTER XXIX

### PENAL OFFENSES BY AND AGAINST RAILROAD COMPANIES

Sec.	Sec.
840. Penal offenses by railroad companies—Generally.	857. Failure to furnish cars.
841. Penal statutes strictly construed—No extraterritorial effect.	858. Unlawful speed.
842. Right of action as affected by penal statutes—Effect of violation as proof of negligence.	859. Penalties for detention of baggage.
843. Whether private injury essential to recovery of penalty.	860. Other penal regulations.
844. Action for enforcement of penal statutes.	861. Full crew and hours of service laws.
845. The informer's rights—Parties.	862. Blacklisting—Clearance cards.
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847. When "penalty" and when "liquidated damages."	864. Penalty for confinement of live stock.
848. Indictment of railroad companies for causing death.	865. Penalty for confinement of live stock—State legislation.
849. Violation of Sunday laws.	866. Offenses against railroads—Obstructing mails and interfering with interstate commerce.
850. Indictment of railroad company for maintaining a nuisance.	867. English statutory penalties for riding without paying fare.
851. Indictment under separate coach act—Variance.	868. Sale of tickets without authority—"Scalpers."
852. Obstruction of highways.	869. Climbing on cars—Evading payment of fare.
853. Failure to maintain accommodations at stations.	870. Placing obstruction on track.
854. Indictment for failure to maintain accommodations.	871. Shooting or throwing missile at car.
855. Statutory signals—Stops at crossings.	872. Breaking into depot or car.—Burglary.
856. Blackboards and bulletins at stations.	873. Injury to railroad property—Malicious trespass.
	874. Other crimes against railroad companies.

**§ 840 (709). Penal offenses by railroad companies—Generally.**—Railroad corporations are the subject of much legislation by Congress, legislatures and municipalities, within their respec-

tive spheres. Regulations arising from the power to regulate commerce are usually such as apply to common carriers generally, but many statutes and ordinances enacted in the exercise of the police power look particularly to the peculiar nature of the operation of railroads and often apply to steam railroads exclusively. It is thoroughly established that legislatures, within their spheres, have power to compel railroad companies to discharge their duties and obligation to shippers and the public by reasonable statutory regulations, which may be enforced by fines and penalties.<sup>1</sup> Some courts have held that corporations are not included in general penal statutes forbidding the commission of particular acts unless included in express language,<sup>2</sup> and base their decisions upon the rule that penal statutes must be strictly construed, maintaining that the term "person" under such strict construction cannot apply to a corporation,<sup>3</sup> but it seems to be the sound rule, supported by the weight of authority, that corporations are amenable to penal statutes forbidding the commission of offenses by "persons," when the circumstances in which they are placed are identical with those of a natural person ex-

<sup>1</sup> *Missouri Pacific R. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. ed. 463, 22 Am. & Eng. R. Cas. 557; *McGowan v. Wilmington &c. R. Co.*, 95 N. Car. 417, 27 Am. & Eng. R. Cas. 64; *Branch v. Wilmington &c. R. Co.*, 77 N. Car. 347. See chapter on governmental control. In the peculiar case of *Goodspeed v. Ithaca St. Ry. Co.*, 184 N. Y. 351, 77 N. E. 392, a carrier was held exempt from the penalty for an overcharge on the ground that it had honestly mistaken its statutory rights. The Texas statute imposing a penalty of not less than \$100 or more than \$500 on a carrier refusing to redeem its unused tickets has been held not open to the objections that it was unreasonably excessive. *Texas &c. R. Co. v. Mahaffey* (Tex. Civ. App.), 81 S. W. 1047.

<sup>2</sup> In *Benson v. Monson &c. R. Co.*, 9 Met. (Mass.) 562, it was held that a statute imposing a penalty upon "the owner, agent, or superintendent of any manufacturing establishment" did not apply to a "manufacturing corporation." See 5 *Thomp. Corp.* (2d ed.) § 6285.

<sup>3</sup> In *Cumberland &c. Co. v. Portland*, 56 Maine 77, the court held that an action for penalty could not be maintained against a municipal corporation which had violated a statute imposing a penalty upon "any person or persons." Another Maine decision asserts that an action can not be maintained against a corporation for the commission of an offense forbidden by a penal statute applying in terms to "any person," and which, in another section, provided that the offense should constitute larceny, for the



pressly included in the statute, and where the statute can be applied equally well to them as corporations.<sup>4</sup> It is generally held that corporations are indictable for non-feasance in the cases in which a natural person would be indictable,<sup>5</sup> but there is conflict as to whether they are thus indictable for acts of misfeasance. It is maintained by some courts, and it seems with good reason, that a corporation may be indicted for misfeasance, or the doing of an act unlawful in itself and injurious to the rights of others, as well as for an omission of duty,<sup>6</sup> but it is said that they cannot be indicted for offenses which derive their criminality from evil intent, or which are simply violations of the social duties peculiar to natural persons.<sup>7</sup> Lord Coke early laid

double reason that criminal intent can not be imputed to a corporation, and that such statutes are not to be enlarged by construction. *Androscoggin &c. Co. v. Bethel &c. Co.*, 64 Maine 441. See also *State v. Ohio &c. R. Co.*, 23 Ind. 362; *Indianapolis &c. R. Co. v. State*, 37 Ind. 489, 493; *Commonwealth v. Swift Run Gap Turnpike*, 2 Va. Cas. 362.

<sup>4</sup> *South Carolina R. Co. v. McDonald*, 5 Ga. 531; *Wales v. Muscatine*, 4 Iowa 302; *Stewart v. Waterloo Turn Verein*, 71 Iowa 226, 32 N. W. 275, 60 Am. Rep. 786; *State v. Morris &c. R. Co.*, 23 N. J. L. 360; *State v. Security Bank*, 2 S. Dak. 538, 51 N. W. 337; *State v. First Nat. Bank*, 2 S. Dak. 568, 51 N. W. 587; *State v. Vermont Cent. R. Co.*, 27 Vt. 103. See *State v. Baltimore &c. R. Co.*, 15 W. Va. 362, 36 Am. Rep. 803, for a review of the authorities. And see also *Chicago &c. R. Co., v. Ellison*, 113 Mich. 33, 71 N. W. 324; *State v. Ice & Fuel Co. (N. Car.)*, 81 S. E. 737, 52 L. R. A. (N. S.) 216; and note in *Ann. Cas.* 1914A, 1310, 5 *Thomp. Corp.* § 6285.

<sup>5</sup> *Texas &c. R. Co. v. State*, 41 Ark. 498, 20 Am. & Eng. R. Cas. 626; *Louisville &c. R. Co. v. Commonwealth*, 13 Bush. (Ky.) 388, 26 Am. Rep. 205, and note; *Commonwealth v. Central Bridge Corp.*, 12 Cush. (Mass.) 242; *Boston &c. R. Co. v. State*, 32 N. H. 215; *Waterford &c. v. People*, 9 Barb. (N. Y.) 161; *People v. Albany*, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95, and note; *Queen v. Birmingham &c. R. Co.*, 2 Gale & D. 236.

<sup>6</sup> *Commonwealth v. Prop. of New Bedford Bridge*, 2 Gray (Mass.), 339; *State v. Morris &c. R. Co.*, 23 N. J. L. 360; *State v. Vermont Cent. R. Co.*, 27 Vt. 103; *State v. Baltimore &c. Co.*, 15 W. Va. 362, 36 Am. Rep. 803, citing authorities; *Queen v. Great &c. R. Co.*, 9 Q. B. 315, 10 Jur. 755. See also *State v. Ice & Fuel Co. (N. Car.)*, 81 S. E. 737, 52 L. R. A. (N. S.) 216; *Commonwealth v. Lehigh Valley R. Co.*, 165 Pa. St. 162, 30 Atl. 836, 27 L. R. A. 231.

<sup>7</sup> It has been held that an action of trespass for false imprisonment will lie against a corporation, but

down the rule that corporations are persons within the purview of penal statutes, and Mr. Justice Story, "finding, therefore, no authority at common law, which overthrows the doctrine of Lord Coke," refused to "engraft any such constructive exception upon the text of the statute."<sup>8</sup> The act, to be punishable by penalty, must come within the scope of the duty or power of the corporation,<sup>9</sup> otherwise the penalty can only be inflicted upon the members and officers or representatives of the corporation,<sup>10</sup> who may be presumed to have acted as individuals. But the members and officers are not always criminally liable when the corporation is.<sup>11</sup> Where a railroad is in the hands of a receiver the corporation cannot be prosecuted for crimes or misdemeanors committed by the agents or servants of the receiver.<sup>12</sup> Under the rule of strict construction it has been held that a penalty denounced against a "railroad company" is not recoverable against a "receiver."<sup>13</sup>

an action on the case for malicious prosecution will not lie for the reason that malicious intent can not be imputed to a corporation. *Owsley v. Montgomery &c. R. Co.*, 37 Ala. 560. But it is now generally held that a corporation may be convicted even where criminal intent is necessary. A recent case to this effect, reviewing many of the authorities, is *State v. Ice & Fuel Co.* (N. Car.), 81 S. E. 737, 52 L. R. A. (N. S.) 216. See also *Com. v. Illinois Cent. R. Co.*, 152 Ky. 320, 153 S. W. 459, 45 L. R. A. (N. S.) 344; *Com. v. New York Cent. &c. R. Co.*, 206 Mass. 417, 92 N. E. 766; *People v. Rochester &c. R. Co.*, 195 N. Y. 102, 88 N. E. 22, 133 Am. St. 770, 21 L. R. A. (N. S.) 998.

<sup>8</sup> *United States v. Amedy*, 11 Wheat. (U. S.) 393, 412, 6 L. ed. 638; *Louisville &c. R. Co. v. State*, 3 Head (Tenn.) 523, 75 Am. Dec. 778; *Queen v. Great &c. R. Co.*, 9 Q. B. 315, 10 Jur. 755.

<sup>9</sup> *Reg. v. Great North of England Railway*, 9 Q. B. 315, 326.

<sup>10</sup> *Kane v. People*, 3 Wend. (N. Y.) 363; *Edge v. Commonwealth*, 7 Pa. St. 275.

<sup>11</sup> *State v. Barksdale*, 5 Humph. (Tenn.) 154. Stockholders are not usually liable individually. *State v. Gilmore*, 24 N. H. 461.

<sup>12</sup> *State v. Wabash R. Co.*, 115 Ind. 466, 17 N. E. 909, 1 L. R. A. 179, 35 Am. & Eng. R. Cas. 1; *State v. Norfolk &c. R. Co.*, 152 N. Car. 785, 67 S. E. 42, 26 L. R. A. (N. S.) 710.

<sup>13</sup> *Bonner v. Franklin Co-op. Assn.*, 4 Tex. Civ. App. 166, 23 S. W. 317; *Turner v. Cross*, 33 Tex. 218, 18 S. W. 578, 15 L. R. A. 262, and note; *Texas &c. R. Co. v. Barnhart*, 5 Tex. Civ. App. 601, 23 S. W. 801; *Missouri &c. R. Co. v. Stoner*, 5 Tex. Civ. App. 50, 23 S. W. 1020. See however, and compare *Arkansas Cent. R. Co. v. State*, 72 Ark. 252, 79 S. W. 772.

But it has been held that receivers appointed by the federal courts do not fall under this rule as they are required by a federal statute to operate the roads under and in compliance with the laws governing railway companies in the states respectively in which the property is situated.<sup>14</sup>

**§ 841 (710). Penal statutes strictly construed—No extraterritorial effect.**—The rigid rules of the common law with reference to the liability of common carriers should not be applied in cases involving the violation of a penal statute, for a penal statute is to be construed strictly in favor of one charged with violating it,<sup>15</sup> but it has been held that “this rule is not violated by adopting the sense of the words which best harmonize with the object and intent of the legislature, and the whole context of the statute must be construed together.”<sup>16</sup> The declaration or complaint

<sup>14</sup> *Bonner v. Franklin Co-op. Assn.* 4 Tex. Civ. App. 166, 23 S. W. 317.

<sup>15</sup> *Chicago &c. R. Co. v. People*, 217 Ill. 164, 75 N. E. 368; *Bond v. Wabash &c. R. Co.*, 67 Iowa 712, 25 N. W. 892, 23 Am. & Eng. R. Cas. 608; *Omaha &c. R. Co. v. Hale*, 45 Nebr. 418, 63 N. W. 849; *Whitehead v. Wilmington &c. R. Co.*, 87 N. Car. 255, 9 Am. & Eng. R. Cas. 168.

<sup>16</sup> *State v. Indiana &c. R. Co.*, 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502; *State v. Hirsch*, 125 Ind. 207, 24 N. E. 1062, 9 L. R. A. 170. In *United States v. Wiltberger*, 5 Wheaton (U. S.) 76, 5 L. ed. 37, Marshall, C. J., said: “Though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words in their ordi-

nary acceptance, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction.” In *United States v. Hartwell*, 6 Wall. (U. S.) 385, 18 L. ed. 830, Swayne, J., said: “The object in construing penal as well as other statutes is to ascertain the legislative intent. That constitutes the law. If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but the intention must be gathered from the words and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and overstrict construction.”

must present a case strictly within the provisions of the statute, not leaving any essential facts to be gathered by argument or inference.<sup>17</sup> Besides being strictly construed, these statutes carry no extraterritorial effect, whether the penalty be to the public or to persons, and they cannot be enforced in the courts of another state, either by force of the statute or upon the principles of comity.<sup>18</sup> The Supreme Court of the United States has held, however, that a statute making directors personally liable to creditors of a corporation for making false reports may be enforced anywhere, deciding that while such a statute is penal in the sense that it should receive a strict construction it is not penal in the sense that it cannot be enforced in a foreign state, for it gives a civil remedy at the suit of the creditor only, measured by the amount of the debt.<sup>19</sup> It has also been held by the Supreme Court of the United States that the question whether a statute is penal in such a sense as to forbid its enforcement in a foreign jurisdiction, "depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."<sup>20</sup>

<sup>17</sup> *Whitecraft v. Vanderver*, 12 Ill. 235; *Western U. Tel. Co. v. Wilson*, 108 Ind. 308, 9 N. E. 172, 16 Am. & Eng. Corp. Cas. 257; *State v. Androscoggin R. Co.*, 76 Maine 411, 20 Am. & Eng. R. Cas. 624; *Barter v. Martin*, 5 Maine 76. Where the statute says that the action shall be brought in the name of the people of the state of Michigan, an action in the name of the prosecuting attorney for and on behalf of the people of the state of Michigan will lie. *People v. Brady*, 90 Mich. 459, 51 N. W. 537.

<sup>18</sup> *Carnahan v. W. U. Tel. Co.*, 89 Ind. 526, 46 Am. Rep. 175; *First National Bank v. Price*, 33 Md. 487, 3 Am. Rep. 204; *Derrickson v. Smith*, 27 N. J. L. 166; *Scoville v. Canfield*, 14 Johns. (N. Y.) 338, 7 Am. Dec. 467; *Blaine v. Curtis*, 59

Vt. 120, 7 Atl. 708, 59 Am. Rep. 702; *Ogden v. Folliott*, 3 T. R. 726; See *Western U. Tel. Co. v. Hamilton*, 50 Ind. 181; *Henry v. Sargeant*, 13 N. H. 321, 40 Am. Dec. 146. But see where statute is partly compensatory. *Great Western Mach. Co. v. Smith*, 87 Kans. 331, 124 Pac. 414, Ann. Cas. 1913E, 242.

<sup>19</sup> *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123, per Gray, J. See *Boyce v. Wabash & Co.*, 63 Iowa 70, 18 N. W. 673, 50 Am. Rep. 730, 23 Am. & Eng. R. Cas. 172, in which an Iowa Court allowed an action for double damages provided by an Illinois statute; also *Great Western Mach. Co. v. Smith*, 87 Kans. 331, 124 Pac. 414, Ann. Cas. 1913E, 243.

<sup>20</sup> *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123,

§ 842 (711). Right of action as affected by penal statutes—**Effect of violation as proof of negligence.**—Unless the common law right of action is thereby taken away in express terms or by necessary implication, the penalty imposed by a penal statute is cumulative only, and the common law right of action continues to exist unimpaired.<sup>21</sup> It may, perhaps, be laid down as a general rule that the enactment of a penal statute does not establish a new liability aside from the penalty denounced by the statute itself. In other words, a penal statute cannot ordinarily be regarded as the foundation of a new right of action in addition to that prescribed, and the best reasoned cases hold that the only new liability arising from the neglect of such purely statutory duty is for the prescribed penalty,<sup>22</sup> except, perhaps, where the

per *Gray, J*; *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. ed. 439; *Herrick v. Minneapolis &c. R. Co.*, 31 Minn. 11, 16 N. W. 413, 47 Am. R. 771; *Chicago &c. R. Co. v. Doyle*, 60 Miss. 977; *Knight v. West Jersey R. Co.*, 108 Pa. St. 250, 56 Am. Rep. 200; *Morris v. Chicago &c. R. Co.*, 65 Iowa 727, 23 N. W. 143, 54 Am. Rep. 39; *Higgins v. Central &c. R. Co.*, 155 Mass. 176, 29 N. E. 534, 31 Am. St. 544; *In Mexican Natl. R. Co. v. Jackson (Tex. Civ. App.)*, 32 S. W. 230, it was held that a law of Mexico making negligence resulting in injury to another a penal offence, and also giving a right of action civil in nature, was not penal in the sense that the civil remedy could not be enforced in the courts of Texas, and the Texas court awarded damages, although the injury occurred in Mexico. See also 2 Am. L. Reg. & Rev. (N. S.) 725.

<sup>21</sup> *United States v. Howard*, 17 Fed. 638; *Tyler v. W. U. Tel. Co.*,

54 Fed. 634; *Aldrich v. Howard*, 7 R. I. 199; *Caswell v. Worth*, 5 El. & Bl. 848, per *Coleridge, J.*; *Couch v. Steel*, 3 El. & Bl. 402. See post, § 844.

<sup>22</sup> *Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189; *Flynn v. Canton Co.*, 49 Md. 312, 17 Am. Rep. 603; *Kirby v. Boylston Market Asso.*, 14 Gray (Mass.) 249, 74 Am. Dec. 682; *Taylor v. Lake Shore &c. R. Co.*, 45 Mich. 74, 7 N. W. 728, 40 Am. Rep. 457, per *Cooley, J.*; *Holwerson v. St. Louis &c. R. Co.*, 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850, 861 (quoting the text as stating the law); *Vandyke v. Cincinnati*, 1 Disney (Ohio) 532; *Philadelphia R. Co. v. Ervin*, 89 Pa. St. 71, 33 Am. Rep. 726; *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502. But see *Bott v. Pratt*, 33 Minn. 323, 23 N. W. 237, 53 Am. Rep. 47, 53 n.; *Jetter v. N. Y. &c. R. Co.*, 2 Abb. Dec. 458. See also *Bain v. Ft. Smith &c. Co.*, 116 Ark. 125, 172 S. W. 843 (ordinance);

statute prescribes that the duty shall be to particular persons or to a particular class of persons, and not purely a public duty.<sup>23</sup> In one instance, however, the Supreme Court of the United States held in the case of the death of a boy resulting from a violation of an ordinance requiring railroad companies to fence their right of way in a prescribed manner, that "the duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individ-

Indiana &c. Coal Co. v. Neal, 166 Ind. 458, 77 N. E. 850; Gibson v. Kansas City &c. Co., 85 Kans. 346, 116 Pac. 502, Ann. Cas. 1912D, 1103 and cases cited in note. In his opinion in the Michigan case, supra, Judge Cooley said: "If it was only a public duty it can not be pretended that a private action can be maintained for a breach thereof . . . . Nevertheless, the burden that individuals are required to bear for the public protection or benefit may in part be imposed for the protection or benefit of some particular individual or class of individuals also, and then there may be an individual right of action as well as a public prosecution of a breach of duty which causes individual injury . . . . The nature of the duty and the benefits to be accomplished through its performances must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit." In Aldrich v. Tripp, 11 R. I. 141, 23 Am. Rep. 434,

the plaintiff sought to recover damages for an injury arising from a violation of an ordinance which created a new duty. The court said: "We do not suppose that the creation of new civil liabilities between individuals was any part of the object for which the power to enact ordinances was granted." On the other hand, in Jetter v. N. Y. &c. R. Co., 2 Abb. Dec. 458, the court, taking an extreme view and overruling some previous decisions, said: "It is an axiomatic truth that every person, while violating an express statute, is a wrong-doer, and as such is ex necessitate negligent in the eye of the law, and every innocent party whose person is injured by the act which constitutes the violation of the statute is entitled to a civil remedy for such injury, notwithstanding any redress the public may also have."

<sup>23</sup> Taylor v. Lake Shore &c. R. Co., 45 Mich. 74, 7 N. W. 728, 40 Am. Rep. 457. See also Monteith v. Kokomo &c. Co., 159 Ind. 149, 152, 153, 64 N. E. 610, 58 L. R. A. 944, and cases cited; and note in 47 L. R. A. (N. S.) 821.

ual compensation, and to an action for its recovery.”<sup>24</sup> It is also well settled that where the statute prescribes a duty which is owing to an individual or class of individuals, the fact of its violation may constitute negligence, or at least prima facie evidence thereof, and contribute an important element of the injured person’s cause of action,<sup>25</sup> even though the omission of the duty may not have constituted negligence before the passage of the law. It has been held that non-performance of such statutory duty, resulting in injury to another, may be pronounced to be negligence as a conclusion of law.<sup>26</sup> There is, however, much conflict among the authorities as to how far the violation of these statutory duties should be deemed to constitute negligence. In some states the statutes themselves provide that where injury follows violation, the violation shall constitute a prima facie case of negligence,<sup>27</sup> and in one of these states where violation of the statute is followed by injury, the element of proximate cause has been conclusively presumed by the courts.<sup>28</sup> These last decisions are, as it seems to us, unsound, and the rule, supported by the weight of au-

<sup>24</sup> *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. ed. 410, per Matthews, J. Compare, however, *Southern R. Co. v. Cooper*, 172 Ala. 505, 55 So. 211 (but not those in service of company); *Bain v. Ft. Smith & Co.*, 116 Ark. 125, 172 S. W. 843; *Bischof v. Illinois So. R. Co.*, 232 Ill. 446, 83 N. E. 948, 13 Ann. Cas. 185.

<sup>25</sup> *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. ed. 410.

<sup>26</sup> *Central R. & Co. v. Smith*, 78 Ga. 694, 3 S. E. 267, 34 Am. & Eng. R. Cas. 1; *Terre Haute & Indianapolis R. Co. v. Voelker*, 129 Ill. 540, 22 N. E. 20, 39 Am. & Eng. R. Cas. 615. See also *Stafford v. Chippewa & R. Co.*, 110 Wis. 331, 85 N. W. 1036, 1045, citing text;

*White’s Supp. to Thomp. Neg.* § 10 and numerous authorities there cited.

<sup>27</sup> *Columbus & C. R. Co. v. Kennedy*, 78 Ga. 646, 3 S. E. 267, 31 Am. & Eng. R. Cas. 92. In Mississippi, Georgia and Tennessee. See *Chicago & C. R. Co. v. Trotter*, 60 Miss. 442; *Mobile & C. R. Co. v. Dale*, 61 Miss. 206, 20 Am. & Eng. R. Cas. 651; *Tennessee R. Co. v. Walker*, 11 Heisk. (Tenn.) 383. See also *Stafford v. Chippewa & C. R. Co.*, 110 Wis. 331, 85 N. W. 1036.

<sup>28</sup> *Tennessee R. Co. v. Walker*, 11 Heisk. (Tenn.) 383; *Hill v. Louisville & C. R. Co.*, 9 Heisk. (Tenn.) 823; *Nashville & C. R. Co. v. Thomas*, 5 Heisk. (Tenn.) 262. But see *Louisville & C. R. Co. v. Connor*, 9 Heisk. (Tenn.) 19.

thority, is that while one who violates a statute or an ordinance<sup>29</sup> may be regarded as a wrong-doer, and the act regarded as negligence, still it may or may not be the proximate cause of the injury complained of according to the facts of the particular case. In some courts, however, it is held that the mere violation of a municipal ordinance is not negligence per se, but merely evidence of it.<sup>30</sup> It is generally held, and this we regard as the true doctrine, that the element of proximate cause must be established, and that it will not necessarily be presumed from the fact that an ordinance or statute has been violated.<sup>31</sup> Negligence, no matter in what it consists, cannot create a right of action unless it is the proximate cause of the injury complained of by the plaintiff.

<sup>29</sup> *Wesley City Coal Co. v. Healer*, 84 Ill. 126; *St. Louis &c. R. Co. v. Dunn*, 78 Ill. 197; *Pennsylvania Co. v. Hensil*, 70 Ind. 569, 36 Am. Rep. 188, 6 Am. & Eng. R. Cas. 79; *Chicago &c. R. Co. v. Boggs*, 101 Ind. 522, 51 Am. Rep. 761; *Pennsylvania R. Co. v. Stegemeier*, 118 Ind. 305, 309, 20 N. E. 843, 10 Am. St. 136; *Indiana &c. R. Co. v. Barnhart*, 115 Ind. 399, 410, 16 N. E. 121; *Pennsylvania R. Co. v. Horton*, 132 Ind. 189, 31 N. E. 45; *Correll v. Burlington &c. R. Co.*, 38 Iowa 120, 18 Am. Rep. 22; *Railway Co. v. Schneider*, 45 Ohio St. 678, 17 N. E. 321; *Baker v. Pendergast*, 32 Ohio St. 494, 30 Am. Rep. 620; *San Antonio &c. R. Co. v. Bowles*, 88 Tex. 634, 32 S. W. 880; *Wanless v. N. E. R. W. Co.*, L. R. 6 Q. B. 481 (L. R. 7 H. L. Cas. 12). See also *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354; *Baltimore City R. Co. v. McDonnell*, 43 Md. 552.

<sup>30</sup> *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. ed. 410; *Bain v. Ft. Smith &c. Co.*, 116 Ark. 125, 172 S. W. 843;

*Van Horn v. Burlington &c. R. Co.*, 59 Iowa 33, 12 N. W. 752, 7 Am. & Eng. R. Cas. 591; *Baltimore &c. R. Co. v. McDonnell*, 43 Md. 534; *Lane v. Atlantic Works*, 111 Mass. 136; *Hanlon v. South Boston &c. R. Co.*, 129 Mass. 310; *Faber v. St. Paul &c. R. Co.*, 29 Minn. 465, 13 N. W. 902, 8 Am. & Eng. R. Cas. 277; *Liddy v. St. Louis R. Co.*, 40 Mo. 506; *Kelley v. Hannibal &c. R. Co.*, 75 Mo. 138; *Knupfle v. Knickerbocker &c. Co.*, 84 N. Y. 491; *Meek v. Pennsylvania R. Co.*, 38 Ohio St. 632, 13 Am. & Eng. R. Cas. 643, and note; *Philadelphia &c. R. Co. v. Boyer*, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172. Upon principle this seems to us to be a better rule than that which makes the violation of an ordinance, or even a statute, conclusive proof of negligence or negligence per se. See also *Henderson v. Durham Traction Co.*, 132 N. Car. 779, 44 S. E. 598, 600, and note to *Ashley v. Kanawha &c. Co.*, 9 Ann. Cas. 840, 842.

<sup>31</sup> *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. ed. 410, 15 Am. & Eng. R.



§ 843 (711a). **Whether private injury essential to recovery of penalty.**—Proof of private injury is not required under the Wisconsin statute which provides that if any railroad corporation shall violate any of the regulations of the statute it shall be liable to any person injured for all damages and “in addition” shall forfeit not less than the sum specified as a penalty to be recovered in an action in the name of the state.<sup>32</sup>

§ 844 (712). **Action for enforcement of penal statutes.**—Actions for the enforcement of statutory penalties against corporations are generally held to be civil actions.<sup>33</sup> In jurisdictions in which corporations are held to be included in the term “persons” in general statutes, the action should conform to the usual or prescribed action under such statutes, be it civil or criminal. It is held in some jurisdictions which still recognize common law crimes and actions, that the statutory penalty may be recovered

Cas. 394; *Pennsylvania R. Co. v. Hensil*, 70 Ind. 569, 36 Am. Rep. 188; *Baltimore &c. R. Co. v. Young*, 146 Ind. 374, 45 N. E. 479; *Lake Erie &c. R. Co. v. Mikesell*, 23 Ind. App. 395, 55 N. E. 488; *Philadelphia &c. R. Co. v. Stebbing*, 62 Md. 504, 19 Am. & Eng. R. Cas. 36; *Kelley v. Hannibal &c. R. Co.*, 75 Mo. 138, 13 Am. & Eng. R. Cas. 638. See also post, §§ 1648, 1649. The text is also quoted with approval in *Henderson v. Durham Traction Co.*, 132 N. Car. 779, 44 S. E. 598, 600. See upon the general subject as to whether such violation is negligence per se and also as to proximate cause, the notes in 47 L. R. A. (N. S.) 821, and 49 L. R. A. (N. S.) 660, et. seq.

<sup>32</sup> *State v. Wisconsin &c. R. Co.*, 128 Wis. 79, 107 N. W. 295.

<sup>33</sup> *Katzenstein v. Raleigh &c. R. Co.*, 84 N. Car. 688, 6 Am. & Eng. R. Cas. 464; *Rockwell v. State*, 11

Ohio 130; *Edenton v. Wool*, 65 N. Car. 379; 3 Black's Com. 160. See also *Chaffee v. United States*, 18 Wall. (U. S.) 516, 21 L. ed. 908; *Corporation &c. v. Eaton*, 4 Cranch C. C. 352; *Durham v. State*, 117 Ind. 477, 19 N. E. 327; *McCoun v. New York Central &c. R. Co.*, 50 N. Y. 176; *Western Union Tel. Co. v. Scircle*, 103 Ind. 227, 2 N. E. 604; *Davis v. State*, 119 Ind. 555, 22 N. E. 9; *City of Owosso v. Mich. Cent. R. Co.*, 183 Mich. 688, 150 N. W. 323. See also note in 27 L. R. A. (N. S.) 739. As elsewhere stated, however, it is held that an action to recover a penalty, although civil in form, is essentially criminal in its nature. Ante, § 746. But it is held that the state need not prove the offense beyond a reasonable doubt. *State v. Chicago &c. R. Co.*, 122 Iowa 22, 96 N. W. 904, 101 Am. St. 254.

by indictment or information unless such mode is excluded by the statute, and that the prescribed remedy is only cumulative to the one given by the common law.<sup>84</sup> In some other jurisdictions it has been held that both the statutory penalty and the actual damages may be recovered in one action where both arise from the same transaction.<sup>85</sup> In these actions it has been held that it is not required that the plaintiff should prove his case with the same degree of certainty that he would if the action were criminal in form.<sup>86</sup>

§ 845 (713). **The informer's rights—Parties.**—The informer cannot maintain an action in his own name unless plainly authorized by statute, nor can he control such action, without such authority, when brought.<sup>87</sup> It is held that the penalty is a forfeiture to the sovereign for the violation of the law and the share accorded the informer is simply an inducement to the citizen to apprise the public officer of violations.<sup>88</sup> It has also been held that a complaint is defective, on demurrer, if the informer is made plaintiff when only the state can sue, and in one case leave to amend by making the state plaintiff was refused,<sup>89</sup> but other

<sup>84</sup> *United States v. Howard*, 17 Fed. 638; *State v. Wabash &c. R. Co.*, 89 Mo. 562; *State v. Corwin*, 4 Mo. 609; *Hodgman v. People*, 4 Den. (N. Y.) 235; *State v. Helgen*, 1 Speer (S. Car.) 310; *State v. Meyer*, 1 Speer (S. Car.) 305; *State v. Maze*, 6 Humph. (Tenn.) 17. It is held that the Missouri statute permits one bringing a *qui tam* action to bring the action either civilly or criminally by information. *State v. Hannibal &c. Co.*, 30 Mo. App. 494.

<sup>85</sup> *Wells v. New Haven &c. Co.*, 151 Mass. 46, 23 N. E. 724, 21 Am. St. 423, 44 Am. & Eng. R. Cas. 491n; *Kansas City &c. R. Co. v. Spencer*, 72 Miss. 491, 17 So. 168; *Hodges v. Wilmington &c. R. Co.*, 105 N. Car. 170, 10 S. E. 917. See

also *McFarland v. Mississippi River &c. Ry. Co.*, 175 Mo. 422, 75 S. W. 152.

<sup>86</sup> *Texas &c. R. Co. v. Mahaffey* (Tex. Civ. App.), 81 S. W. 1047.

<sup>87</sup> *Colburn v. Swett*, 1 Metc. (Mass.) 232; *Nye v. Lamphere*, 2 Gray (Mass.) 297; *Omaha &c. R. Co. v. Hale*, 45 Nebr. 418, 63 N. W. 849, 50 Am. St. 554, and note; *Seward v. Beach*, 29 Barb. (N. Y.) 239; *Fleming v. Bailey*, 5 East 313; *Barnard v. Gostling*, 2 East 569; *Drew v. Hilliker*, 56 Vt. 641. But see *Chicago &c. Co. v. Howard*, 38 Ill. 414.

<sup>88</sup> *Omaha &c. R. Co. v. Hale*, 45 Nebr. 418, 63 N. W. 849, 50 Am. St. 554, and note.

<sup>89</sup> *St. Louis &c. R. Co. v. State*, 56 Ark. 166, 19 S. W. 572.

courts have permitted amendments.<sup>40</sup> Where the statute provides for a recovery of the penalty by an action in the name of the state by the prosecuting attorney for the benefit of himself and the school fund the case is not removable to the federal court, although the company is a citizen of another state, on the ground that the prosecuting attorney is the real party in interest.<sup>41</sup> It is said that the same strict construction precludes the state from prosecuting an action where the statute gives that right to the informer,<sup>42</sup> but to exclude the state, the right in the informer must be plainly conferred by the statute, although not necessarily in express words,<sup>43</sup> and it has been held that where one moiety goes to the state, the state may prosecute for the whole, unless the informer has commenced a *qui tam* action.<sup>44</sup> It would seem that the offense should not go unpunished and the state thereby lose its portion of the penalty, simply because no citizen has elected to prosecute an action in the role of informer. It has also been held that where the state prosecutes a civil action for the penalty or when the grand jury returns an indictment it must appear of record that the informer complained in the prescribed manner, under the statute,<sup>45</sup> or the whole penalty will go to the state. No acts can render one an informer unless he actually gave the information leading to conviction,<sup>46</sup> nor can a

<sup>40</sup> See *Maggett v. Roberts*, 108 N. Car. 174, 12 S. E. 890.

<sup>41</sup> *Southern R. Co. v. State* (Ind. App.), 72 N. E. 174. See also *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123.

<sup>42</sup> *United States v. Laescki*, 29 Fed. 699; *Higby v. People*, 5 Ill. 165. See also *McFarland v. Mississippi River &c. R. Co.*, 175 Mo. 422, 75 S. W. 152.

<sup>43</sup> The clause "who may prosecute," or "who prosecutes" has been held sufficient to show the legislative intent. *Drew v. Hilliker*, 56 Vt. 641. A common informer has the right to sue under a statute giving the penalty "to any person who may prosecute there-

for." *Nye v. Lamphere*, 2 Gray (Mass.) 297. In *United States v. Laescki*, 29 Fed. 699; the use of the language "recoverable, one-half to the use of the informer" in the statute was held to authorize the informer to sue. See also *Lynch v. The Economy*, 27 Wis. 69.

<sup>44</sup> *State v. Bishop*, 7 Conn. 181; *Commonwealth v. Howard*, 13 Mass. 221; *Rex v. Hymen*, 7 T. R. 532.

<sup>45</sup> *Commonwealth v. Frost*, 5 Mass. 53; *State v. Smith*, 49 N. H. 155; *Commonwealth v. Davenger*, 10 Phila. (Pa.) 478.

<sup>46</sup> *Brewster v. Gelston*, 1 Paine (U. S.) 426.

person claim an informer's share of the penalty simply because he is the sole witness in the case.<sup>47</sup> Some of the courts hold that if the party injured is authorized to sue for the penalty, any one of several parties jointly injured by the same offense may sue and recover the penalty,<sup>48</sup> but it has been held, on the other hand, that a penal action cannot be maintained by several persons jointly as common informers unless the statute authorizes such a proceeding,<sup>49</sup> although it seems that if the penalty is specific and does not rest in computation, only one action can be brought, and the parties injured must join in a single action in order that all may secure their respective shares.<sup>50</sup> The party who first commences a *qui tam* action thereby acquires an interest in the penalty of which he cannot be divested by a subsequent suit by another informer, even though judgment first be awarded in the latter suit,<sup>51</sup> but while the informer, by first instituting suit or, perhaps by giving the necessary information to the prosecutor, acquires a right superior to any other informer of the same offense, he does not acquire a vested right to the penalty until after judgment,<sup>52</sup> and his right to a share of a forfeiture does not vest until the money is ready for distribution. Accordingly, his share of the penalty will be determined by the law in force at the time of the final decree directing distribution.<sup>53</sup> By some of the statutes a private citizen is given the right to sue in his own name to re-

<sup>47</sup> *Williamson v. State*, 16 Ala. 431. See *United States v. Connor*, 138 U. S. 61, 11 Sup. Ct. 229, 34 L. ed. 860.

<sup>48</sup> *Phillips v. Bevans*, 23 N. J. L. 373.

<sup>49</sup> *Commonwealth v. Winchester*, 3 Pa. L. J. Rep. 34.

<sup>50</sup> *Edwards v. Hill*, 11 Ill. 22.

<sup>51</sup> *Pike v. Madbury*, 12 N. H. 262; *Beadleston v. Sprague*, 6 Johns. (N. Y.) 101.

<sup>52</sup> *Confiscation cases*, 7 Wall. (U. S.) 454, 19 L. ed. 196; *St. Mary's v. State*, 12 Ga. 475; *Chicago &c. R. Co. v. Adler*, 56 Ill. 344.

<sup>53</sup> *United States v. About Twenty-five Thousand Gallons &c.*, 1 Ben. (U. S.) 367; *United States v. Twenty-five Thousand Segars*, 5 Blatchf. (U. S.) 500; *United States v. Eight Barrels Distilled Spirits*, 1 Ben. (U. S.) 472; *United States v. Connor*, 138 U. S. 61, 11 Sup. Ct. 229, 34 L. ed. 860. But in Indiana, Missouri, Kentucky and elsewhere this common law rule has been altered somewhat by statute and it is only necessary that the penalty should have accrued before the repeal of the statute imposing it.

cover the penalty, where, after a certain time, the proper officers having had notice of the offense, fail to sue for the state, and in such a case it is no defense that the suit is brought without authority of such officers or without notice to them.<sup>54</sup> Upon recovery, the informer properly designated on the record as such may secure his share of the penalty by motion to have it paid to him.<sup>55</sup> It has been held that the fact that the informer rode on trains repeatedly for the sole purpose of accumulating penalties accruing by reason of overcharges in fare will not constitute a defense, and the penalties may be collected.<sup>56</sup> In one instance it was held that in case of the compromise of an action for a penalty the informer was entitled to his share of the amount the same as if it had been prosecuted to judgment.<sup>57</sup> But, ordinarily, penal actions brought *qui tam* cannot be compromised without leave of the court,<sup>58</sup> and as a general rule it will require that the portion due the state be paid.<sup>59</sup> Furthermore, the law does not concern itself with the motives of the party seeking to enforce a penalty. This is entirely outside the issue, and it is not in any wise material that the informer at the time of noting a violation of the law had in mind the matter of collecting the statutory penalty.<sup>60</sup>

**§ 846 (714). The penalty—Computation.**—Where the statute simply prescribes a maximum and minimum penalty, and does not specify who shall fix the amount, it has been held that the question is for the jury.<sup>61</sup> And if the statute directs that the pen-

<sup>54</sup> *Commissioners v. Purdy*, 13 Abb. Pr. (N. Y.) 434, 36 Barb. (N. Y.) 266; *Root v. Alexander*, 63 Hun 557, 18 N. Y. S. 632. See *Pomroy v. Sperry*, 16 How. Pr. (N. Y.) 211.

<sup>55</sup> *Hull v. Welsh*, 82 Iowa 117, 47 N. W. 982.

<sup>56</sup> *St. Louis &c. R. Co. v. Gill*, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452; *Fisher v. New York &c. R. Co.*, 46 N. Y. 644; *Parks v. Nashville &c. R. Co.*, 13 Lea (Tenn.) 1, 49 Am. Rep. 655, 18 Am. & Eng. R. Cas. 404.

<sup>57</sup> *Hull v. Welsh*, 82 Iowa 117, 47 N. W. 982.

<sup>58</sup> *Raynham v. Rounseville*, 9 Pick. (Mass.) 44; *Caswell v. Allen*, 10 Johns. (N. Y.) 118; *Middleton v. Wilmington &c. R. Co.*, 95 N. Car. 167.

<sup>59</sup> *Wardens v. Cope*, 2 Ired. (N. Car.) 44. See *Bradway v. LeWorthy*, 9 Johns. (N. Y.) 251; *Haskins v. Newcomb*, 2 Johns. (N. Y.) 405.

<sup>60</sup> *Hennion v. New York St. R. Co.*, 101 N. Y. S. 100.

<sup>61</sup> *McDaniel v. Gate City Co.*, 79 Ga. 58, 3 S. E. 693; *Hines v. Dar-*

alty shall equal double the value of certain goods, the jury may determine the value of the goods by verdict, and the court may double the amount,<sup>62</sup> but if, after the proper instructions, the jury find for a specific sum, that sum is presumed to be twice the value of the goods, unless otherwise shown in the verdict.<sup>63</sup> If the offense is single and continuous and it is plain that the statute only contemplates one offense, it is held that only one penalty will have accrued up to the time the action is brought,<sup>64</sup> but where a specific penalty is declared for each separate offense, or for each day or week of its continuance, the amount of the judgment may be a matter of computation for the court, after conviction for each offense.<sup>65</sup> In some cases, however, it has been maintained that it was not the legislative intent that an informer be allowed to open a book account of penalties earned, and, delaying suit a year, bring an action for an enormous sum, and that but one penalty could be recovered for all delinquencies prior

ling, 99 Mich. 47, 57 N. W. 1081. It seems to us that a statute which does not designate the penalty, or give some rule for ascertaining it, should be held invalid.

<sup>62</sup> *Dygert v. Schenck*, 23 Wend. (N. Y.) 446, 35 Am. Dec. 375, and note.

<sup>63</sup> *Cross v. United States*, 1 Gall. (U. S.) 26.

<sup>64</sup> It has also been held that if the offense was committed by several persons, only one penalty can be recovered, and the offense will not be regarded a distinct offense by each. *Palmer v. Conly*, 4 Den. (N. Y.) 374; *Conley v. Palmer*, 2 N. Y. 182; *Ingersoll v. Skinner*, 1 Den. (N. Y.) 540. Held, under Ohio statute providing that railway companies shall provide a blackboard and register the time of arrival, lateness, etc., of each train, and providing a penalty of \$10 for "each violation of the provisions of the act," that failure to provide a

blackboard renders the company liable to only one penalty, although a large number of trains were unregistered. *State v. Cleveland & C. R. Co.*, 8 Ohio C. C. 604. Under the differently worded Indiana statute it was held that one penalty could be collected for each train not registered, no blackboard having been erected. *State v. Indiana & C. R. Co.*, 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502.

<sup>65</sup> Where the penalty was for each day's continuance, it was held unnecessary to declare in separate counts, but all were properly grouped together. *Toledo & C. R. Co. v. Stephenson*, 131 Ind. 203, 30 N. E. 1082. See also *Gulf & C. R. Co. v. State* (Tex. Civ. App.), 169 S. W. 385. But the second offense must be of the same nature as the first, and there must be conviction. *Scot v. Turner*, 1 Root (Conn.) 163.

to each action,<sup>66</sup> and this is on the additional ground that the penalty is not for the satisfaction of the injured party, for he still has his action for damages. But where the language of the statute is plain, courts, although sometimes reluctant, have felt bound to award a penalty for each violation, where the sum amounted to many thousands of dollars.<sup>67</sup> Following the rule of strict construction, it has been held that only one penalty can be assessed where the plaintiff has paid, in one payment, an account covering a large number of overcharges, where the statute provided a penalty for each "collection or demand."<sup>68</sup> In enforcing the federal statute relating to confinement of animals, the courts have refused to construe the law so as to make the confinement of each animal a separate offense, where a large shipment was made.<sup>69</sup> And in a recent Texas case, where the statute provided that the company should be liable for a certain penalty for each week it failed to have water closets at passenger stations, it was held that the penalty could be recovered for each week the company failed to comply with the statute at any station in the county, but not for each station at which it failed to comply with the statute.<sup>70</sup> We have elsewhere discussed the constitutionality of statutes giving double damages.<sup>71</sup> Such statutes are

<sup>66</sup> *Fisher v. New York &c. R. Co.*, 46 N. Y. 644; *Parks v. Nashville &c. R. Co.*, 13 Lea (Tenn.) 1, 49 Am. Rep. 655; *Murray v. Galveston &c. R. Co.*, 63 Tex. 407, 51 Am. Rep. 650, and note. This seems to us the true doctrine. But the statute may so plainly provide for separate prosecutions that nothing remains for the courts but to enforce it as it is written. The Indiana statute in regard to noting the time of arrival of trains on a black-board authorizes a cumulative penalty. *Southern R. Co. v. State* (Ind. App.), 72 N. E. 174, 165 Ind. 613, 75 N. E. 272; *State v. Indiana &c. R. Co.*, 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502.

<sup>67</sup> See *State v. Kansas City R. Co.*, 32 Fed. 722, per Brewer, J. See also *Gulf &c. R. Co. v. State* (Tex. Civ. App.), 169 S. W. 385.

<sup>68</sup> *Porter v. Dawson Bridge Co.*, 157 Pa. St. 367, 27 Atl. 730. The practice of giving penalties to informers has been condemned by able jurists, and certainly statutes giving such penalties should not be extended by construction.

<sup>69</sup> *United States v. Boston &c. R. Co.*, 15 Fed. 209.

<sup>70</sup> *Missouri &c. R. Co. v. State* (Tex. Civ. App.), 97 S. W. 724. Compare, however, *Gulf &c. R. Co. v. State* (Tex. Civ. App.), 169 S. W. 385.

<sup>71</sup> See ante, § 785.

in their nature penal,<sup>72</sup> but are construed by some courts as here remedial. Statutes giving the party injured by overcharges a right of action for an amount equal to three and even five times the legal amount of freight have been upheld.<sup>73</sup>

§ 847 (715). When "penalty" and when "liquidated damages."—It is often a close question whether the statute in prescribing an amount to be paid to the person injured by its disregard contemplates the enforcement of a penalty or the liquidation of damages. It arises when the court proceeds to give effect to the widely different rules of construction which apply respectively to penal statutes and to statutes creating or defining a civil liability. It has been held in condemnation proceedings where by the terms of the inquisition the company is required to pay a fixed sum to the owner in case it fails to perform specified conditions that such sum is not a penalty but liquidated damages.<sup>74</sup> And the rule was held to be substantially the same as that which prevails in cases of contracts. Where it is stated in "clear and unambiguous terms that a certain sum shall be paid by way of compensation upon a breach of the contract, or where the covenant is to do several acts the damages arising from the breach of which are uncertain, and incapable of being ascertained by any fixed pecuniary standard," the sum so fixed will be considered as liquidated damages and not as a penalty.<sup>75</sup> On the other hand it has been as clearly laid down that where the breach is capable of accurate valuation and the parties have agreed on a different sum to be paid in default, such sum is to be regarded as a penalty

<sup>72</sup> *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. ed. 463, 22 Am. & Eng. R. Cas. 557; *Bettys v. Milwaukee & C. R. Co.*, 37 Wis. 323.

<sup>73</sup> *Burkholder v. Union Trust Co.*, 82 Mo. 572, 23 Am. & Eng. R. Cas. 656; *Missouri Pac. R. Co. v. Humes*, 22 Am. & Eng. R. Cas. 557, and authorities cited; *Spealman v. Missouri Pac. R. Co.*, 71 Mo. 434. A

statute awarding five times the legal freight rate to the victim of overcharges was upheld in *Herрман v. Burlington & C. R. Co.*, 57 Iowa 187, 9 N. W. 378, 10 N. W. 340, 9 Am. & Eng. R. Cas. 339.

<sup>74</sup> *Pennsylvania R. Co. v. Reichert*, 58 Md. 261, 10 Am. & Eng. R. Cas. 429.

<sup>75</sup> *Geiger v. The Western Maryland R. Co.*, 41 Md. 4.



and not as liquidated damages.<sup>76</sup> The reasoning in these cases has been applied to statutes, in regard to which the same distinction has been drawn, and it has been held that laws prescribing the amount to be paid upon a violation, where without reference to the statute the person injured has a cause of action, simply prescribe the measure of damages and do not denounce a penalty;<sup>77</sup> in other words, that such statutes are not penal but remedial.<sup>78</sup> In some states it is held that the "forfeiture" as designated by the statute is a penalty as is also the attorney's fee allowed,<sup>79</sup> but while the attorney's fees may be allowed in addition to the statutory amount prescribed, it is said that it can not be maintained that they constitute a "penalty for exercising the right of defense."<sup>80</sup> The Connecticut statute providing that railroad companies shall be liable for fires kindled by sparks from their locomotives, although they are free from negligence, is held not to be penal but remedial,<sup>81</sup> and statutes allowing treble the usurious interest collected, double damages for fraudulently removing property, and double damages for injuries resulting from defects in highways have respectively been held to be remedial statutes which should be liberally construed.<sup>82</sup> Even revenue laws imposing forfeitures for fraud were held by the Supreme Court of the United States not to be technically penal in

<sup>76</sup> *St. Louis &c. R. Co. v. Shoemaker*, 27 Kans. 677, 11 Am. & Eng. R. Cas. 379.

<sup>77</sup> *Houston &c. R. Co. v. Harry*, 63 Tex. 256, 18 Am. & Eng. R. Cas. 502.

<sup>78</sup> *Frohock v. Pattee*, 38 Maine 103; *Quimby v. Carter*, 20 Maine 218; *Reed v. Northfield*, 13 Pick. (Mass.) 94, 23 Am. Dec. 662, and note.

<sup>79</sup> *Dow v. Beidelman*, 49 Ark. 455, 31 Am. & Eng. R. Cas. 14; *Kansas Pac. R. Co. v. Mower*, 16 Kans. 573; *Kansas Pac. R. Co. v. Yanz*, 16 Kans. 583.

<sup>80</sup> *Burlington &c. R. Co. v. Dey*,

82 Iowa 312, 48 N. W. 98, 12 L. R. A. 436, and note, 31 Am. St. 477.

<sup>81</sup> *Newton v. New York &c. R. Co.*, 56 Conn. 21, 12 Atl. 644, 32 Am. & Eng. R. Cas. 347. In our opinion this doctrine is of doubtful soundness.

<sup>82</sup> *Gray v. Bennett*, 3 Met. (Mass.) 522; *Reed v. Northfield*, 13 Pick. (Mass.) 94, 23 Am. Dec. 662; *Bay City &c. R. Co. v. Austin*, 21 Mich. 390; *Stanley v. Wharton*, 9 Price 301. But see, contra, *Hines v. Wilmington &c. R. Co.*, 95 N. Car. 434, 59 Am. R. 250; *Coble v. Shoffner*, 75 N. Car. 42; *Cohn v. Neeves*, 40 Wis. 393.

such a sense as to require strict construction.<sup>83</sup> On the other hand, it is held that statutes relating to criminal offenses and all statutes which impose as punishment any penalties, pecuniary or otherwise, or forfeitures of money or other property, or which provide for the recovery of damages beyond just compensation to the party injured, whether recovered in a suit by the state or by a private individual, are penal in the sense that they fall under the rule of strict construction.<sup>84</sup> This is the only doctrine that can be defended on principle. The question must, however, necessarily depend largely upon the language of the particular statute and is to be determined, in part, by the apparent intention that the statute carries of providing for redress or for punishment.

**§ 848 (716). Indictment of railroad companies for causing death.**—In some of the states railroad companies are by statute made subject to indictment and fine in case the death of any person is caused by their negligence or that of their servants. Such statutes have been held constitutional and valid.<sup>85</sup> It has been held under the old New Hampshire statute that the form of the indictment is governed, in the main at least, by the principles of the criminal law,<sup>86</sup> but as the fine or penalty is recoverable, under most of the statutes, for the widow, children, next of kin, heirs or other designated person more or less dependent upon

<sup>83</sup> *Taylor v. United States*, 3 How. (U. S.) 197, 11 L. ed. 559.

<sup>84</sup> *Schooner Bolina*, 1 Gall. (U. S.) 75; *Brooks v. Western Union Tel. Co.*, 56 Ark 224, 19 S. W. 572; *Cumberland &c. Canal Corp. v. Hitchings*, 57 Maine 146; *Bay City &c. R. Co. v. Austin*, 21 Mich. 390; *Camden &c. R. Co. v. Briggs*, 22 N. J. L. 623; *Hines v. Wilmington &c. R. Co.*, 95 N. Car. 434, 59 Am. Rep. 250; *Henderson v. Sherborne*, 2 M. & W. 236; *Nicholson v. Fields*, 7 H. & N. 810.

<sup>85</sup> *Boston &c. R. Co. v. State*, 32 N. H. 215, and authorities cited in following notes *infra*. But, in the

absence of statute, the company is usually not held subject to indictment. *Commonwealth v. Illinois Cent. R. Co.*, 152 Ky. 320, 153 S. W. 459, 45 L. R. A. (N. S.) 344; *People v. Rochester R. Co.*, 59 Misc. 347, 112 N. Y. S. 362. But see *Smith v. Louisville &c. R. Co.*, 75 Ala. 449, 21 Am. & Eng. R. Cas. 157.

<sup>86</sup> *State v. Manchester &c. R. Co.*, 52 N. H. 528; *State v. Wentworth*, 37 N. H. 196. For the history of the New Hampshire legislation and the present statute in that state, see *French v. Mascoma &c. Co.*, 66 N. H. 90, 20 Atl. 363.

the deceased, it is said that such statutes are designed to take the place of Lord Campbell's act,<sup>87</sup> and it is held that the indictment must show the existence of some person of the class designated.<sup>88</sup> It is also held, for the same reason, that the same rules of evidence and principles of law are to be applied on the trial as in analogous civil actions for damages.<sup>89</sup> Thus, under the Maine statute, it has been held that the deceased must be shown to have been free from contributory negligence.<sup>90</sup> But the contrary has been held as to passengers in Massachusetts.<sup>91</sup> In Maine, but not in Massachusetts, it seems that the remedy by indictment is limited to cases where the injured person dies immediately, and is not an employe of the company.<sup>92</sup> The proof should support the theory of the indictment, and a material variance may be fatal to a recovery.<sup>93</sup>

<sup>87</sup> *State v. Grand Trunk R. Co.*, 58 Maine 176, 4 Am. Rep. 258.

<sup>88</sup> *State v. Grand Trunk &c. R. Co.*, 60 Maine 145; *Commonwealth v. Eastern R. Co.*, 5 Gray (Mass.) 473; *State v. Gilmore*, 24 N. H. 461. Compare *Commonwealth v. Boston &c. R. Co.*, 11 Cush. (Mass.) 517.

<sup>89</sup> *State v. Grand Trunk R. Co.*, 58 Maine 176, 4 Am. Rep. 258; *State v. Maine Cent. R. Co.*, 77 Maine 490, 21 Am. & Eng. R. Cas. 216; *State v. Manchester &c. R. Co.*, 52 N. H. 528.

<sup>90</sup> *State v. Maine Cent. R. Co.*, 76 Maine 357, 49 Am. R. 622, and note, 19 Am. & Eng. R. Cas. 312; *State v. Maine Cent. R. Co.*, 81 Maine 84, 16 Atl. 368. See also *State v. Manchester &c. R. Co.*, 52 N. H. 528.

<sup>91</sup> *Commonwealth v. Boston &c. R. Co.*, 134 Mass. 211; *Merrill v. Eastern R. Co.*, 139 Mass. 252, 29 N. E. 666. As to one not a passenger the same ruling was made

as in Maine. *Commonwealth v. Boston &c. R. Co.*, 126 Mass. 61.

<sup>92</sup> *State v. Maine Cent. R. Co.*, 60 Maine 490; *State v. Grand Trunk &c. R. Co.*, 61 Maine 114, 14 Am. Rep. 552. But see *Commonwealth v. Metropolitan &c. R. Co.*, 107 Mass. 236; *Daley v. Boston &c. R. Co.*, 147 Mass. 101, 16 N. E. 690, 33 Am. & Eng. R. Cas. 298; *Commonwealth v. Boston &c. R. Co.*, 133 Mass. 383, 8 Am. & Eng. R. Cas. 297. The Massachusetts statute has been changed several times, and under some of the acts death need not result, and special provision is also made for recovery where a servant is killed.

<sup>93</sup> See *State v. Maine Cent. R. Co.*, 81 Maine 84, 16 Atl. 368; *Commonwealth v. Fitchburg R. Co.*, 120 Mass. 372; *Commonwealth v. Fitchburg R. Co.*, 126 Mass. 472; *Commonwealth v. Boston &c. R. Co.*, 133 Mass. 383, 8 Am. & Eng. R. Cas. 297.

§ 849 (717). **Violation of Sunday laws.**—It has been held in some instances that a railroad company is a person within the purview of general penal statutes against "persons" requiring the observance of Sunday.<sup>94</sup> Many states have regulations looking particularly to the operation of railroads on that day. Some prohibit the running of freight or excursion trains, and the loading or unloading of freight. Some designate the hours during which trains may run or the emergency which shall excuse their running during the prohibited hours.<sup>95</sup> These statutes are upheld as falling properly within the police power, and they are enforced by penalty recoverable sometimes by civil action and in some states by indictment. The weight of authority, however, is to the effect that the running of trains is excluded from the statute on the ground of its being "a work of necessity," where such exception is made,<sup>96</sup> but some well reasoned decisions have held it not to be so.<sup>97</sup> The Georgia statute, prohibiting the running of freight trains on the Sabbath, has been held not to apply to a railroad which begins and ends in other states and which does not run a distance greater than thirty miles in Georgia.<sup>98</sup>

§ 850 (718). **Indictment of railroad company for maintaining a nuisance.**—A railroad company may be indicted for maintain-

<sup>94</sup> *Sparhawk v. Union &c. R. Co.*, 54 Pa. St. 401, 439; *State v. Baltimore &c. R. Co.*, 15 W. Va. 362, 36 Am. Rep. 803. In West Virginia the law has since been changed by statute. *State v. Norfolk &c. R. Co.*, 33 W. Va. 440, 10 S. E. 813, 43 Am. & Eng. R. Cas. 330.

<sup>95</sup> *Jackson v. State*, 88 Ga. 787, 15 S. E. 905.

<sup>96</sup> *Augusta R. Co. v. Renz*, 55 Ga. 126; *Commonwealth v. Louisville &c. R. Co.*, 80 Ky. 291, 44 Am. Rep. 475; *Smith v. New York &c. R. Co.*, 46 N. J. L. 7, 18 Am. & Eng. R. Cas. 399. Carrying for-

ward of trains loaded with stock is a work of necessity and not illegal. *Philadelphia &c. R. Co. v. Lehman*, 56 Md. 209, 40 Am. Rep. 415.

<sup>97</sup> *Sparhawk v. Union &c. R. Co.*, 54 Pa. St. 401; *Commonwealth v. Jeandell*, 2 Grant's Cas. (Pa.) 506; *Johnston v. Com.*, 22 Pa. St. 102. This rule has been changed by statute in Pennsylvania. The decision of Strong, J., in *Sparhawk v. Union &c. R. Co.* *supra*, is a valuable contribution to the law on this subject.

<sup>98</sup> *Griggs v. State*, 126 Ga. 442, 55 S. E. 179.

ing a nuisance.<sup>99</sup> Thus, railroad companies have been indicted for placing and leaving cars in a public highway,<sup>1</sup> for failing to keep a crossing in repair,<sup>2</sup> for failure to give warnings or signals at crossings,<sup>3</sup> for unlawfully cutting through and obstructing a public highway,<sup>4</sup> and for permitting pools of water to form on their land and become stagnant.<sup>5</sup> So, they are liable for maintaining a private nuisance to those who are specially injured thereby.<sup>6</sup> But there are many acts that might constitute a nuisance if performed by an individual which will not constitute

<sup>99</sup> *Commonwealth v. New Bedford &c. Co.*, 2 Gray (Mass.) 339; *Northern Cent. R. Co. v. Commonwealth*, 90 Pa. St. 300, 5 Am. & Eng. R. Cas. 318; *State v. Vermont Cent. R. Co.*, 27 Vt. 103; *Reg. v. Great North &c. R. Co.*, 9 Q. B. 315; *Louisville &c. R. Co. v. State*, 3 Head (Tenn.) 523, 75 Am. Dec. 778; note in 14 Am. & Eng. R. Cas. 152, and authorities in following notes, *infra*. And a general railroad statute providing a method for compelling a railroad company to maintain structures in accordance with law does not abrogate the common law remedy by indictment for encroachment on a highway. *State v. Lackawana R. Co.* (N. J.), 90 Atl. 1103; *State v. Morris &c. R. Co.*, 23 N. J. L. 360.

<sup>1</sup> *Cincinnati R. Co. v. Commonwealth*, 80 Ky. 137; *State v. Western &c. R. Co.*, 95 N. Car. 602; *State v. Troy &c. R. Co.*, 57 Vt. 144; post, § 852. See also *Becker v. State*, 33 Ind. App. 261, 71 N. E. 188; *Mason v. Ohio River R. Co.*, 51 W. Va. 183, 41 S. E. 418, 421, citing text.

<sup>2</sup> *Paducah &c. R. Co. v. Commonwealth*, 80 Ky. 147, 10 Am. & Eng. R. Cas. 318; *State v. Morris*

*&c. R. Co.*, 23 N. J. L. 360, and authorities cited; *People v. New York &c. R. Co.*, 74 N. Y. 302; *Memphis &c. R. Co. v. State*, 87 Tenn. 746, 11 S. W. 946; post § 852.

<sup>3</sup> *Louisville &c. R. Co. v. Commonwealth*, 13 Bush (Ky.) 388, 26 Am. Rep. 205, and note; *Louisville &c. R. Co. v. Commonwealth*, 80 Ky. 143, 44 Am. Rep. 468.

<sup>4</sup> *Pittsburgh &c. R. Co. v. Reich*, 101 Ill. 157; *Commonwealth v. Nashua &c. R. Co.*, 2 Gray (Mass.) 54; *Fanning v. Osborne*, 102 N. Y. 441; *Reg. v. Longton Gas Co.*, 2 El. & E. 651; post, § 852.

<sup>5</sup> *Salem v. Eastern R. Co.*, 98 Mass. 431, 96 Am. Dec. 650. This, however, was not a prosecution by indictment, but was an action by a city, under a statute, to recover the expense of removing the nuisance. And it is a penal offense under the Kentucky statute for a railroad company to pollute the waters of a stream with deleterious and deadly substance. *Commonwealth v. Louisville &c. R. Co.*, 175 Ky. 267, 194 S. W. 345.

<sup>6</sup> *Baltimore &c. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. ed. 739, 11 Am. & Eng. R. Cas. 15; *Little Rock R.*

a nuisance by a railroad company. This is especially true where the alleged nuisance merely affects the public. A railroad company authorized by the legislature to construct and operate a road for the public use is thereby relieved from many of the consequences attending the construction and operation of a road by an individual without such authority, and it may, perhaps, be stated as a general rule that, so long as it keeps within the scope of the powers and authority granted, a railroad company is not liable either civilly or criminally for a nuisance which is the necessary result of the construction and operation of its road, in accordance with its charter,<sup>7</sup> although it may be made liable for many acts of commission or omission by express legislation under the police power. It has been held that a provision in the charter of a turnpike company imposing a penalty for failing to

Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277, 17 Am. & Eng. R. Cas. 152; Jones v. Railroad Co., 107 Mass. 261; Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1; Cogswell v. New York &c. R. Co., 103 N. Y. 10, 8 N. E. 537, 56 Am. Rep. 6, and note; Brown v. Eastern &c. R. Co., 22 Q. B. 391, 37 Am. & Eng. R. Cas. 558.

<sup>7</sup> Randall v. Jacksonville &c. R. Co., 19 Fla. 409, 17 Am. & Eng. R. Cas. 184; Georgia R. &c. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315, 321, citing text; State v. Louisville &c. R. Co., 86 Ind. 114, 10 Am. & Eng. R. Cas. 286; Rogers v. Kennebec &c. R. Co., 35 Maine 319; Chope v. Detroit &c. R. Co., 37 Mich. 195, 26 Am. Rep. 512; Eaton v. Boston &c. R. Co., 51 N. H. 504, 12 Am. Rep. 147; Uline v. New York Cent. &c. R. Co., 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661; Danville &c. R. Co. v. Commonwealth, 73 Pa. St. 29; Rex v. Pease, 4 B. & Ad. 30. See also

Louisville &c. Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188, 189, citing text. Certainly this is true as to the state, but it is frequently said that the legislature can not authorize a private nuisance, and it can not take away or destroy individual rights, such as the right of access by authorizing additional burdens upon a highway. Elliott Roads and Streets, (3d ed.) 484, 485, and authorities cited. Where property has been taken, however, under the right of eminent domain the property owners are presumed to have been compensated at the time it was taken, for the inconvenience arising from the ordinary operation of the road. Clark v. Hannibal &c. R. Co., 36 Mo. 202; Porterfield v. Bond, 38 Fed. 391; Dearborn v. Boston &c. R. Co., 24 N. H. 179; Chicago &c. Co. v. Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341, and note, and numerous authorities cited; Lafayette &c. Co. v. New Albany &c. Co., 13 Ind. 90, 74 Am. Dec. 246;

keep its road in repairs does not, ipso, facto, take away its liability to indictment,<sup>8</sup> and it has also been held, on the other hand, that a corporation cannot be indicted for maintaining a nuisance while in the hands of a receiver.<sup>9</sup> But, while this is doubtless true when the nuisance is created and maintained by the receiver, we think there may be cases where the company remains in existence, in which the company might be held liable for a nuisance caused by itself and not connected with the operation of the road by the receiver.

**§ 851 (718a). Indictment under separate coach act—Variance.**—In many states there are statutes requiring separate coaches for white people and for colored people. A railroad company, indicted for failure to furnish separate coaches for the transportation of white and colored passengers under a statute making that an offense, cannot be convicted where the proof merely shows a discrimination in the quality and convenience of the separate coaches and this is made another offense by the statute.<sup>10</sup>

**§ 852 (719). Obstruction of highways.**—Railroad companies, in many jurisdictions, are liable to indictment for the obstruction of public highways, sometimes under general statutes

*Swinney v. Fort Wayne &c. Co.*, 59 Ind. 205; *Lafayette &c. Co. v. Murdock*, 68 Ind. 137; *Indiana &c. Co. v. Allen*, 113 Ind. 308, 15 N. E. 451, 3 Am. St. 650; *White v. Chicago &c. Co.*, 122 Ind. 317, 23 N. E. 782, 7 L. R. A. 257. *Dunsmore v. Central &c. R. Co.*, 72 Iowa 182, 33 N. W. 456; *Cosby v. Owensboro Railway Co.*, 10 Bush (Ky.) 288; *Randle v. Pacific &c. Co.*, 65 Mo. 325; *Parrot v. Cincinnati &c. Railway Co.*, 10 Ohio St. 624; *Struthers v. Dunkirk &c. Railway Co.*, 87 Pa. St. 282. See also *Pennsylvania Co. v. Lippincott*, 116 Pa. St. 472, 9 Atl. 871, 2 Am. St. 618; *Pennsylvania R. Co. v. Marchant*, 119 Pa. St. 541, 13

Atl. 690, 4 Am. St. 659. A city ordinance attempting to authorize the obstructing of a highway crossing for thirty minutes has been held unreasonable. *J. K. & W. H. Gilcrest Co. v. Des Moines*, 128 Iowa 49, 102 N. W. 831.

<sup>8</sup> *Susquehanna &c. Turnpike Co. v. People*, 15 Wend. (N. Y.) 267; *President &c. v. People*, 9 Barb. (N. Y.) 161.

<sup>9</sup> *State v. Wabash R. Co.*, 115 Ind. 466, 17 N. E. 909, 1 L. R. A. 179; *State v. Vermont Cent. R. Co.*, 30 Vt. 108.

<sup>10</sup> *Illinois &c. R. Co. v. Commonwealth*, 74 S. W. 1076, 25 Ky. L. 295.

and sometimes under statutes directed specifically against them.<sup>11</sup> In Tennessee it is held that a railroad company is indictable, under the common law, for obstructing highways while constructing their road, if they can prevent obstruction of the highway by building bridges or substituting a road, which must be done within a reasonable time, and that this is the rule, whether the charter prohibits the obstruction or not.<sup>12</sup> In most of the states the matter is regulated by statutes which prescribe the penalty and the mode of collecting it,<sup>13</sup> but in the absence of statutes the railroad company is amenable to the common law. In Indiana the statute imposes a penalty upon "any person" who shall, "unnecessarily and to the hindrance of passengers," obstruct any highway, and declares that the word "persons" shall here include corporations. Strictly construing this statute, the court held that an action seeking to recover the penalty for failure to restore a highway, after construction of the railroad, would not lie, but said that the company could be compelled, by mandate, to restore the highway to its original condition.<sup>14</sup> Under the same statute the company was required to pay the penalty for each day of the continuance of obstruction, where the road was constructed at such a grade as to make the highway passing under it impassable.<sup>15</sup> Railroad companies, in most states, are made liable to penalties for obstructing a passage

<sup>11</sup> *State v. Morris &c. R. Co.*, 23 N. J. L. 360; *Northern Cent. R. Co. v. Commonwealth*, 90 Pa. St. 300; *Louisville &c. R. Co. v. State*, 3 Head (Tenn.) 523, 75 Am. Dec. 778; *State v. Vermont Cent. R. Co.*, 27 Vt. 103, 107. See also *Becker v. State*, 33 Ind. App. 261, 71 N. E. 188.

<sup>12</sup> *Commonwealth v. Erie &c. R. Co.*, 27 Pa. St. 339, 67 Am. Dec. 471; *Louisville &c. R. Co. v. State*, 3 Head (Tenn.) 523, 75 Am. Dec. 778.

<sup>13</sup> *State v. Dubuque &c. Railroad Co.*, 88 Iowa 508, 55 N. W. 727;

*Illinois &c. R. Co. v. State*, 71 Miss. 253, 14 So. 459; *Corning v. Head*, 33 N. Y. S. 360, 86 Hun (N. Y.) 12; *Northern Cent. R. Co. v. Commonwealth*, 90 Pa. St. 300; *Pittsburgh &c. R. Co. v. Commonwealth*, 101 Pa. St. 192; *State v. Floyd*, 39 S. Car. 23, 17 S. E. 505.

<sup>14</sup> *Cummins v. Evansville &c. R. Co.*, 115 Ind. 417, 18 N. E. 6; citing *Indianapolis &c. R. Co. v. State*, 37 Ind. 489; *State v. Demaree*, 80 Ind. 519; *Clawson v. Chicago &c. R. Co.*, 95 Ind. 152.

<sup>15</sup> *Toledo &c. R. Co. v. Stephenson*, 131 Ind. 203, 30 N. E. 1082.



over a highway by allowing their trains to stand on crossings beyond a reasonable or necessary time.<sup>16</sup> It has been held that the simple stopping of trains on the highway does not constitute the offense unless it has actually obstructed travel.<sup>17</sup> A railroad company has been held not to be liable to a fine for obstructing a street in a town having no ordinance on the subject where the statute provides for a fine for obstructing a street for a longer time "than the ordinance shall prescribe."<sup>18</sup> So a railroad company may be liable for the acts of its servants in obstructing streets in violation of law, notwithstanding its instructions to its servants to conform to the law.<sup>19</sup> Railroad companies necessarily have the right to construct their road upon their right of way over highways, but the common law, and, in many states, special laws relating to highways, require that they shall do so without unnecessary inconvenience to the public. The right of way over public highways is generally obtained on the condition, either implied or specified in the grant or condemnation proceedings, that after construction the highway shall be restored to a condition at least as good as the original, and upon failure of such restoration prosecution may follow,<sup>20</sup> and it is

<sup>16</sup> See *Commonwealth v. Boston &c. R. Co.*, 135 Mass. 550; *Illinois &c. R. Co. v. State*, 71 Miss. 253, 14 So. 459; ante, § 850. And cities usually have power to pass ordinances to that effect under charter authority to control streets, prevent obstruction, and the like. *City of Owosso v. Michigan Cent. R. Co.*, 183 Mich. 688, 150 N. W. 323.

<sup>17</sup> *Illinois &c. R. Co. v. People*, 49 Ill. App. 538, 540, 542. See also *Hinchman v. Pere Marquette R. Co.*, 136 Mich. 341, 99 N. W. 277; 65 L. R. A. 553; *Crowley v. Chicago &c. R. Co.*, 122 Wis. 287, 99 N. W. 1016. But this must depend upon the particular statute involved.

<sup>18</sup> *Illinois &c. R. Co. v. State*, 71 Miss. 253, 14 So. 459.

<sup>19</sup> *Commonwealth v. New York &c. R. Co.*, 112 Mass. 412.

<sup>20</sup> *People v. Chicago & Alton R. Co.*, 67 Ill. 118; *Chicago &c. R. Co. v. People*, 44 Ill. App. 632; *Paducah &c. R. Co. v. Commonwealth*, 80 Ky. 147, 10 Am. & Eng. R. Cas. 318; *People v. New York &c. R. Co.*, 89 N. Y. 266, 10 Am. & Eng. R. Cas. 266; *Pittsburgh &c. R. Co. v. Commonwealth*, 101 Pa. St. 192, 10 Am. & Eng. R. Cas. 321; *State v. Ohio River R. Co.*, 38 W. Va. 242, 18 S. E. 582; *State v. Monongahela R. Co.*, 37 W. Va. 108, 16 S. E. 519. See *Louisville &c. R. Co. v. Commonwealth*, 16 Ky. L. 68, 26 S. W. 536.

not necessary that a demand first be made upon the defendant to restore the highway.<sup>21</sup> Where the company claims to have constructed a sufficient substitute for the highway impaired the question is for the jury.<sup>22</sup>

**§ 853 (720). Failure to maintain accommodations at stations.**

—It is generally conceded that railroad companies may, by statute, be required to maintain such station-houses as will accommodate their passengers, and it has even been held by some courts, in the absence of express statutory requirement, that mandamus will lie to compel the construction of a station at a proper and necessary place.<sup>23</sup> But in some states there are statutes prescribing penalties for such omission, which may be enforced by suit,<sup>24</sup> and it has been held, in the absence of a penal statute, that where the station is poorly kept and is unsuitable for its purpose, the company may be liable to indictment and fine for criminal negligence in the performance of its public duties.<sup>25</sup> Where two companies had both violated a statute by not providing waiting-rooms at the crossing of their roads, it was held that either was liable separately, and that they need not be joined as defendants, and one company was compelled to pay the penalty for each day of the continuance of the violation.<sup>26</sup>

<sup>21</sup> *Corning v. Head*, 33 N. Y. S. 360, 86 Hun (N. Y.) 12.

<sup>22</sup> *State v. Monongahela R. Co.*, 37 W. Va. 108, 16 S. E. 519; *Roberts v. Chicago &c. R. Co.*, 35 Wis. 679.

<sup>23</sup> *State, ex rel. Mattoon v. Republican &c. R. Co.*, 17 Nebr. 647, 52 Am. Rep. 424, 22 Am. & Eng. R. Cas. 500; *State, ex rel. Moore v. Chicago &c. R. Co.*, 19 Nebr. 476, 27 N. W. 434. See also note to *Minneapolis &c. R. Co. v. Railroad Com.*, 136 Wis. 146, 116 N. W. 905, in 17 L. R. A. (N. S.) 821. But see ante, § 739.

<sup>24</sup> *State v. Alabama &c. Co.*, 67 Minn. 647, 7 So. 502, 42 Am. & Eng. R. Cas. 681; *State v. Wabash &c.*

*R. Co.*, 83 Mo. 144, 25 Am. & Eng. R. Cas. 133; *State v. Concord &c. R. Co.*, 59 N. H. 85; *Bonham v. Columbia &c. R. Co.*, 26 S. Car. 353, 2 S. E. 127, 30 Am. & Eng. R. Cas. 177; *State v. Kansas City &c. R. Co.*, 32 Fed. 722. See also as to penalty for failure to furnish freight cars, note in 15 L. R. A. (N. S.) 733. As to heating cars, see note in 42 L. R. A. (N. S.) 110. And as to penalty for delay in delivery or destruction of freight, see note in 20 L. R. A. (N. S.) 126.

<sup>25</sup> *McKinney v. I. C. R. Co.*, 6 Iowa Ry. Com. 557.

<sup>26</sup> *State v. Kansas City &c. R. Co.*, 32 Fed. 722, per Brewer, J.

Where it was made the duty of the railroad commission to direct the building of station-houses and to prescribe their dimensions, the company was held not liable to the penalty for each day of a violation of the order of the commission, as the commissioners had failed to prescribe the dimensions.<sup>27</sup> In most of the states there are statutes requiring railway companies to maintain stations and freight depots either under the order of railway commissioners or where some prescribed population or amount of business exists to demand them, and in some cases the offices and waiting rooms are required to be open and in condition to receive the public for a designated time before the arrival of trains. In some instances the neglect to follow the statute constitutes a misdemeanor on the part of the officer or servant, and in other cases the statute denounces a penalty against the corporation.<sup>28</sup> A statute imposing penalties for the failure of railroad companies to maintain water closets at passenger stations has been sustained against the objection that it amounted to a deprivation of property without due process of law.<sup>29</sup> But it has been held that a statute requiring water closets at stations does not apply to mere flag stations at which there are no buildings and no agent.<sup>30</sup>

<sup>27</sup> *State v. Alabama &c. R. Co.*, 67 Miss. 647, 7 So. 502, 42 Am. & Eng. R. Cas. 681. As to extent of power of railroad commissions, see chapter on State Railroad Commissions, ante.

<sup>28</sup> As to what orders as to facilities a railroad commission may make, compare *State v. Florida East Coast R. Co.*, 67 Fla. 83, 64 So. 443, with *Erie R. Co. v. Board* (N. J.), 89 Atl. 1001.

<sup>29</sup> *Missouri &c. R. Co. v. State* (Tex. Civ. App.), 97 S. W. 720. See also as to indictment and evidence under such statutes requiring convenient water closets. *Louisville &c. R. Co. v. Commonwealth*, 175

Ky. 315, 194 S. W. 346; *Galveston &c. Ry. Co. v. State* (Tex. Civ. App.), 194 S. W. 462.

<sup>30</sup> *State v. Baltimore &c. R. Co.* 61 W. Va. 367, 56 S. E. 518. See also *Commonwealth v. Chesapeake &c. Ry. Co.*, 157 Ky. 140, 162 S. W. 783. And so as to a statute requiring ticket offices and waiting rooms to be kept open at least thirty minutes before the schedule time for the departure of passenger trains. *Sandifer v. Louisville &c. R. Co.*, 28 Ky. L. 464, 89 S. W. 528. Compare *Chesapeake &c. Ry. Co. v. Lanhorn*, 159 Ky. 325, 167 S. W. 132.

**§ 854 (720a). Indictment for failure to maintain accommodations.**—Under the Kentucky statute requiring every railroad company to provide a suitable waiting room in cities and towns, and at such other stations as the railroad commissioners of the state may require, an indictment against a railroad company for failing to provide a waiting room at a certain village on its line was held fatally defective because of its failure to charge that the railroad commission had ordered the company to maintain such a station.<sup>31</sup>

**§ 855 (721). Statutory signals—Stops at crossings.**—The legislatures of the different states possess and freely exercise the power to prescribe regulations for the moving and operation of trains with safety both to the passengers and to the public. In most cases they require that each locomotive shall carry a bell and whistle and prescribe the signals which shall be given upon approaching crossings, upon starting trains, or while moving through populous neighborhoods. Most cities exercise the power through ordinances.<sup>32</sup> These regulations are enforced sometimes by penalty against the corporation and sometimes by fine or even imprisonment of the servant who disregards them.<sup>33</sup> Where

<sup>31</sup> *Commonwealth v. Illinois Cent. R. Co.*, 27 Ky. L. 763, 86 S. W. 542.

<sup>32</sup> *Galena &c. R. Co. v. Loomis*, 13 Ill. 548, 56 Am. Dec. 471; *Galena &c. R. Co. v. Appleby*, 28 Ill. 283; *Pittsburgh &c. Co. v. Brown*, 67 Ind. 45, 33 Am. Rep. 73; *Commonwealth v. Eastern R. Co.*, 103 Mass. 254, 4 Am. Rep. 555, *Kaminitsky v. Northeastern R. Co.*, 25 S. Car. 53. Also *Louisville &c. R. Co. v. Loyd*, 185 Ala. 119, 65 So. 153.

<sup>33</sup> *State v. Kansas City &c. R. Co.*, 54 Ark. 546, 16 S. W. 567; *St. Louis &c. R. Co. v. State*, 58 Ark. 39, 22 S. W. 918; *St. Louis &c. R. Co. v. State*, 55 Ark. 200, 17 S. W. 806; *State v. Norfolk So. R. Co.*, 168 N. Car. 103, 82 S. E. 963 (ordi-

nance prohibiting blocking of crossing for more than ten minutes held to make the engineer alone liable). *Western Union R. Co. v. Fulton*, 64 Ill. 271; *People v. New York &c. R. Co.*, 25 Barb. (N. Y.) 199; *Beck v. Portland &c. R. Co.*, 25 Ore. 32, 34 Pac. 753; *Missouri &c. R. Co. v. Reynolds (Tex.)*, 26 S. W. 879. An ordinance imposing imprisonment upon the person in charge of train who crosses a street, upon which street cars run, without being signaled by the watchman required to be at the crossing is held valid as within the grant of powers of the city. *State v. Cozzens*, 42 La. Ann. 1069, 8 So. 268.

the statute imposes a penalty for each failure to give the statutory signals, the penalty may be collected once for each time a crossing is passed without the giving of the signals,<sup>34</sup> and it has been held that the regulation applies whether the crossing be at grade or not.<sup>35</sup> While, ordinarily, an action for damages will lie where injury results from failure to observe these regulations, there are instances in which the only liability is the penalty.<sup>36</sup> Statutes requiring signals are mandatory, and there is ordinarily no question for the jury where the facts showing a failure to give the signals are undisputed.<sup>37</sup> The enforcement is often by indictment.<sup>38</sup> In many states trains are required to come to a full stop at the crossing with other railroads, except where safety appliances are used or where watchmen are kept constantly, and failure to stop is punishable, under some of the statutes, by indictment.<sup>39</sup>

**§ 856 (722). Blackboards and bulletins at stations.**—In Indiana and Ohio railroad companies are required to erect at each station having a telegraph office, a blackboard, upon which it is the duty of the agent to record the time of the arrival of trains,

<sup>34</sup> *People v. New York &c. R. Co.*, 25 Barb. (N. Y.) 199.

<sup>35</sup> *Johnson v. Southern Pac. R. Co.*, 147 Cal. 624, 82 Pac. 306; *People v. New York &c. R. Co.*, 13 N. Y. 78. Contra, *Jenson v. Chicago &c. R. Co.*, 86 Wis. 589, 57 N. W. 359, 22 L. R. A. 680. It has been held that a statute requiring a whistle to be blown at least eighty rods from a crossing does not impose that duty when the train starts within that distance. *Gulf &c. R. Co. v. Hall*, 34 Tex. Civ. App. 535, 80 S. W. 133. But the better rule seems to be that the whistle must be blown even in such a case. *Pittsburgh &c. R. Co. v. Terrell*, 177 Ind. 447, 95 N. E. 1109, 42 L. R. A. (N. S.) 367, and cases

there cited; also post, § 1648.

<sup>36</sup> *Chicago &c. R. Co. v. McDaniels*, 63 Ill. 122.

<sup>37</sup> *Havens v. Erie R. Co.*, 53 Barb. (N. Y.) 328; *Semel v. New York &c. R. Co.*, 9 Daly (N. Y.) 321. We suppose, however, that there may be cases where necessity will excuse or justify the failure to give the prescribed signals.

<sup>38</sup> *Commonwealth v. Boston &c. R. Co.*, 133 Mass. 383, 8 Am. & Eng. R. Cas. 297, and note citing authorities.

<sup>39</sup> *Commonwealth v. Chesapeake &c. R. Co.*, 16 Ky. L. 481, 29 S. W. 136. See also § 787 as to checking speed or stopping at highway crossings.

and "if late, how much." Both statutes have been upheld as constitutional, and the language of the Ohio statute has been construed to impose but one penalty where no blackboard was erected at all, on the ground that the failure to erect the board was a necessary part of each violation.<sup>40</sup> The more explicit language of the Indiana statute has been held to authorize a penalty for each train not recorded after a reasonable time being allowed for the erection of the blackboard, and a large accumulation of penalties has several times been allowed,<sup>41</sup> but it is held not to apply to a company operating a line, the regular time of passage from one end to the other of which is less than the time required to elapse between the posting of the bulletin and the arrival of the train, for the reason that it would be useless, impracticable, and not within the implication of the statute.<sup>42</sup> It has been held that the owner of a railway not operating it is not within the letter or spirit of the act, and that a railway company created by the consolidation of two companies is not liable for a failure of the lessee of one of the extinguished companies to give the blackboard notices.<sup>43</sup> It is also held a valid exercise of the police power to require a railroad company to annually fix its passenger and freight rates and post a schedule in each of its depots or stations, and such a requirement is not a regulation of interstate commerce.<sup>44</sup>

**§ 857 (722a). Failure to furnish cars.**—Under the rule of strict construction of penal statutes the Texas statute imposing

<sup>40</sup> *State v. Cleveland &c. R. Co.*, 8 Ohio C. C. R. 604. It may be doubtful whether these statutes referred to in the text are constitutional, but they have been upheld. *Pennsylvania Co. v. State*, 142 Ind. 428, 41 N. E. 937.

<sup>41</sup> *State v. Indiana &c. R. Co.*, 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502; *State v. Penn. R. Co.*, 133 Ind. 700, 32 N. E. 822; *Pennsylvania Co. v. State*, 142 Ind. 428, 41 N. E. 937; *Southern R. Co. v. State* (Ind. App.), 72 N. E. 174; *Same v. Same*,

165 Ind. 613, 75 N. E. 272. It has been held that the statute does not apply to night trains at stations where there is no night telegraph operator. *Terre Haute &c. R. Co. v. State*, 142 Ind. 428, 41 N. E. 952.

<sup>42</sup> *State v. Kentucky &c. Bridge Co.*, 136 Ind. 195, 35 N. E. 991.

<sup>43</sup> *State v. Pittsburgh &c. R. Co.*, 135 Ind. 578, 35 N. E. 700.

<sup>44</sup> *Chicago &c. R. Co. v. Fuller*, 17 Wall. (U. S.) 560, 21 L. ed. 710, affirming *Fuller v. Chicago &c. R. Co.*, 31 Iowa 187.

a penalty on a railroad company for failure to furnish cars on demand has been held not to impose the duty on a railroad company to furnish cars for use beyond its own lines.<sup>45</sup> The statute of this state requires the application for cars to state the time when they are desired. An application for a car "as soon as possible" is not sufficient to bring the applicant within the statute.<sup>46</sup> There is authority that an unprecedented demand on a railroad company for cars will excuse the company for failing to provide the cars demanded where the company has sufficient equipment for ordinary demands upon it.<sup>47</sup>

**§ 858 (723). Unlawful speed.**—The speed of trains moving through cities and towns where not regulated by statute is usually governed by ordinances enacted within the local exercise of the police power. The statutory limitations upon the rate of speed of trains at highway crossing are held to be limitations upon the company's franchises, and a violation may be prosecuted by indictment or otherwise.<sup>48</sup> Where the penalty is awarded to "the person aggrieved," it has been held to be collectible at the suit of one who suffered injury resulting from the frightening of his horse because of the illegal rate of speed, although no actual collision occurred.<sup>49</sup>

<sup>45</sup> *Houston &c. R. Co. v. Buchanan*, 42 Tex. Civ. App. 620, 94 S. W. 199.

<sup>46</sup> *Texas &c. R. Co. v. Hughes*, 99 Tex. 533, 91 S. W. 567.

<sup>47</sup> *St. Louis &c. R. Co. v. Leder Bros.*, 79 Ark. 59; 95 S. W. 170. But see *Patterson v. Missouri Pac. Coal Co.*, 77 Kans. 236, 94 Pac. 138, 15 L. R. A. (N. S.) 733. The Texas statute has been upheld as to intrastate commerce, *Allen v. Texas &c. R. Co.*, 100 Tex. 525, 101 S. W. 792, and held invalid as to interstate commerce. *Houston &c. R. Co. v. Mayes*, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. ed. 772.

<sup>48</sup> *Chicago &c. R. Co. v. Hagger-*

*ty*, 67 Ill. 113; *Whitson v. Franklin*, 34 Ind. 393; *Mobile &c. R. Co. v. State*, 51 Miss. 137; *Merz v. Missouri Pac. R. Co.*, 88 Mo. 672; *Clark v. Boston &c. R. Co.*, 64 N. H. 323, 31 Am. & Eng. R. Cas. 548; *People v. Boston &c. R. Co.*, 70 N. Y. 569; *Buffalo &c. R. Co. v. Buffalo*, 5 Hill (N. Y.) 209; *Pennsylvania &c. R. Co. v. Lewis*, 79 Pa. St. 33; *Horn v. Chicago &c. R. Co.*, 38 Wis. 463; *Haas v. Chicago &c. R. Co.*, 41 Wis. 44.

<sup>49</sup> *Chicago &c. R. Co. v. People*, 120 Ill. 667, 12 N. E. 207; *Grand Trunk R. Co. v. Rosenberger*, 9 Can. S. C. 311, 19 Am. & Eng. R. Cas. 8.

**§ 859 (723a). Penalties for detention of baggage.**—An Iowa statute which provides, “that for every day’s detention to travelers in consequence of damage as before described, and necessary delay in suit for same, said companies, owners, or agents shall pay to each person so delayed a sum of not less than three dollars, which amount shall be added to the judgment for damages to property, should the action be sustained,” was held to apply to the delay caused by damage or injury to the baggage only, and not to that consequent upon a detention of the same, or a failure to deliver it.<sup>50</sup> The statute only covers articles that are strictly baggage; it does not apply, for example, to sample cases of merchandise checked as baggage.<sup>51</sup>

**§ 860 (724). Other penal regulations.**—There are many penal regulations applying to the operation of railroads which are not easily classified. In many states railroad commissioners have jurisdiction to require gates, flagmen, or electric signals at railroad crossings.<sup>52</sup> In other states this power is to a limited extent conferred upon the county commissioners, and may be exercised by the towns and cities through ordinances, and in most of the states the municipal corporations are granted the power to make reasonable regulations. Where a crossing was over a switch track only, and such track was not in use after six o’clock in the evening nor on Sundays or legal holidays, an ordinance requiring the company to maintain a flagman at such crossing “between the hours of 7 o’clock A. M. and 9 o’clock P. M. of each and every day of the year” was held unreasonable and void.<sup>53</sup> Railroads are often required to provide large signs at road crossings to warn travelers of the proximity of the track and its danger, and to maintain and keep in repair proper crossings. In Indiana and Ohio cities and towns have power to require rail-

<sup>50</sup> *Anderson v. Toledo &c. R. Co.*, 32 Iowa 86.

<sup>51</sup> *McElroy v. Iowa Cent. R. Co.*, 133 Iowa 544, 110 N. W. 915.

<sup>52</sup> Massachusetts, Vermont, Connecticut, Ohio, Michigan, South Carolina, and other states. See

*Richards v. Southern R. Co.*, 97 S. Car. 77, 81 S. E. 314; *People v. Long Island R. Co.*, 58 Hun 412, 34 N. Y. S. 715.

<sup>53</sup> *Southern Ind. R. Co. v. Bedford*, 165 Ind. 272, 75 N. E. 268.



road intersection with streets to be lighted at night.<sup>54</sup> Different states make it a penal offense to place a freight car in the rear of a passenger coach in mixed trains. And most states have regulations requiring that cars shall be rendered comfortable and safe, that tools shall be carried to be available in case of accident, that certain combustibles be not carried, and in several states automatic couplers are required on all freight and passenger cars, air brakes on certain cars, and electric headlights and automatic bell ringers on engines.<sup>55</sup> Penalties are exacted of railroads in some jurisdictions where employes are retained who are color blind, or in the habit of becoming intoxicated, and in a number of states the law designates the number of brakemen to accompany a train, and prescribes the use of air brakes or others

<sup>54</sup> See *Cincinnati &c. R. Co. v. Sullivan*, 32 Ohio St. 152. Several ordinances under the Indiana statute have been held too uncertain and indefinite in two cases. *Shelbyville v. Cleveland &c. R. Co.*, 146 Ind. 66, 44 N. E. 929; *Cleveland &c. R. Co. v. Connersville*, 147 Ind. 277, 46 N. E. 579, 37 L. R. A. 175, 62 Am. St. 418. But these decisions were modified and an ordinance was upheld in the recent case of *Chicago &c. R. Co. v. Crawfordsville*, 164 Ind. 70, 72 N. E. 1025. See also *Chicago &c. R. Co. v. Salem*, 170 Ind. 153, 82 N. E. 913, 19 L. R. A. (N. S.) 658; *St. Mary's v. Lake Erie &c. R. Co.*, 60 Ohio St. 136, 53 N. E. 795; *Cincinnati &c. R. Co. v. Bowling Green*, 57 Ohio St. 336, 49 N. E. 121. But compare *Chicago v. Penna. Co.*, 252 Ill. 185, 96 N. E. 833, Ann. Cas. 1912D, 400.

<sup>55</sup> As elsewhere shown, the federal safety appliance act requiring automatic couplers and certain

other equipment has superseded state laws on the subject in interstate commerce. Upon this general subject and for construction of such acts, see *Chicago &c. R. Co. v. United States*, 211 Fed. 12; *United States v. Trinity &c. Ry. Co.*, 211 Fed. 448; *United States v. Pere Marquette R. Co.*, 211 Fed. 220; *Pennell v. Philadelphia &c. R. Co.*, 231 U. S. 675, 34 Sup. Ct. 220, 58 L. ed. 430; *United States v. Erie R. Co.*, 212 Fed. 853; *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 285, 34 Sup. Ct. 829, 58 L. ed. 1312; *Pittsburgh &c. R. Co. v. State*, 178 Ind. 498, 99 N. E. 801; *Cleveland &c. R. Co. v. Railroad Com. (Ind.)*, 162 N. E. 829; *Southern R. Co. v. Railroad Com.*, 179 Ind. 23, 100 N. E. 852; *Railroad Com. v. Grand Trunk &c. R. Co.*, 179 Ind. 253, 100 N. E. 852. As to heating cars, see *People v. Clark*, 14 N. Y. S. 642; *People v. N. Y. &c. R. Co.*, 55 Hun 409, 8 N. Y. S. 672.

equally as good.<sup>56</sup> But a statute making it a misdemeanor to act as conductor without having served two years as a freight conductor or brakeman has been held unconstitutional.<sup>57</sup> Railroad companies are generally required to fence their right of way, and to maintain cattle-guards at public crossings. Failure to do so is sometimes punished by specific penalties, but in many cases by imposing an absolute liability for stock killed by reason of the neglect. Sometimes the kind of switch to be used is prescribed by law, and the company is required to construct switches, frogs, guard rails, and the like, in such a manner as to insure the minimum danger to employes or others walking over them. In many states the laws regulate the stopping of trains at stations, designating the length of time a train must stop and the frequency of stopping to be observed at stations of certain descriptions.<sup>58</sup> It is sometimes made a penal offense to fail to announce the stopping place previous to arrival at each station.<sup>59</sup> In a number of states it is provided that upon demand of the federal authorities any or all trains must carry mail or transport troops in time of war, and a heavy penalty is denounced for refusal. There are many other penal regulations in the different states, which we will not enumerate here, but which will be treated under the subject of carriers, and the discussion of the operation of the road.<sup>60</sup>

<sup>56</sup> Regulation as to color blindness held valid and violation punishable by indictment. *Nashville &c. R. Co. v. State*, 83 Ala. 71, 3 So. 702, affirmed 128 U. S. 96, 9 Sup. Ct. 28, 38 Am. & Eng. R. Cas. 1. See also *Baldwin v. Kouns*, 81 Ala. 272, 2 So. 638, 31 Am. & Eng. R. Cas. 347. Legislative requirements as to qualifications of employes are valid. *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 560, 31 L. ed. 508, 33 Am. & Eng. R. Cas. 425.

<sup>57</sup> *Smith v. Texas*, 233 U. S. 630, 34 Sup. Ct. 681, 58 L. ed. 1129.

<sup>58</sup> See *Davidson v. State*, 4 Tex.

App. 545, 30 Am. Rep. 166; *Galveston &c. R. Co. v. La Gierse*, 51 Tex. 189; *Davis v. State*, 6 Tex. App. 166. Compare *State v. Noyes*, 47 Maine 189.

<sup>59</sup> *Parks v. Nashville &c. R. Co.*, 13 Lea (Tenn.) 1, 49 Am. Rep. 655, 18 Am. & Eng. R. Cas. 404.

<sup>60</sup> See also *Rohrig v. Chicago &c. R. Co.*, 130 Iowa 380, 106 N. W. 935 (penalty for failure to redeem tickets); *Clark v. American Exp. Co.*, 130 Iowa 254, 106 N. W. 642; *St. Louis &c. R. Co. v. Clay*, 77 Ark. 357, 92 S. W. 531; *Geer v. Michigan Cent. R. Co.*, 142 Mich. 511, 106 N. W. 72; *Hawes v. South-*

§ 861. **Full crew and hours of service laws.**—Among the acts referred to in the last preceding section are the full crew and hours of service statutes. Such laws have been upheld as a proper exercise of the police power;<sup>61</sup> but state hours of service laws have been superseded, in some instances, by the Act of Congress of March 4, 1907, and held invalid or ineffective as to interstate employes.<sup>62</sup>

§ 862. **Blacklisting—Clearance cards.**—In some jurisdictions blacklisting statutes, or statutes of that nature, have been enacted, but many of them have been held unconstitutional in requiring the employer to give a discharged employe a clearance card or written statement of the reasons for his discharge.<sup>63</sup> Others, however, have been upheld where they merely prohibit improper blacklisting or the like.<sup>64</sup>

ern R. Co., 73 S. Car. 274, 53 S. E. 285; San Antonio &c. R. Co. v. Burnes, 39 Tex. Civ. App. 32, 89 S. W. 21. Failure to run at least one passenger train a day, except Sunday, with certain provisos or exceptions, is made a penal offense by a Kentucky statute. Louisville &c. R. Co. v. Commonwealth, 175 Ky. 372, 194 S. W. 315.

<sup>61</sup> Full crew acts: Chicago &c. R. Co. v. Arkansas, 219 U. S. 453, 31 Sup. Ct. 275, 55 L. ed. 290; Pittsburgh &c. R. Co. v. State, 172 Ind. 147, 87 N. E. 1034; Penna. R. Co. v. Ewing, 241 Pa. St. 581, 88 Atl. 775, 49 L. R. A. (N. S.) 977. Hours of service laws generally: Ex parte Wong Wing, 167 Cal. 109, 138 Pac. 695, 51 L. R. A. (N. S.) 361, and cases cited in note; State v. Barba, 132 La. Ann. 768, 61 So. 785, Ann. Cas. 1914D, 1281 and cases cited in note.

<sup>62</sup> Erie R. Co. v. New York, 233 U. S. 671, 34 Sup. Ct. 756, 58 L. ed. 1149, 52 L. R. A. (N. S.) 266;

Northern Pac. R. Co. v. Washington, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. ed. 237; Louisville &c. R. Co. v. Hughes, 201 Fed. 727. As to when this act applies and as to its construction and when there is immunity from delay where it is not complied with, and the like, see United States v. Chicago &c. R. Co., 218 Fed. 701; United States v. Delaware &c. R. Co., 218 Fed. 608; United States v. Kansas City &c. Ry., 202 Fed. 828.

<sup>63</sup> Wallace v. Georgia &c. R. Co., 94 Ga. 732, 22 S. E. 579; Atchison &c. Ry. Co. v. Brown, 80 Kans. 314, 102 Pac. 459, 23 L. R. A. (N. S.) 247, 133 Am. St. 213; St. Louis &c. R. Co. v. Griffin, 106 Tex. 477, 171 S. W. 703.

<sup>64</sup> State Minn. ex rel. Scheffer v. Justus, 85 Minn. 279, 88 N. W. 759, 56 L. R. A. 757, 89 Am. St. 550. See upon the general subject, Cleveland &c. R. Co. v. Jenkins, 174 Ill. 398, 51 N. E. 811, 62 L. R. A. 922, and notes; Wabash R. Co. v.

§ 863 (725). **Violations of federal regulations.**—Under the constitutional power to regulate commerce Congress has enacted federal statutes, which, for the most part, relate to the duties of the railroad as a common carrier, and sometimes extend to legislation for the safety of passengers, and the expeditious and safe carriage of live stock. It has been held that the power to regulate commerce includes that of punishing all offenses against commerce, such as larceny, where it does not thereby interfere with the internal police regulations of a state.<sup>65</sup> These statutes being penal are strictly construed, yet the construction must be fair and reasonable so as to give effect to the legislative will. Thus it was held that a statute forbidding the shipment of nitroglycerine on passenger trains extended to a shipment of dynamite and the statutory penalty was exacted.<sup>66</sup>

§ 864 (726). **Penalty for confinement of live stock.**—One of comparatively recent acts of Congress affecting railroad traffic is that looking to the humane treatment of live stock, and requiring that animals shall not be confined in shipment more than twenty-eight hours continuously without unloading for food, rest and water, and providing a penalty for its violation to be recovered in a civil action in the name of the United States.<sup>67</sup> The statute requires that the time of confinement, immediately prior to delivery to the particular carrier, shall be included in estimating the period, and it is held that the carrier who has

Young, 162 Ind. 102, 69 N. E. 1003, 4 L. R. A. (N. S.) 1091 and elaborate note; 3 Elliott Cont., § 2699.

<sup>65</sup> United States v. Coombs, 12 Pet. (U. S.) 72, 9 L. ed. 1004; Kentucky &c. Bridge Co. v. Louisville &c. R. Co., 37 Fed. 567, 2 L. R. A. 289; and see penal clauses of various statutes.

<sup>66</sup> United States v. Saul, 58 Fed. 763; Rev. St. U. S., § 5353, and following. Other and more recent acts of congress relating to railroads will be considered in a subsequent volume.

<sup>67</sup> 5 Thomp. Corp. (2d ed.), § 6435. Upheld as constitutional in United States v. Boston &c. Co., 15 Fed. 209. But see act of June, 1906, extending the time, under certain circumstances, to thirty-six hours. See generally Baltimore &c. R. Co. v. United States, 220 U. S. 94, 31 Sup. Ct. 368, 55 L. ed. 384. See also as to statutes concerning the transportation of infected animals, note in 43 L. R. A. (N. S.) 1068.

possession at the time the period expires is alone liable, although the first carrier may have contracted for through carriage,<sup>68</sup> and the original statute has been held to apply only to shipments from one state to another.<sup>69</sup> The liability of the company on account of omission of the duty imposed by this statute has been held to be avoided by a special contract by which the shipper agrees to feed and water the stock himself, but this doctrine has been questioned, although followed in many states which have their own regulations.<sup>70</sup> Non-compliance with the statute is not excused by an accident resulting from negligence of the company.<sup>71</sup> In addition to the penalty, the carrier is liable to the owner in actual damages, but it has been held that the owner must affirmatively plead that the failure to feed, water and provide rest did not fall within the exceptions named in the statute.<sup>72</sup> The courts have refused to construe the statute so as to make the unlawful confinement of each animal a separate offense and thus multiply the penalty.<sup>73</sup>

**§ 865 (726a). Penalty for confinement of live stock—State legislation.**—Under a Massachusetts statute limiting the time of confinement of animals during transportation, it has been held that it is the duty of the company, in a case where a part

<sup>68</sup> *United States v. Louisville & C. R. Co.*, 18 Fed. 480; *Cincinnati & C. R. Co. v. Gregg*, 25 Ky. L. 2329, 80 S. W. 512.

<sup>69</sup> *United States v. East Tennessee & C. R. Co.*, 13 Fed. 642. See also *Galveston & C. R. Co. v. Jones* (Tex. Civ. App.), 123 S. W. 737. But the present statute is held applicable even though the shipment originated in Canada, the violation occurring while the stock was being carried through one state and into another. *Grand Trunk R. Co. v. United States*, 229 Fed. 116 (also holding that intentionally failing to obey the statute is a violation even though there is no evil intent).

<sup>70</sup> *Missouri Pac. R. Co. v. Texas & C. R. Co.*, 41 Fed. 913.

<sup>71</sup> *Newport & C. Co. v. United States*, 61 Fed. 488.

<sup>72</sup> *Hale v. Mo. & C. Co.*, 36 Nebr. 266, 54 N. W. 517. But in an action by the United States for the penalty it is held that the existence of accidental or unavoidable cause within the proviso or exception is matter of defense. *Grand Trunk R. Co. v. United States*, 229 Fed. 116.

<sup>73</sup> *United States v. Boston & C. R. Co.*, 15 Fed. 209. But compare *United States v. Oregon Short Line R. Co.*, 218 Fed. 868.

of the statutory period of confinement was spent on a connecting road outside the Commonwealth, to refuse the cars, unless they could be unloaded lawfully within the time fixed by the statute limiting the period of continuous confinement.<sup>74</sup> The failure of a railroad company to furnish the necessary facilities for unloading, feeding and watering need not be wanton to render the company liable under the South Carolina statute.<sup>75</sup> And the statute of that state expressly provides that the time the animals have been confined on connecting roads shall be included in estimating the time of confinement.<sup>76</sup> The Texas statute makes it the duty of the carrier to feed and water not oftener than an ordinary prudent person would feed and water his own stock under the same circumstances, and allows this duty to be shifted to the shoulders of the shipper by contract, notwithstanding a provision in the laws of that state denying the common carrier the right to limit his common-law liability.<sup>77</sup> And it is not regarded as necessary to the validity of such contract that a reduction of rates should have been granted.<sup>78</sup> Under this statute it is the duty of the carrier undertaking to transport cattle in cars which are not properly constructed for feeding and watering stock, to furnish places where the stock may be unloaded, watered and fed without injury in all kinds of weather.<sup>79</sup> A shipper who tenders his cattle to the carrier in a starved and famished condition for a haul of a few hours, cannot compel the carrier to feed them or incur the penalty provided by the Texas statute for failure to do so.<sup>80</sup>

<sup>74</sup> *Hendrick v. Boston &c. R. Co.*, 170 Mass. 44, 48 N. E. 835.

<sup>75</sup> *Comer v. Columbia &c. R. Co.*, 52 S. Car. 36, 29 S. E. 637.

<sup>76</sup> *Comer v. Columbia &c. R. Co.*, 52 S. Car. 36, 29 S. E. 637.

<sup>77</sup> *Texas &c. R. Co. v. Davis* (Tex. Civ. App.), 40 S. W. 167.

<sup>78</sup> *Texas &c. R. Co. v. Peters*, 31 Tex. Civ. App. 6, 71 S. W. 70.

<sup>79</sup> *International &c. R. Co. v. Rae*, 82 Tex. 614, 18 S. W. 672, 27 Am. St. 926. But see *San Antonio &c.*

*R. Co. v. Broad-Davis Cattle Co.* (Tex. Civ. App.), 140 S. W. 514.

<sup>80</sup> *Texas &c. R. Co. v. Stribling* (Tex. Civ. App.), 34 S. W. 1002.

For other cases under the Texas statute, see *Gulf &c. R. Co. v. Gray*, 87 Tex. 312; *Galveston &c. R. Co. v. Thompson* (Tex. Civ. App.), 23 S. W. 930; *San Antonio &c. R. Co. v. Chittnie* (Tex. Civ. App.), 135 S. W. 747; *Trinity &c. R. Co. v. Crawford* (Tex. Civ. App.), 146 S. W. 329.

§ 866 (727). **Offenses against railroads—Obstructing mails and interfering with interstate commerce.**—Obstructing the United States mails,<sup>81</sup> or unlawfully conspiring and interfering with the passage of trains engaged in interstate commerce,<sup>82</sup> is indictable as a crime under the United States statutes. This has been announced as the law, not only in the cases to which we have just referred, but also in many other cases, elsewhere referred to, growing out of railroad strikes. In one of them, boys only twelve years old, who obstructed a mail car during a strike, were held liable to indictment and punishment for obstructing the mails.<sup>83</sup>

§ 867 (727a). **English statutory penalties for riding without paying fare.**—In England it is provided by statute,<sup>84</sup> that “if any person travel, or attempt to travel, in any carriage of the company, or of any other company or party using the railway, without having previously paid his fare, and with intent to avoid payment thereof; or if any person, having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof; or if any person knowingly and wilfully refuse or neglect, on arriving at the point to which he has paid his fare, to quit such carriage, every such person shall, for every such offense, forfeit to the company a sum not exceeding forty shillings.” By the same statute it is provided:<sup>85</sup> “For better enforcing the observance of all or any of such regulations, it shall be lawful for the company, subject, etc., to make by-laws; \* \* \* provided that such by-laws be not repugnant to the laws of that part of the United Kingdom where the

<sup>81</sup> Charge to Grand Jury, In re, 62 Fed. 828; United States v. Thomas, 55 Fed. 380; United States v. Clark, Fed. Cas. 14805; United States v. Kirby, 7 Wall. (U. S.) 482, 19 L. ed. 278; United States v. Kane, 9 Sawy. (U. S. C. C.) 614.

<sup>82</sup> Grand Jury, In re, 62 Fed. 834, 840; Thomas v. Cincinnati &c. R.

Co., 62 Fed. 803; United States v. Debs, 64 Fed. 724; United States v. Elliott, 62 Fed. 801.

<sup>83</sup> United States v. Thomas, 55 Fed. 380.

<sup>84</sup> Companies Clauses Consolidation Act, 8 Vict., c. 20, § 103.

<sup>85</sup> Ibid. § 109.

same are to have effect, or to the provisions of this or the special act; \* \* \* and any person offending against any such by-law shall forfeit for every such offense any sum not exceeding five pounds, to be imposed by the company in such by-laws as a penalty for any such offense." \* \* \* Under § 103 of the foregoing provisions it is held that fraudulent intention is the gist of the offense of traveling without having paid the fare,<sup>86</sup> and the fact that a person rode beyond the station for which he had purchased a ticket, but, on getting out of the train, tendered the full local fare charged by the company for this extra distance, after delivering up his ticket, was no evidence of an intention to defraud the company.<sup>87</sup> Under § 103, by-laws were frequently made requiring a passenger not producing or delivering up his ticket, to pay his fare from the place from which the train originally started, or in default thereof forfeit a sum not exceeding forty shillings. In one case,<sup>88</sup> a by-law of this description, made under the provisions of an act incorporating the railway company, similar in effect to the provisions above set out from the Companies Clauses Consolidated Act, was held not to impose a penalty, and did not, therefore, justify the arrest and imprisonment of a passenger committing a breach of it, in accordance with other provisions for the enforcement of penalties in the act incorporating the company.<sup>89</sup> But the contrary was intimated in another case.<sup>90</sup> In still another case,<sup>91</sup> the express ground of the decision of the Court of Appeal was that such a by-law did impose a penalty, recoverable only before justices, according to the provisions of the act,<sup>92</sup> and not as a debt in a court of civil jurisdiction.

<sup>86</sup> *Dearden v. Townsend*, L. R. 1 Q. B. 10; *Bentham v. Hoyle*, L. R. 3 Q. B. Div. 289; *London &c. R. Co. v. Watson*, L. R. 3 C. P. Div. 429, 4 C. P. Div. 118. See also *Regina v. Frere*, 4 El. & Bl. 598; *McCarthy v. Dublin &c. R. Co.*, Irish, 3 C. L. 511. See also *Burns v. Jagmetty*, 86 N. J. 23, 90 Atl. 1050.

<sup>87</sup> *Dearden v. Townsend*, L. R. 1 Q. B. 10.

<sup>88</sup> *Chilton v. London &c. R. Co.*, 16 Mee. & W. 212.

<sup>89</sup> See also *Barr v. Midland R. Co.*, Irish Rep. 1 C. L. 130.

<sup>90</sup> *Brown v. Great Eastern R. Co.*, L. R. 2 Q. B. Div. 406.

<sup>91</sup> *London &c. R. Co. v. Watson*, L. R. 4 C. P. Div. 118, 3 C. P. Div. 429.

<sup>92</sup> Section 145.



**§ 868 (728). Sale of tickets without authority—"Scalpers."**—Some of the states prohibit "ticket scalping," or the sale, by others than ticket agents of the respective roads, of railroad tickets. Such a statute being in the nature of a police regulation, it is held not to be a regulation of interstate commerce, and does not violate the constitution of the United States, nor does it violate the provision of a state constitution that "no person shall be deprived of life, liberty or property without due process of law."<sup>93</sup> But this regulation is generally held not to apply to the sale by a traveler of an unused portion of a ticket purchased for his own use.<sup>94</sup>

**§ 869 (729). Climbing on cars—Evading payment of fare.**—Numerous special provisions for the protection of railroad companies in the operation of their roads and of the public patronizing them have been made by law in the various states. In

<sup>93</sup> *Burdick v. People*, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, and note, 41 Am. St. 329; *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238; *Commonwealth v. Wilson*, 37 Legal Intelligencer (Pa.) 484, 56 Am. & Eng. R. Cas. 230; *Commonwealth v. Keary*, 198 Pa. St. 500, 48 Atl. 472; *Samuelson v. State* (Tenn.), 95 S. W. 1012. See also *State v. Thompson*, 47 Ore. 492, 84 Pac. 476, 4 L. R. A. (N. S.) 480; *Ex parte O'Neill* (Wash.), 83 Pac. 104, 3 L. R. A. (N. S.) 558, and other cases cited in note. But see *Tyroler v. Warden*, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. 763; *People v. Caldwell*, 168 N. Y. 671, 61 N. E. 1132, affirming 64 App. Div. (N. Y.) 46. As to injunction in such a case, see *Schubach v. McDonald*, 179 Mo. 163, 78 S. W. 1020, 65 L. R. A. 136, 101 Am. St. 452; *Nashville R. Co. v. McConnell*, 82 Fed. 66; *Bittman v. Louisville & C. R. Co.* (U. S.), 28

Sup. Ct. 91, and note in 10 L. R. A. (N. S.) 437.

<sup>94</sup> In North Carolina the statute provides that "it shall be unlawful for any person to sell or deal in tickets issued by any railroad company unless he is a duly authorized agent of said railroad company." It was held that the prohibition does not extend to the simple sale of a ticket an individual may happen to have that he can not use, since such a sale is not "dealing in tickets," and is not within the reason for the statute. *State v. Ray*, 109 N. Car. 736, 14 S. E. 83, 14 L. R. A. 529, and note, 52 Am. & Eng. R. Cas. 157; *State v. Clark*, 109 N. Car. 739, note, 14 S. E. 84. In Indiana the statute does not apply to special, half-fare, or excursion tickets; and the sale of a ticket marked with the word "special" is prima facie not unlawful. *State v. Fry*, 81 Ind. 7.

many of the states, clinging to or climbing upon railroad engines or cars by one not a passenger or employe is made a misdemeanor.<sup>95</sup> So, in some states a penalty is prescribed for riding upon freight trains without lawful authority, and for entering passenger trains furtively, with the intention of riding thereon, and evading the payment of fare.<sup>96</sup> The Georgia statute, making it an offense to steal a ride on a railroad train, was held violated in a case where a person without fare or ticket was ordered to leave the train, and after an opportunity to comply with the demand he concealed himself in the car and continued his journey, and it was held no defense that he was under the influence of liquor at the time.<sup>97</sup>

§ 870 (730). **Placing obstruction on track.**—It is made a penal offense in nearly all the states to place any obstruction upon the track of a railroad, or to wilfully or maliciously commit any other act in order to throw from the track the engine and cars.<sup>98</sup> It is not material, in making out an offense under such a statute, to show that the railroad company whose track was obstructed was duly incorporated.<sup>99</sup> The offense may be com-

<sup>95</sup> *Moores & Elliott Ind. Crim. L. § 670* (form of indictment, § 1190).

<sup>96</sup> *Dyer v. Placer*, 90 Cal. 276, 27 Pac. 197. See *Regina v. Frere*, 4 El. & Bl. 598; *Queen v. Paget*, L. R. 8 Q. B. D. 151.

<sup>97</sup> *Brazzell v. State*, 119 Ga. 559, 46 S. E. 837.

<sup>98</sup> *Clifton v. State*, 73 Ala. 473; *Hodge v. State*, 82 Ga. 643, 9 S. E. 676; *Riley v. State*, 95 Ind. 446; *Coghill v. State*, 37 Ind. 111; *State v. Hessenkamp*, 17 Iowa 25; *State v. Douglass*, 44 Kans. 618, 26 Pac. 476; *Commonwealth v. Bakeman*, 105 Mass. 53; *People v. Dunkel*, 39 Mich. 255; *State v. Kilty*, 28 Minn. 421, 10 N. W. 475; *State v. Kluseman*, 53 Minn. 541, 55 N. W. 741; *State v. Stubblefield*, 157 Mo. 360,

58 S. W. 337; *Davis v. State*, 51 Nebr. 301, 70 N. W. 984; *State v. Beckman*, 57 N. H. 174; *People v. Adams*, 16 Hun. (N. Y.) 549; *Crawford v. State*, 15 Lea (Tenn.) 343, 54 Am. Rep. 423; *Barton v. State*, 28 Tex. App. 483, 13 S. W. 783; *State v. Bisping*, 123 Wis. 267, 101 N. W. 359; *Moores & Elliott Ind. Crim. L. §§ 398, 989* (form of indictment). The word "railroad" in such an act includes street railroads. *Commonwealth v. McCaully*, 2 Pa. Dist. 63.

<sup>99</sup> See *Duncan v. State*, 29 Fla. 439, 10 So. 815; *Hodge v. State*, 82 Ga. 643, 9 S. E. 676; *State v. Wentworth*, 37 N. H. 196; *Alsbrough v. State*, 126 Ga. 100, 54 S. E. 805.

mitted by obstructing the track of a railroad operated by private individuals.<sup>1</sup> It is not necessary to show that any engine or car was actually stopped or impeded.<sup>2</sup> The principal element of criminality in the offense is the endangering of life or property, and it is sufficient to show that the act tended to render dangerous the passage of trains over the road.<sup>3</sup> No intent to injure any particular person need be shown,<sup>4</sup> nor need a specific

<sup>1</sup> *Hodge v. State*, 82 Ga. 643, 9 S. E. 676. See also *Walker v. State*, 97 Ga. 213, 22 S. E. 528. Under the California penal code the malicious destruction of a railroad track is a felony; and this applies to a track which is used for the running of cable street cars. *People v. Stites*, 75 Cal. 570, 17 Pac. 693; *Commonwealth v. McCauly*, 2 Pa. Dist. 63.

<sup>2</sup> *State v. Clemens*, 38 Iowa 257; *State v. Kilty*, 28 Minn. 421, 10 N. W. 475. To sustain a conviction under the Texas statute, the evidence must show that the obstruction was such as might have endangered human life. *Bullion v. State*, 7 Tex. App. 462. But the persons whose lives were endangered need not be specified. *Barton v. State*, 28 Tex. App. 483, 13 S. W. 783.

<sup>3</sup> *State v. Wentworth*, 37 N. H. 196. As to sufficiency of indictment, see *State v. Oliver*, 55 Kans. 711, 41 Pac. 954. In *Riley v. State*, 95 Ind. 446, the court says: "We suppose that if the obstruction was apparently sufficient to endanger the passage of trains or to throw the engine or cars from the track, the offender ought not to be acquitted merely because, through a lack of judgment, he did not provide sufficient means to accomplish

his criminal purpose." Under 3 and 4 Vict. Ch. 97, § 15, it is a crime to place an obstruction upon a railway track, even though the road has not yet been opened up for traffic. *Regina v. Bradford*, 8 Cox C. C. 309. But in Tennessee, the statute provided a punishment for the obstruction of a railroad track, whereby cars are thrown off the track. It was held that to make out the offense, some vehicle mentioned in the statute must be shown to have been thrown from the track, and that where it appeared that a handcar only had been derailed by the obstruction, a conviction could not be sustained, since the statute did not mention handcars. *Harris v. State*, 14 Lea (Tenn.) 485. It is not necessary to prove that all the obstructions named in the indictment were placed upon the road. It is sufficient, in making out the crime, to show that the road was obstructed by any one of the articles alleged to have been placed thereon. *Alison v. State*, 42 Ind. 354.

<sup>4</sup> *Commonwealth v. Bakeman*, 105 Mass. 53. It is sufficient to charge the crime in the language of the statute, without setting out in the indictment the names of the persons whose lives were endangered. *Barton v. State*, 28 Tex.

intent to do an injury to life or property be shown.<sup>5</sup> Thus, under a statute punishing any person who should "wilfully and maliciously" place any obstruction on a railroad track, a person who placed an obstruction on the track for the purpose of obtaining a reward from the railroad company by giving notice of the obstruction was held guilty, though he intended to and did signal and stop the train so as to prevent injury.<sup>6</sup> Evidence that the road was so obstructed as to endanger the passage of trains, and that the person obstructing it knew at the time that it was being used and operated as a railroad, will raise the presumption of malicious intent.<sup>7</sup> And this presumption cannot be overcome by proof that the intention was merely to stop the train and claim a reward, or to do some other mischievous act by which no injury should be permitted to accrue to life or property.<sup>8</sup> The fact that the railroad has never become the legal owner of its right of way across defendant's land, or has been guilty of a breach of the contract by which such right was acquired, is no defense to an indictment against a land-owner for obstructing a railroad track where it crosses his land.<sup>9</sup> Evi-

App. 483, 13 S. W. 783. As to indictment, see *Riley v. State*, 95 Ind. 446; *Commonwealth v. Hicks*, 7 Allen (Mass.) 573; *State v. Kluseman*, 53 Minn. 541, 55 N. W. 741; *McCarty v. State*, 37 Miss. 411; *State v. Wentworth*, 37 N. H. 196.

<sup>5</sup> *Clifton v. State*, 73 Ala. 473; *People v. Adams*, 16 Hun (N. Y.) 549; *State v. Bisping*, 123 Wis. 267; 101 N. W. 359.

<sup>6</sup> *Crawford v. State*, 15 Lea (Tenn.) 343, 54 Am. Rep. 423.

<sup>7</sup> *State v. Hessenkamp*, 17 Iowa 25. Evidence of the probable consequences of the act is sufficient to warrant the jury in inferring a criminal purpose. *Commonwealth v. Bakeman*, 105 Mass. 53.

<sup>8</sup> *State v. Johns*, 124 Mo. 379, 27 S. W. 1115; *State v. Beckman*, 57

N. H. 174; *Crawford v. State*, 15 Lea (Tenn.) 343, 54 Am. Rep. 423. But advising and encouraging another to place an obstruction on the track, believing that it is so placed with malicious intent, is not sufficient to constitute a crime under such a statute where the person placing the obstruction on the track is a detective seeking evidence against the accused, and only places the obstruction for the purpose of obtaining such evidence. *State v. Douglass*, 44 Kans. 618, 26 Pac. 476. See also *Nowell v. State*, 94 Ga. 588, 21 S. E. 591, and *Reg. v. Holroyd*, 2 M. & Rob. 339, as to accidental obstruction.

<sup>9</sup> *State v. Hessenkamp*, 17 Iowa 25.

dence that the defendant placed a similar obstruction on another part of the track a short time after the offense under consideration has been held competent in trying an indictment for a crime of this character, as tending to raise the presumption of the defendant's guilt,<sup>10</sup> and as part of the *res gestae*.<sup>11</sup> The English statute is designed to prevent any and all interference with the operation of railroads, and is much more general in its prohibition than the statutes of most of the states.<sup>12</sup> Under this statute it has been held a crime to place an obstruction on the track of a railroad which had not yet been opened up for traffic.<sup>13</sup> And one who piles rubbish on the track of a railroad,<sup>14</sup> or alters signals,<sup>15</sup> or stands upon the railroad right of way and makes gestures with his hands and arms,<sup>13</sup> thereby causing trains to stop, or otherwise interfering with the operation of the road, is guilty of obstructing the road within the meaning of the statute. In a recent Georgia case it is held that an indictment charging accused with maliciously attempting to obstruct a railroad track, and that he procured a cross-tie and carried the same to the track with the intent to place said cross-tie upon the track to wreck a railroad train, but was prevented from so doing, simply charges an attempt to obstruct the track under one provision of the Penal Code, and not an attempt to wreck a railroad train under an entirely different section.<sup>17</sup>

§ 871 (731). **Shooting or throwing missile at car.**—Many states prescribe a penalty for shooting at or throwing any missile at a railroad car.<sup>18</sup> Under the North Carolina statute the

<sup>10</sup> *State v. Wentworth*, 37 N. H. 196.

<sup>11</sup> *Barton v. State*, 28 Tex. App. 483, 13 S. W. 783. See also *Stanfield v. State*, 43 Tex. Crim. 10, 62 S. W. 917.

<sup>12</sup> 24 and 25 Vict. Ch. 97, § 15.

<sup>13</sup> *Regina v. Bradford*, 8 Cox C. C. 309.

<sup>14</sup> *Roberts v. Preston*, 9 C. B. N. S. 206.

<sup>15</sup> *Regina v. Hadfield*, 11 Cox C.

C. 574, L. R. 1 Cr. Cas. Res. 253.

<sup>16</sup> *Regina v. Hardy*, 11 Cox C. C. 656.

<sup>17</sup> *Alsobrook v. State*, 126 Ga. 100, 54 S. E. 805.

<sup>18</sup> See *Burkhart v. Commonwealth*, 119 Ky. 317, 83 S. W. 633, 26 Ky. L. 1245. An indictment for shooting at and injuring a car under the Georgia statute must aver that the car belonged to a "chartered" railway company. *Kiser v.*

indictment must charge that the car was in motion or stopped merely for a temporary purpose at the time the alleged offense was committed.<sup>19</sup> The court, in the case referred to, construed the statute as intended to secure the safety of persons upon the train and protect the cars while in use, and not when in the round-house or in the yards of the company with no one upon them. But, under the Massachusetts statute, throwing a missile at a car is a penal offense, whether the car is in use at the time or not.<sup>20</sup> Where the offense denounced by the statute consists in merely shooting or throwing at a car, it is, of course, unnecessary to prove that the car was struck.<sup>21</sup> And, where the statute making it an offense to hurl any missile at or into a moving train, it was held that one who throws a missile into a coach in a moving train, although standing on the platform of the coach at the time, was punishable under the statute.<sup>22</sup>

**§ 872 (732). Breaking into depot or car—Burglary.**—Breaking and entering a railroad depot,<sup>23</sup> or station-house,<sup>24</sup> or a railroad car,<sup>25</sup> with intent to commit a felony, is made burglary by

State, 89 Ga. 421, 15 S. E. 495. An indictment under the Florida statute must set forth the facts and circumstances which constitute the offense. *Hamilton v. State*, 30 Fla. 229, 11 So. 523.

<sup>19</sup> *State v. Boyd*, 86 N. Car. 634, 9 Am. & Eng. R. Cas. 155. See also *State v. Hinson*, 82 N. Car. 597.

<sup>20</sup> *Commonwealth v. Carroll*, 145 Mass. 403, 14 N. E. 618.

<sup>21</sup> *State v. Hinson*, 82 N. Car. 597.

<sup>22</sup> *State v. Ray*, 87 Miss. 183, 39 So. 521.

<sup>23</sup> *State v. Scripture*, 42 N. H. 485. If the depot was jointly used or occupied by two railroad corporations, it may be so charged in the indictment. *State v. Edwards*, 109 Mo. 315, 19 S. W. 91; *State v. Bishop*, 51 Vt. 287, 31 Am. Rep. 690, and note.

<sup>24</sup> *Norton v. State*, 74 Ind. 337. This case holds that it is sufficient to designate the railroad company by its corporate name in the indictment without averring its corporate existence, since that will be implied. In deciding this case the court said: "No innocent man can ever be put in peril by the adoption of this rule, and many guilty ones may by its operation, be prevented from escaping merited punishment." *Burke v. State*, 34 Ohio St. 79.

<sup>25</sup> *Lyons v. People*, 68 Ill. 271; *Boyer v. Commonwealth*, 14 Ky. L. 167, 19 S. W. 845; *State v. Parker*, 16 Nev. 79; *Nicholls v. State*, 68 Wis. 416, 32 N. W. 543, 60 Am. Rep. 870. On a trial under the Alabama statute for breaking into a railroad car "upon or connected

the statutes of most of the states. Breaking into a ticket office in the day-time, with intent to steal, is merely a misdemeanor in Massachusetts.<sup>26</sup> This is the general rule. In the absence of a statute changing the rule, the breaking and entering must be in the night-time in order to constitute burglary.<sup>27</sup> And in Texas it is held that a mere attempt to break and enter a car is not a penal offense.<sup>28</sup> And the act of Congress of February 13, 1913, makes it a penal offense to unlawfully enter or break the seal of any car containing interstate shipments, with intent to commit larceny, or to steal any of such goods therefrom.<sup>29</sup> In charging the burglary of a railroad car it is not necessary to allege that the railroad company is a corporation, partnership or stock company. The corporate existence will be implied.<sup>30</sup> But it has been intimated that if such fact is alleged the allegation must be proved.<sup>31</sup>

**§ 873 (733). Injury to railroad property—Malicious trespass.**—Injury to or interference with railroad property is made an offense by special statute in many states.<sup>32</sup> Even in the absence

with a railroad in this state," it is not necessary to prove that the car was "standing on" the tracks of the railroad company. *Johnson v. State*, 98 Ala. 57, 13 So. 503.

<sup>26</sup> *Commonwealth v. Carey*, 12 Cush. (Mass.) 246.

<sup>27</sup> *People v. Bielfass*, 59 Mich. 576, 26 N. W. 771; *State v. White*, 4 Jones L. (N. Car.) 349; *Adams v. State*, 31 Ohio St. 462; *Devine v. State*, 22 Tex. App. 683, 3 S. W. 660.

<sup>28</sup> *Summers v. State*, 49 Tex. Cr. App. 90, 90 S. W. 310.

<sup>29</sup> *Morris v. United States*, 229 Fed. 516.

<sup>30</sup> *Morris v. United States*, 229 Fed. 516; *Norton v. State*, 74 Ind. 337; *State v. Watson*, 141 Mo. 338, 42 S. W. 726; *State v. Shields*, 89 Mo. 259, 1 S. W. 336.

<sup>31</sup> *Johnson v. State*, 73 Ala. 483; but see *Crawford v. State*, 44 Ala. 382.

<sup>32</sup> *Clifton v. State*, 73 Ala. 473. Offenses against property of steamboats, railroads and other carriers made punishable. Act July 1, 1890 (Acts La. 1890, No. 47, p. 40). Malicious injury to railroad tracks, bridges, etc., punished by imprisonment at hard labor. Act March 2, 1891 (Laws Wash. 1891, c. 69, § 4, p. 120). The wilful injury to or interference with railroad property made a misdemeanor. Act March 19, 1891 (St. Nev. 1891, c. 67, p. 78). The Minnesota statute declares that "any person who displaces, removes, injures or destroys a rail, sleeper, switch, bridge, viaduct, culvert, embankment, or structure, or any part thereof at-

of such a special statute an injury to the property of a railroad company, if committed with a malicious intent, would doubtless be punishable as malicious mischief or malicious trespass in most of the states.<sup>33</sup> But employes of a railroad company who remove a fence from real estate claimed by the company are not guilty of malicious trespass in the absence of any malicious intent.<sup>34</sup>

§ 874 (734). **Other crimes against railroad companies.**—We have treated at some length many of the offenses against railroad companies which are specifically denounced by statute in most of the states; but there are many other crimes from which railroad companies as well as individuals may suffer, even though they are not expressly named in the statute defining the offense. We shall mention some of the most common offenses of this character, without considering them in detail. Railroad officers and employes have often been held guilty of embezzlement under general statutes,<sup>35</sup> and third persons have been held indictable for obtaining goods or money from railroad companies by false pretenses.<sup>36</sup> So, it has been held that the fraudulent and unlawful counterfeiting of a railroad ticket is forgery at common law.<sup>37</sup> Stealing a railroad ticket may also constitute

tached to or appertaining to or connected with a railway" shall be punished. It was held that this did not apply to a fence or other structure not constituting a part of the railroad proper. *State v. Walsh*, 43 Minn. 444. Those structures forming parts of railway beds by which they span streams, chasms, ditches, etc., are "bridges," the wilful and malicious burning of which is prohibited by the Florida statute. *Duncan v. State*, 29 Fla. 439, 10 So. 815.

<sup>33</sup> See *State v. Simpson*, 2 Hawks (N. Car.) 460; *Rex v. Bowry*, 10 Jur. 211.

<sup>34</sup> *Hughes v. State*, 103 Ind. 344, 2 N. E. 956.

<sup>35</sup> *State v. Goode*, 68 Iowa 593, 27 N. W. 772; *Commonwealth v. Tuckerman*, 10 Gray (Mass.) 173; *State v. Porter*, 26 Mo. 201; *Ricord*, Ex parte, 11 Nev. 287; *Calkins v. State*, 18 Ohio St. 366, 98 Am. Dec. 121, and note. Compare *Panama R. Co. v. Johnson*, 63 Hun 629, 17 N. Y. S. 777; *State v. Mims*, 26 Minn. 191, 2 N. W. 492.

<sup>36</sup> *Reg. v. Boulton*, 2 C. & K. 917, 13 Jur. 1034, distinguished in *Reg. v. Kilham*, 11 Cox C. C. 561, 22 L. T. 625. See also *White v. State*; 86 Ala. 69, 5 So. 674; *State v. Haven*, 59 Vt. 399, 9 Atl. 841.

<sup>37</sup> *Commonwealth v. Ray*, 3 Gray (Mass.) 441. See also *State v. Weaver*, 94 N. Car. 836, 55 Am.



larceny,<sup>38</sup> but not, it has been held, where it is not signed and stamped,<sup>39</sup> and so, of course, may the stealing of grain or other property from a car.<sup>40</sup> An Illinois statute making it unlawful to use or attempt to use any pass, "which, by conditions expressed thereon, is not transferable," has been held not to cover the case of one using a pass containing no other restriction as to its transferability than the endorsement, "if presented by any other person than the person named thereon, the conductor will take up pass and collect fare."<sup>41</sup> An interesting question arose in a recent case in which the defendant was charged with feloniously breaking and entering a freight car in the night-time with intent to commit larceny. The entry was made in one county, while the car was moving, and the defendant continued in the car, with the same felonious intent, until after the car had passed into another county, in which the defendant was indicted. The court held that there was, in law, a fresh entry in the latter county, and that the defendant was indictable therein.<sup>42</sup>

Rep. 647, and note; Reg. v. Boulton, 2 C. & K. 604, 61 Eng. C. L. 603.

<sup>38</sup> *McDaniels v. People*, 118 Ill. 301, 8 N. E. 687; *State v. Brin*, 30 Minn. 522, 16 N. W. 406; *Eaton v. Farmer*, 46 N. H. 200. But see *State v. Hill*, 1 Houst. Crim. (Del.) 421; *State v. Musgang*, 51 Minn. 556, 53 N. W. 874.

<sup>39</sup> *McCarty v. State*, 1 Wash. St. 377, 25 Pac. 299. See also *Millner v. State*, 15 Lea (Tenn.) 179.

<sup>40</sup> *Lucas v. State*, 96 Ala. 51, 11

So. 216; *Rogers v. State*, 90 Ga. 463, 16 S. E. 205; *Smith v. State*, 28 Ind. 321; *State v. Poyner*, 36 La. Ann. 572; *State v. Sharp*, 106 Mo. 106, 17 S. W. 225; *Manson v. State*, 24 Ohio St. 590; *Price v. State*, 41 Tex. 215; *Sikes v. State* (Tex. Crim. App.), 28 S. W. 688.

<sup>41</sup> *Allardt v. People*, 197 Ill. 501, 64 N. E. 533.

<sup>42</sup> *Powell v. State*, 52 Wis. 217, 9 N. W. 17, 9 Am. & Eng. R. Cas. 156.

## CHAPTER XXX.

### TAXATION OF RAILROAD PROPERTY

Sec.		Sec.	
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		906.	Inequality no ground for injunction.
		907.	Tender of amount of taxes owing is required.

§ 880 (735). **Taxation of railroads—Preliminary.**—The power of a state to tax railroad property of every description is a sovereign power, and over purely domestic or intrastate railroad companies the power of the state is supreme, but over railroad companies engaged in interstate commerce the power of the state is necessarily abridged to some extent by the commerce clause of the federal constitution. The property of a railroad company engaged in interstate commerce which is not used in any way in its business of conducting commerce between the states is, of course, subject to taxation by the state to the same

extent as the like property of any artificial or natural person. If, for instance, a railroad company is the owner of lots which are not used in connection with its business as a carrier of articles of interstate commerce the lots are subject to taxation by the state to the same extent as similar property of natural persons, and the power to tax such property is not affected by the commerce clause of the federal constitution.<sup>1</sup> As the federal constitution exerts such an important influence upon the subject of taxation the subject can be more clearly presented by treating the class of railroad companies which may be denominated interstate railroads in a separate chapter, and accordingly we have adopted that method.

**§ 881 (736). Legislative power.**—The legislature is invested with supreme power over the subject of taxation, except in so far as the constitution limits and abridges the power. Taxes must be levied by the legislature and the mode of assessing property must be prescribed by statute.<sup>2</sup> We do not mean, of

<sup>1</sup> See also as to taxation on property having a situs in the state although employed in interstate commerce. *Atlantic &c. Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. ed. 996. As to realty not essential to the operation of the road being assessable by local authorities, see *St. Louis &c. R. Co. v. Miller*, 67 Ark. 498, 55 S. W. 926; *Chicago &c. R. Co. v. People*, 195 Ill. 184, 62 N. E. 869; *Harter v. Chicago &c. R. Co.*, 114 Iowa 330, 86 N. W. 266; *State v. Chicago &c. R. Co.*, 162 Mo. 391, 13 S. W. 495; *Erie R. Co., Matter of*, 64 N. J. L. 123, 44 Atl. 976; *Jersey City v. Board*, 74 N. J. L. 763, 67 Atl. 38. And see generally, note in 60 L. R. A. 652, et seq.

<sup>2</sup> *Railroad Co. v. Pennsylvania*, 15 Wall. (U. S.) 300, 21 L. ed. 179; *State Railroad Tax Cases*, 15 Wall. (U. S.) 284, 21 L. ed. 164; *Union Pacific &c. R. Co. v. Peniston*, 18

Wall. (U. S.) 5, 21 L. ed. 787; *Delaware Railroad Tax Case*, 18 Wall. (U. S.) 206, 21 L. ed. 888; *Rees v. Watertown*, 19 Wall. (U. S.) 107, 116, 22 L. ed. 72; *Heine v. Levee Commissioners*, 19 Wall. (U. S.) 655, 22 L. ed. 223; *North Missouri R. Co. v. Maguire*, 20 Wall. (U. S.) 46, 22 L. ed. 287; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Meriwether v. Garrett*, 102 U. S. 472, 515; *Southern R. Co. v. North Carolina Corp. Co.*, 97 Fed. 513; *Bragg v. Tufts*, 49 Ark. 554, 6 S. W. 158; *Porter v. Rockford &c. Co.*, 76 Ill. 561; *Ottawa v. McCaleb*, 81 Ill. 559; *Hyland v. Brazil*, 128 Ind. 335, 26 N. E. 672; *Dubuque v. Chicago &c. Co.*, 47 Iowa 201; *Louisville &c. Co. v. Commonwealth*, 10 Bush (Ky.) 43; *Turner v. Althaus*, 6 Nebr. 54; *State v. Central &c. Co.*, 21 Nev. 260, 30 Pac. 689; *State v. Bentley*, 23 N. J. L. 532; *State v. Flavell*, 24 N. J. L.

course, that the exact sum shall be designated by statute, but we do mean that the tax shall be provided for by statute and the rate fixed or due authority conferred upon state, county or municipal officers to designate the amount of the tax that shall be assessed. All taxation must rest upon legislation, and the law-making department must provide the mode of assessment. Defects in the mode cannot be remedied by the judiciary, but where a mode is provided, and an exemption is made which the legislature had no power to make, the provision making the exemption will fall and the other part of the statute will stand.<sup>3</sup> Of all matters of policy and expediency, the legislature is the exclusive judge, and its determination is final and conclusive.<sup>4</sup> The policy of the law is to compel all property held or used for purposes of gain or profit to bear its burden of taxation, but as there can be no effective assessment of taxes without legislative authority, it is evident that the failure to include all property may have the effect to relieve it from taxation. A casus omissus cannot be supplied by the courts,<sup>5</sup> and where the legis-

370; *Wisconsin Cent. R. v. Taylor Co.*, 52 Wis. 37, 8 N. W. 833. See *Michigan Cent. R. Co. v. Powers* 201 U. S. 245, 26 Sup. Ct. 459, 50 L. ed. 744. In *Meriwether v. Garrett*, supra, it was said: "The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the legislature."

<sup>3</sup> *Huntington v. Worthen*, 120 U. S. 97, 7 Sup. Ct. 469, 30 L. ed. 588; *Little Rock &c. Co. v. Worthen* 46 Ark. 312; *Norris v. Boston*, 4 Metc. (Mass.) 282. And an exemption is not to be presumed from mere failure to make detailed provisions for the valuation. *State v. Milwaukee St. R. Co.*, 90 Wis. 550, 63 N. W. 746. See also *State v. Holcaub*, 81 Kans. 879, 106 Pac. 1030, 28 L. R. A. (N. S.) 251.

<sup>4</sup> *Spinney, Ex parte*, 10 Nev. 323.

See also *Board &c. v. Harrell*, 147 Ind. 500, 46 N. E. 124; *State v. Marion County*, 170 Ind. 595, 85 N. E. 513; *Dubuque v. Chicago &c. R. Co.*, 47 Iowa 196; *Federal &c. R. Co. v. Pittsburgh*, 226 Pa. St. 419, 75 Atl. 662; *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284, 21 L. ed. 164; *White's Supp. to Thomp. Corp.* §§ 5880, 5885. As showing the broad powers of the legislature in classifying and prescribing different methods, see *New York v. Tax Comrs.*, 199 U. S. 1, 25 Sup. Ct. 705, 50 L. ed. 65; *Ohio River &c. R. Co. v. Dittey*, 203 Fed. 537; *McDaniel v. Texarkana &c. Co.*, 94 Ark. 235, 126 S. W. 727; *State v. Illinois Cent. R. Co.*, 246 Ill. 188, 92 N. E. 814.

<sup>5</sup> *State Board of Tax Comrs. v. Holliday*, 150 Ind. 216, 49 N. E. 14 42 L. R. A. 826; *Gwynne v. Bur-*

lature omits to subject property to taxation it may escape, for the courts have no power to lay taxes upon property. It has been held that, where a method is not specifically prescribed for taxing corporate property, the tax must be paid by the owner of the shares of stock, but we suppose that this can be true only in cases where provision is made for taxing the stock in the hands of the stockholders.<sup>6</sup>

§ 882 (736a). **Whether boards of assessment and equalization have judicial powers.**—Boards having power to assess property and equalize values for purposes of taxation are generally not regarded as judicial officers, in the strict sense, and, hence, their action is not to be invalidated on the sole ground that the law creating the board invested executive officers with judicial powers in violation of the constitutional rule. Thus, a statute making specified state officers members of the state tax board, with power to ascertain the valuation of intangible property and report it for assessment to the local assessors, was held not void on this ground, especially since the board was not given power to make the assessment.<sup>7</sup> In Indiana, the board of equalization has power to inspect and examine the books of taxpayers,<sup>8</sup> and its powers are quasi judicial, so that its judgment is not subject to collateral attack.<sup>9</sup>

nell, 7 Cl. & F. 572, 696; Jones v. Smart, 1 T. R. 44.

<sup>6</sup> Conwell v. Connersville, 15 Ind 150; King v. Madison, 17 Ind. 48. See Wright v. Southwestern R. Co. 64 Ga. 783; Georgia R. &c. Co. v. Wright, 124 Ga. 596, 53 S. E. 251.

<sup>7</sup> Missouri &c. R. Co. v. Shannon (Tex. Civ. App.), 97 S. W. 527. See also State v. Thorne, 112 Wis 81, 87 N. W. 797. And compare Cleveland &c. R. Co. v. Backus 133 Ind. 513, 547, 33 N. E. 421, 18 L. R. A. 729; Langenberg v. Decker, 131 Ind. 471, 31 N. E. 190, 193, 16 L. R. A. 108.

<sup>8</sup> Co-operative &c. Assn. v. State,

156 Ind. 463, 60 N. E. 146; Satterwhite v. State, 142 Ind. 1, 40 N. E. 654, 1087. See also People v. National Bank, 123 Cal. 63, 55 Pac. 685, 69 Am. St. 32.

<sup>9</sup> Senour v. Matchett, 140 Ind. 636, 40 N. E. 122; Biggs v. Board, 7 Ind. App. 142, 34 N. E. 500. See also Stanley v. Supervisors of Albany, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. ed. 1000; East St. Louis &c. R. Co. v. People, 119 Ill. 182, 10 N. E. 397. But see as to its lack of power under the Act of 1881 to increase assessment of railroad personal property as made and returned by township assessors.

§ 883 (737). **Appropriate method of assessing.**—The best method of taxing the property of a railroad company forming part of its line and used in the operation of its road is by regarding it as a unit and assessing the property as an entirety, since any other method would dissect the property into fragmentary parts and tend to lead to confusion and injustice.<sup>10</sup> Some of the courts hold that the property can only be taxed as an entirety,<sup>11</sup> but in our opinion the legislature is, in the absence of constitutional provisions prescribing the method of assessing the property, the sole judge of the method that shall be pursued. The power of the legislature is so broad and comprehensive that it is difficult to conceive upon what principle it can be correctly held that the only method that it can provide is that of assessing the property as an entirety.<sup>12</sup>

Cleveland &c. R. Co. v. Board, 19 Ind. App. 58, 49 N. E. 51.

<sup>10</sup> Detroit &c. R. Co. v. Common Council, 125 Mich. 673, 85 N. W. 96, 84 Am. St. 589, 597 (quoting text). See also Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 220, 17 Sup. Ct. 305, 41 L. ed. 683; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. ed. 613; Western Union Tel. Co. v. Taggart, 141 Ind. 281, 40 N. E. 1051; Cincinnati &c. R. Co. v. Commonwealth, 81 Ky. 492; State v. Canadian Pac. R. Co., 100 Maine 202, 60 Atl. 901, 60 L. R. A. 671n; State v. Savage, 65 Nebr. 714, 91 N. W. 716; State v. Back, 72 Nebr. 402, 100 N. W. 952; Chicago &c. R. Co. v. Richardson Co., 72 Nebr. 482, 100 N. W. 950; Louisville &c. R. Co. v. Bate, 12 Lea (Tenn.) 581; Chicago &c. R. Co. v. State, 128 Wis. 553, 108 N. W. 557. In the last case just cited it is said: "The property of a public-service corporation is to be valued for taxation as a unit, the franchise

element and tangible elements, whether in land or movables, being regarded as inseparable parts of one thing in which the former so far predominates as to stamp all with the impress of personal property." See also Northern Pac. R. Co. v. State, 84 Wash. 570, 147 Pac. 45, Ann. Cas. 1916E, 1166.

<sup>11</sup> Applegate v. Ernst, 3 Bush (Ky.) 648, 96 Am. Dec. 272. See generally Graham v. Mt. Sterling Coal Co., 14 Bush (Ky.) 425; Railroad School Tax, In re, 78 Mo. 596, 17 Am. & Eng. R. Cas. 491; Franklin County v. Nashville &c. Co., 12 Lea (Tenn.) 521, 17 Am. & Eng. R. Cas. 445.

<sup>12</sup> There are many cases recognizing the validity of assessments by counties. Huntington v. Central Pacific &c. Co., 2 Sawy. (U. S.) 503; People v. Placerville &c. Co., 34 Cal. 656; Sangamon &c. Co. v. Morgan, 14 Ill. 163, 56 Am. Dec. 497; State v. Illinois Central R. Co., 27 Ill. 64, 79 Am. Dec. 396;

§ 884 (738). **Methods of taxation.**—The four principal methods of taxation are, (1) on the capital stock, (2) on the corporate property, (3) on the franchises, (4) on the business done by the corporation.<sup>13</sup> As the levying of taxes and the mode of assessment are matters for legislative consideration and determination, the legislature may, where no constitutional provi-

Wilson v. Weber, 96 Ill. 454, 5 Am. & Eng. R. Cas. 112; Mohawk &c. Co. v. Clute, 4 Paige (N. Y.) 384; Albany &c. Co. v. Osborn, 12 Barb. (N. Y.) 223; Albany &c. Co. v. Canaan, 16 Barb. (N. Y.) 244; Providence &c. Co. v. Wright, 2 R. I. 459; Orange &c. Co. v. Alexandria, 17 Grat. (Va.) 176. See generally Missouri River &c. Co. v. Morris, 7 Kans. 210; Chicago &c. Co. v. Davenport, 51 Iowa 451, 1 N. W. 720; State v. Severance, 55 Mo. 378; Richmond &c. Co. v. Alamance County, 84 N. Car. 504; The Tax Cases, 12 Gill & J. (Mo.) 117; Chicago &c. R. Co. v. Babcock, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. ed. 636. But compare Blomquist v. Bannock County, 25 Idaho 284, 137 Pac. 174 (may be assessed as a whole by State Board of Equalization).

<sup>13</sup> Tennessee v. Whitworth, 117 U. S. 129, 6 Sup. Ct. 645, 29 L. ed. 830; Louisville &c. Co. v. State, 8 Heisk. (Tenn.) 663, 795. See Cleveland &c. Co. v. Backus, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729; State v. Hamilton, 5 Ind. 310; King v. Madison, 17 Ind. 48; Whitney v. Madison, 23 Ind. 331, 335. There is reason for saying that there is a fifth method, namely a tax on the profits of the business, but we have followed the usual course in naming the methods of taxation.

See as to "net earnings" rule in New York, People v. State Board, 212 N. Y. 472, 106 N. E. 325; People v. Tax Comrs., 203 N. Y. 119, 96 N. E. 435; People v. Tax Comrs., 196 N. Y. 39, 89 N. E. 581; People v. Woodbury, 203 N. Y. 231, 96 N. E. 420. The reason given for not making a separate division of profits of the business is that it is included in the third method of tax on the franchise, but the reason is hardly satisfactory. In Detroit &c. R. Co. v. Common Council, 125 Mich. 673, 85 N. W. 96, 84 Am. St. 589, it is held that the franchise to exist as a corporation has no cash value within the meaning of the tax law, but special privileges and franchises of that nature have, especially in connection with the property used therewith. In State v. Galveston &c. Ry. Co., 100 Tex. 153, 97 S. W. 71, a tax of a certain per cent. of gross receipts was held an occupation tax and not objectionable as double taxation although the franchise was subject to an ad valorem tax. See also Washington County v. State, 172 Ala. 242, 55 So. 623; Hunt v. Allen County, 82 Kans. 842, 109 Pac. 106. But see Galveston &c. R. Co. v. Davidson (Tex. Civ. App.), 93 S. W. 436; and see also Central Granaries &c. Co. v. Lancaster Co., 77 Nebr. 311, 109 N. W.

sion forbids a choice of methods, select the method, and the method selected is exclusive. While the courts may declare invalid a statute which is in conflict with the constitution, they cannot supervise or control legislative discretion, nor can they dictate the policy to be pursued.<sup>14</sup>

**§ 885 (738a).** What is meant by "roadway" in revenue laws.—In states where the "roadway" or the "right of way" is assessed by a state assessing board, and other railroad property is assessed by local assessing officers or boards, it is a matter of some importance to know what is meant by this term. The decisions on the question are in hopeless conflict, for the term

384, where it was held that a tax on the average capital is a tax on property and not on business, and that, where real estate and other tangible property was taxed, and grain in elevators on a certain day was also taxed there was double taxation. See also *Dallas Co. v. Home F. Ins. Co.*, 97 Ark. 254, 133 S. W. 1113. As to propriety of using mileage basis, see *Commonwealth v. United States Exp. Co.*, 149 Ky. 755, 149 S. W. 1037, Ann. Cas. 1914B, 196, and cases there reviewed. And see as to taxation of franchises generally, 2 *Thomp. Corp.* (2nd ed.) §§ 2920-2942; *White's Supp.* §§ 2920-2942. Controlled mileage within and without the state, and not merely operated mileage, is what must be considered under the Kentucky statute. *Louisville &c. R. Co. v. Greene*, 244 U. S. 522, 37 Sup. Ct. 683, 61 L. ed. 1291, Ann. Cas. 1917E, 97. See generally as to the valuation of railroad property for taxation, the elaborate note in Ann. Cas. 1916E, 1180 et seq.

<sup>14</sup> Mr. Justice Bradley forcibly

expressed the general rule in *Legal Tender Cases*, 12 Wall. (U. S.) 457, 561, 20 L. ed. 287. "The legislative department," said that able judge, "being the nation itself speaking by its representatives, has a choice of methods and is the master of its own discretion." *State v. Haworth*, 122 Ind. 462, 467, 23 N. E. 946, 7 L. R. A. 240; *Carr v. State*, 127 Ind. 204, 208, 26 N. E. 778, 11 L. R. A. 370n, 22 Am. St. 624n; *Dubuque v. Chicago &c. Co.*, 47 Iowa 196; *Davenport v. Chicago &c. Co.*, 38 Iowa 633; *Dubuque v. Illinois &c. Co.*, 39 Iowa 56. In *State v. Kolsem*, 130 Ind. 434, 440, 29 N. E. 595, 14 L. R. A. 566n, it was said: "Where the principal subject belongs, there the incidents belong. Means, methods and the like belong to the department that is invested with power over the general subject. It is for that department to make choice of modes and means." See also *State v. Savage*, 65 Nebr. 714, 91 N. W. 716, 733 (citing text); *Missouri &c. Ry. Co. v. Shannon* (Tex. Civ. App.), 97 S. W. 527.



"roadway" is used in the same connection, and yet a different construction is given it, in the decisions of both California and North Dakota. In the former state the term is strictly limited to the continuous strip upon which the railroad is constructed, and excludes tracts of land used for cattle yards, switch yards and depot purposes.<sup>15</sup> In the latter state it is broadly held that the term will include not only the strip of land upon which the main line is located, but also all ground necessary for the construction of side-tracks, turnouts, station houses, freight houses, and all other accommodations reasonably necessary to accomplish the objects for which the railroad was incorporated.<sup>16</sup> It is thought that the weight of authority is in favor giving the more enlarged meaning in such cases.<sup>17</sup> In line with this view there is a class of cases which hold that the exemption of local taxation covers such property, and only such, as might be taken by condemnation proceedings.<sup>18</sup> Under either theory land not used as part of the roadway or right of way, though bought with the intent to use it for that purpose when necessary, is not a part of the roadbed, and should be assessed by the local assessors.<sup>19</sup> So it has been held that land belonging to railroad companies and leased for commercial purposes will not be regarded as "necessary or in use in the proper operation" of the

<sup>15</sup> *San Francisco &c. R. Co. v. Stockton*, 149 Cal. 83, 84 Pac. 771. See also *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. ed. 118; *Grand Trunk Pac. Ry. Co. v. City of Calgary*, 55 Can. Sup. Ct. 103, Ann. Cas. 1918D, 724.

<sup>16</sup> *Chicago &c. R. Co. v. Cass Co.*, 8 N. Dak. 18, 76 N. W. 239.

<sup>17</sup> *Chicago &c. R. Co. v. People*, 98 Ill. 350; *Chicago &c. R. Co. v. People*, 99 Ill. 464; *People v. Illinois Central R. Co.*, 215 Ill. 177, 74 N. E. 116 (includes bridges and approaches); *Pfaff v. Terre Haute &c. R. Co.*, 108 Ind. 144, 9 N. E.

93; *Central R. Co. of N. J.*, In re, 71 N. J. L. 475, 58 Atl. 1089. Compare also *Northern Pac. R. Co. v. Brogan*, 52 Mont. 461, 158 Pac. 820. See generally ante, § 6.

<sup>18</sup> *State v. Hancock*, 33 N. J. L. 315; *Milwaukee &c. R. Co. v. Milwaukee*, 34 Wis. 271.

<sup>19</sup> *San Francisco &c. R. Co. v. Stockton*, 149 Cal. 83, 84 Pac. 771; *Red Willow Co. v. Chicago &c. R. Co.*, 26 Nebr. 660, 42 N. W. 879; *Republican Valley &c. R. Co. v. Chase Co.*, 33 Nebr. 759, 51 N. W. 132. See also *State v. St. Louis &c. R. Co.*, 117 Mo. 1, 22 S. W. 910.

road, and is to be assessed by the local officers.<sup>20</sup> But the Illinois courts have held that land adjoining the right of way of a railroad and used as a reservoir from which it obtains water for its locomotives, and other purposes connected with the operation of the road, is assessable as railroad track by the State Board of Equalization, and not by local assessors.<sup>21</sup>

**§ 886 (738b). Railroad bridges and bridge companies.**—A bridge owned by a railroad company and used as part of its roadbed and tracks is assessable as part of the railroad itself and not as a separate structure, and this has been so held where the bridge was used as a toll bridge.<sup>22</sup> Another case is authority to the effect that a bridge owned by a corporation organized under the Railroad Incorporation Act, whose business it was to build and own a bridge used solely for railroad purposes, and which has always reported the property for taxation as railroad property, is regarded as a railroad, and is taxable as such.<sup>23</sup> But a bridge owned by a bridge company, although used exclusively for railroad purposes, and leased forever to a railroad company, but subject to determination of the lease for default of the lessee in regard to its terms and conditions, has been held not to be railroad property which could be assessed as such along with the railroad track by the Illinois State Board of Equalization instead of the local authorities.<sup>24</sup>

<sup>20</sup> *Grand Rapids &c. R. Co. v. Grand Rapids*, 137 Mich. 587, 100 N. W. 1012. See also *Adams County v. Kansas City &c. R. Co.*, 71 Nebr. 549, 99 N. W. 245; *Central R. Co., In re*, 72 N. J. 86, 59 Atl. 1062; note in L. R. A. 1916E, 407.

<sup>21</sup> *Chicago &c. R. Co. v. People*, 218 Ill. 463, 75 N. E. 1021.

<sup>22</sup> *State v. Louisiana &c. R. Co.*, 196 Mo. 523, 94 S. W. 279; *State v. Louisiana &c. R. Co.*, 215 Mo. 479, 114 S. W. 956. See also *Board v. Louisville &c. R. Co.*, 33 Ky. L. 78, 109 S. W. 303; *People v. Atchi-*

*son &c. R. Co.*, 225 Ill. 593, 80 N. E. 272.

<sup>23</sup> *Sault Ste. Marie Bridge Co. v. Powers*, 138 Fed. 262.

<sup>24</sup> *Chicago &c. R. Co. v. People*, 153 Ill. 409, 38 N. E. 1075, 29 L. R. A. 69; and see note as to assessment of bridges between states and the like; also *Henderson Bridge Co. v. Commonwealth*, 99 Ky. 623, 31 S. W. 486, 29 L. R. A. 73, affirmed in *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. 532, 41 L. ed. 953; *Southern R. Co. v. Mitchell*, 139 Ala. 629, 37

§ 887 (739). **Statutory method of assessment exclusive.**—Where the statute prescribes a specific method for assessing or valuing the property of railroad companies the method prescribed excludes all others and must be pursued.<sup>25</sup> The legislative method is always exclusive. The rule is settled that where the legislature classifies property and prescribes the mode in which it shall be taxed, neither the taxing officers nor the courts can prescribe any other.

§ 888 (740). **Legislative discretion—Classification.**—The legislature may, in its discretion, provide different methods for assessing corporations of different classes, and a statute cannot be successfully assailed upon the ground that it prescribes a method of assessing railroad corporations different from that prescribed for assessing other corporations.<sup>26</sup> Classifications

So. 85; *Commonwealth v. Covington &c. Bridge Co.*, 114 Ky. 343, 70 S. W. 849. As to taxation of bridges and tunnels under New York law, see *People v. Purdy*, 149 N. Y. S. 315; *People v. Purdy*, 85 Misc. 581, 148 N. Y. S. 1074.

<sup>25</sup> *Louisville &c. Co. v. Warren County*, 5 Bush (Ky.) 243; *State v. Savage*, 65 Nebr. 714, 91 N. W. 716, 733 (citing text). See also *Chicago &c. R. Co. v. People*, 213 Ill. 458, 72 N. E. 1105; *Ohio River &c. R. Co. v. Detty*, 203 Fed. 537.

<sup>26</sup> *Cincinnati &c. Co. v. Kentucky*, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. ed. 414; *Kentucky Railroad Tax Cases*, 92 U. S. 663; *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989; *Cummings v. Merchants' &c. Bank*, 101 U. S. 160, 25 L. ed. 905; *Missouri Pacific R. Co. v. Mackey*, 127 U. S. 205, 6 Sup. Ct. 1161, 32 L. ed. 107, 33 Am. & Eng. R. Cas. 390; *Minneapolis &c. R. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. ed. 585; *Home Ins. Co.*

*v. New York*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. ed. 1025; *Bell Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. ed. 892; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. ed. 1035; *Chamberlain v. Walter*, 60 Fed. 788; overruling *Western Union &c. Co. v. Poe*, 61 Fed. 449; *Western Union &c. Co. v. Poe*, 64 Fed. 9; *Pulaski County &c. Cases*, 49 Ark. 518, 6 S. W. 1; *St. Louis &c. Co. v. Worthen*, 52 Ark. 529, 13 S. W. 254, 7 L. R. A. 374; *San Francisco &c. Co. v. State Board*, 60 Cal. 12; *Central Iowa Co. v. Board &c.*, 67 Iowa 199, 25 N. W. 128; *State v. Jones*, 51 Ohio St. 492, 37 N. E. 945; *Ancona v. Becker*, 14 Pa. Co. Ct. 73. See also *Florida Cent. &c. R. Co. v. Reynolds*, 183 U. S. 471, 22 Sup. Ct. 176, 46 L. ed. 283; *Kidd v. Alabama*, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. ed. 669; *Peacock v. Pratt*, 121 Fed. 772; *Louisville &c. R. Co. v. State*, 25 Ind. 177, 87 Am.

may be made and railroad corporations may constitute a distinct and separate class of corporations, and a mode of assessing and valuing their property may be prescribed different from that prescribed for taxing and valuing the property of other corporations. So, it has been held that the difference between an ordinary commercial railroad and a street railroad may warrant diversity in the mode of taxation.<sup>27</sup> The legislative discretion is broad, and no matter how unjustly or capriciously it may be exercised the courts are powerless to interfere, but they may interfere in cases where the legislature transcends its constitutional powers. The question is power or no power; if there be power the judiciary can not alter, amend or annul the statute; if there be no power the courts may annul the statute by adjudging it to be void.

**§ 889 (741). Equality and uniformity.**—Where the constitution requires that taxes shall be equal and uniform the mode of assessing railroad companies must be uniform, that is, one company of the same class and character cannot be assessed in one method and another company of precisely the same kind and character in a materially different method.<sup>28</sup> Corporations

Dec. 358; *Pittsburgh &c. R. Co. v. Backus*, 133 Ind. 625, 33 N. E. 432; *Chicago &c. R. Co. v. State*, 128 Wis. 553, 108 N. W. 557.

<sup>27</sup> *Savannah &c. R. Co. v. Savannah*, 198 U. S. 392, 25 Sup. Ct. 690, 49 L. ed. 1097 (a privilege tax or tax on business); *New York v. Tax Commissioners*, 199 U. S. 1, 25 Sup. Ct. 705, 50 L. ed. 65. See also *Chamberlain v. Walter*, 60 Fed. 788; *American Sugar &c. Co. v. New Orleans*, 181 U. S. 277, 21 Sup. Ct. 646, 45 L. ed. 859.

<sup>28</sup> *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *State v. Lathrop*, 10 La. Ann. 398; *New Orleans v. Kaufman*, 29 La. Ann. 283, 29 Am. Rep. 328; *Worth v. Wilmington &c. Co.*, 89 N. Car.

291, 45 Am. Rep. 679; *Pittsburgh &c. R. Co. v. State*, 49 Ohio St. 189, 16 L. R. A. 380; *Durach's Appeal*, 62 Pa. St. 491; *Shenandoah Val. &c. R. Co. v. Clarke Co. Suprs.*, 78 Va. 269; *Kneeland v. Milwaukee*, 15 Wis. 454. See also *Greene v. Louisville &c. R. Co.*, 244 U. S. 499, 37 Sup. Ct. 673, 61 L. ed. 1280, Ann. Cas. 1917E, 88, and note. A statute providing for raising a fund for the salaries and current expenses of a state railroad commission by taxing the property of railroad companies only, violates the rule as to uniformity and equality. *Atchison &c. R. Co. v. Howe*, 32 Kans. 737, 5 Pac. 397. But see *Chicago &c. Co. v. Siders*, 88 Ill. 320.

of different classes may be assessed in different methods, but corporations of the same class can not be assessed in different methods. The general rule is as we have stated it, but it is possible that in very rare instances there may be some peculiar elements that will carry the case out of the operation of the general rule. Where the constitution of the state requires equality and uniformity of taxation the tax upon railroad property cannot rightfully be materially or essentially greater than that imposed upon other property, although, as we have seen, the mode of assessment may be different. This is so independently of the influence of the federal constitution.<sup>29</sup> But absolute uniformity in every detail is usually unattainable, and uniformity of burden or result, rather than uniformity of method in all respects, is what is required.<sup>30</sup> The rule as to uniformity

<sup>29</sup> Board of Assessment v. Alabama &c. R. Co., 59 Ala. 551; Chicago &c. Co. v. Board &c., 44 Ill. 244; Board &c. v. Chicago &c. R. Co., 44 Ill. 229; Cumberland &c. Co. v. Portland, 37 Maine 444; State Treasurer v. Auditor &c., 46 Mich. 224, 13 Am. & Eng. Cas. 296; Teagan Transp. Co. v. Board of Assessors, 139 Mich. 1, 102 N. W. 273, 69 L. R. A. 431, and note; Schmidt v. Galveston &c. Co. (Tex. Civ. App.), 24 S. W. 547; Missouri &c. R. Co. v. Kone (Tex. Civ. App.), 122 S. W. 424. See, however, Williams v. Rees, 9 Biss. (U. S.) 405. See, however, Dubuque v. Illinois Cent. Co., 39 Iowa 56; Francis v. Atchison &c. Co., 19 Kans. 303; Mississippi Mills v. Cook, 56 Miss. 40. See also State v. Canada Cattle Car Co., 85 Minn. 457, 89 N. W. 66; State v. Chicago &c. R. Co., 195 Mo. 228, 93 S. W. 784; Jones v. Board of Comrs. of Stokes Co., 143 N. Car. 59, 55 S. E. 427; Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 26 Sup. Ct. 459,

50 L. ed. 744. See also Boston &c. R. Co. v. State, 75 N. H. 513, 31 L. R. A. (N. S.) 539, 77 Atl. 996; Mineral R. &c. Co. v. Northumberland Co. Comrs., 229 Pa. St. 436, 78 Atl. 991; Spokane &c. R. Co. v. Spokane Co., 82 Wash. 24, 143 Pac. 307.

<sup>30</sup> Kentucky R. Tax Cases, 115 U. S. 337, 6 Sup. Ct. 57, 29 L. ed. 414; Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. ed. 683; Adams Express Co. v. Ohio State Auditor, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. ed. 965; Louisville &c. R. Co. v. State, 25 Ind. 177, 87 Am. Dec. 358; Pittsburgh &c. R. Co. v. Backus, 133 Ind. 625, 33 N. E. 432; Central Iowa R. Co. v. Board of Supervisors, 67 Iowa 199, 25 N. W. 128; Gulf R. v. Morris, 7 Kans. 210; Applegate &c. v. Ernst, 3 Bush (Ky.) 648, 96 Am. Dec. 272; State &c. v. Severance, 55 Mo. 378; State &c. v. Aitken, 62 Nebr. 428, 87 N. W. 153; State v. Back, 72 Nebr. 402, 100 N. W. 952, 69 L. R.

has been held not violated by the assessment of railroads extending into unorganized territory, though other property therein escapes taxation by reason of the want of a county government.<sup>31</sup>

**§ 890 (741a). Equality and uniformity—Double taxation.**—On this subject it has been said by one able court: "The general policy of the law is to avoid duplicate taxation. No one subject of taxation ought to be required to contribute more than once to the same public burden, while other subjects of taxation, belonging to the same class, are required to contribute but once. In the exposition of any tax law, therefore, a construction leading to any such result should be avoided, unless the cogency of some express provision or unavoidable implication of the statutes compels its adoption."<sup>32</sup> Double taxation is not favored and is never presumed.<sup>33</sup> In one case it was held that double taxation was imposed where a tax was levied against a railroad company upon all its property and a tax was also levied upon the value of the shares in the hands of the stockholders. The court regarded it as clear that the elements which made up the

A. 447; *Boston &c. R. Co. v. State*, 60 N. H. 87; *Boston &c. R. v. State*, 63 N. H. 571, 4 Atl. 571; *State Board &c. v. Railroad Co.*, 48 N. J. L. 146, 4 Atl. 578; *Wagner v. Loomis*, 37 Ohio St. 571; *State &c. v. Jones, Auditor*, 51 Ohio St. 492, 37 N. E. 945; *Franklin County v. Nashville &c. R.*, 12 Lea (Tenn.) 521; *Chattanooga v. Railway*, 7 Lea (Tenn.) 561; *Dayton v. Coal & Iron Co.*, 99 Tenn. 578, 42 S. W. 444; *Baltimore &c. R. Co. v. Koontz*, 77 Va. 698; *Shenandoah Val. R. Co. v. Clark Co.*, 78 Va. 269; *Commonwealth v. Brown*, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110; *Pacific National Bank v. Pierce County*, 20 Wash. 675, 56 Pac. 936; *Chicago &c. R. Co. v. State*, 128 Wis. 553, 108 N. W. 557;

*Billings v. United States*, 232 U. S. 261, 34 Sup. Ct. 421, 58 L. ed. 596; *People v. Illinois Cent. R. Co.*, 273 Ill. 220, 112 N. E. 700; note in 60 L. R. A. 324.

<sup>31</sup> *Francis v. Railroad Co.*, 19 Kans. 303. And privilege taxes have been held not to be within the rule requiring uniformity. *St. Louis &c. Ry. Co. v. State*, 106 Ark. 321, 152 S. W. 110. See also note in 60 L. R. A. 333.

<sup>32</sup> *Rice Co. v. Bank*, 23 Minn. 280.

<sup>33</sup> *Tennessee v. Whitworth*, 117 U. S. 137, 6 Sup. Ct. 645, 29 L. ed. 832; *Georgia &c. R. Co. v. Wright*, 125 Ga. 589, 54 S. E. 52; *State v. Louisiana &c. R. Co.*, 196 Mo. 523, 94 S. W. 279.

value of the property of the railroad company and those which made the value of the shares of the stockholders were one and the same thing, and that the taxation of both amounted to a plain violation of the rule.<sup>34</sup>

**§ 891 (742). Duties of corporations—Rights of stockholders.**—Where the tax is laid upon the corporation the corporate officers must make the required returns and pay the taxes. The tax in such a case is laid upon the legal entity and must be paid out of the corporate revenues. If the tax is unauthorized and not enforceable the resistance to its enforcement is properly made by the corporation and not its members. Where there are errors or irregularities prejudicial to the interests of the corporation it is incumbent upon the corporate officers to take measures to secure the proper correction or appropriate relief.

<sup>34</sup> Georgia &c. R. Co. v. Wright, 125 Ga. 589, 54 S. E. 52. See also Dallas Co. v. Home Fire Ins. Co., 97 Ark. 254, 133 S. W. 1113; East Livermore v. Livermore &c. Co., 103 Maine 418, 69 Atl. 306, 15 L. R. A. (N. S.) 952; Stroh v. Detroit, 131 Mich. 109, 90 N. W. 1029; State v. Hannibal &c. R. Co., 37 Mo. 268; Central Granaries &c. Co. v. Lancaster County, 77 Nebr. 311, 109 N. W. 384; Commonwealth v. American &c. Co., 2 Dauph. Co. Rep. (Pa.) 212. But compare Washington County v. State, 172 Ala. 242, 55 So. 623; Durham County v. Blackwell Co., 116 N. Car. 441, 21 S. E. 423; Pullen v. Corporation Commission, 152 N. Car. 548, 68 S. E. 155; Shelby County v. Union & Planters' Bank, 161 U. S. 149, 16 Sup. Ct. 558, 40 L. ed. 650; Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. ed. 850; Porter v. Rockford &c. R. Co., 76 Ill. 561. Most of the conflicting authorities

upon this question are reviewed in note in 58 L. R. A. 589, et seq. Chicago &c. R. Co. v. Siders, 88 Ill. 320; Greenleaf v. Board of Review, 184 Ill. 226, 56 N. E. 295, 75 Am. St. 168; Wilmington &c. R. Co. v. Brunswick County, 72 N. Car. 10; South Nashville St. R. Co. v. Morrow, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853; Commonwealth v. Charlottesville &c. Co., 90 Va. 790, 20 S. E. 364, 44 Am. St. 950. A railroad statute providing for local tax on intangible assets in addition to ad valorem tax on intangible properties has been held not void as providing double taxation. Baker v. Druesdow (Tex. Civ. App.), 197 S. W. 1043. But where land for side tracks is taxed by local authorities after being rightly returned and assessed by the tax commission, the company may enjoin collection of the local tax. Atchison &c. R. Co. v. Board, 101 Kans. 618, 168 Pac. 687.

The shareholders, however, have an interest in preventing the enforcement of illegal taxes against the corporation and in having errors corrected, and this enables them to invoke judicial assistance in the event that the corporate officers refuse to perform their duty.<sup>35</sup> To entitle a stockholder to relief he must show, in addition to the other essential facts, that the corporate officers have been guilty of fraud, or, upon proper request, have refused to take proper steps to protect the corporate interests.

**§ 892 (743). Failure of the corporation to make return—Effect on stockholder.**—Corporations may be made the instrumentalities for collecting from the stockholders the tax, or the tax may be laid directly on the shares of stock in the hands of the shareholders, or it may be laid upon the corporation.<sup>36</sup> Where the tax is laid on the shares of stock in the hands of the stockholders it cannot be accurately said that the tax is laid on the corporation, for, where the tax is placed upon the stock in the hands of the shareholders the tax is really laid upon individual and not upon corporate property. If the tax is laid on the corporation, and not on the members, the breach of duty in failing to make returns is that of the corporation, and the members cannot be in fault for failing or refusing to return the property for taxation. The corporation may, if guilty of a

<sup>35</sup> *Bailey v. Atlantic &c. Co.*, 3 Dill. (U. S.) 22; *Parmley v. St. Louis &c. R. Co.*, 3 Dill. (U. S.) 13; *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. ed. 961; *Davenport v. Dows*, 18 Wall. (U. S.) 626, 21 L. ed. 938; *Dodge v. Woolsey*, 18 How. (U. S.) 331, 15 L. ed. 401; *Foote v. Linck*, 5 McLean (U. S.) 616; *Paine v. Wright*, 6 McLean (U. S.) 395; *Piqua State Bank v. Knoop*, 16 How. (U. S.) 369, 14 L. ed. 977; *Wilmington Railroad v. Reid*, 13 Wall. (U. S.) 264, 20 L. ed. 568; *Louisville v. Louisville &c.*, 90 Ky. 409, 14 S. W. 408, 9

L. R. A. 629n; *Lenawee &c. Bank v. Adrian*, 66 Mich. 273; *Davenport v. Dows*, 18 Wall. (U. S.) 626, 21 L. ed. 938. The corporation is a necessary party to such a suit, and the suit should be brought in behalf of all the stockholders.

<sup>36</sup> See *United States v. Baltimore &c. R. Co.*, 17 Wall. (U. S.) 322, 21 L. ed. 597; *South Nashville St. R. Co. v. Morrow*, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853; *St. Albans v. National Car Co.*, 57 Vt. 68; note to *State Board of Equalization v. People*, 191 Ill. 528, 58 L. R. A. 513.



culpable breach of duty, be liable to such penalties as may be provided, but the stockholder cannot be.<sup>37</sup>

**§ 893 (743a). Situs of stock of nonresident corporation owned by domestic corporation.**—Under a provision in a tax law requiring the assessment of property "located in each county," the Supreme Court of Georgia has held that stock in a nonresident corporation owned by a domestic railroad company is located, within the meaning of the statute, in the county and city where the principal office of the corporation owning the stock is located.<sup>38</sup> This seems to be in accord with the general rule that shares of stock are taxable at the domicile of the owner.<sup>39</sup>

**§ 894 (743b). Situs of rolling stock.**—Where there is no statute to the contrary, rolling stock is usually taxable at the head

<sup>37</sup> *Whitaker v. Brooks*, 90 Ky. 68, 13 S. W. 355; *Gillespie v. Gaston*, 67 Tex. 599, 4 S. W. 248. In the first of the cases cited it was said: "It seems to us it is a sufficient answer by the stockholder when called upon to assess his stock to say the law requires the corporation to assess its corporate property and declares that the stock of the shareholder shall be exempt. It matters not to him whether the corporation has done so or not. If not, it should be made to do so. The grant of exemption to the stockholder has not been made to depend upon this being done. If it can not be done under existing law, then resort must be had to additional legislation, instead of a court attempting to annul a plain legislative grant of exemption to one because another has failed to perform what is perhaps a legal duty. If the statute declares without conditions (as it does) that the corporation, and not the stock-

holder, shall answer for the tax, then it is immaterial to him in the present condition of the law whether the corporation has or has not listed its property and paid the tax. He need only show that the law places the burden upon the corporation." See *State v. Chicago &c. R. Co.*, 128 Wis. 449, 108 N. W. 594; *Ridpath v. Spokane Co.*, 23 Wash. 436, 63 Pac. 261.

<sup>38</sup> *Green Co. v. Wright*, 126 Ga. 504, 54 S. E. 951. See also *Wright v. Louisville &c. R. Co.*, 195 U. S. 219, 25 Sup. Ct. 16, 49 L. ed. 167.

<sup>39</sup> See *State v. Kidd*, 125 Ala. 413, 28 So. 480, affirmed in *Kidd v. Alabama*, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. ed. 669; *Hawley v. Malden*, 232 U. S. 1, 34 Sup. Ct. 201, 58 L. ed. 477; *Greenleaf v. Board of Review*, 184 Ill. 226, 56 N. E. 295, 75 Am. St. 168; note to *Buck v. Miller*, 147 Ind. 586, 45 N. E. 647, 47 N. E. 8, 37 L. R. A. 384, 62 Am. St. 458; and note in L. R. A. 1915C, 942.

or home office of the company.<sup>40</sup> But it has been held that if the charter does not fix any such place the domicile for taxing purposes will be held to be where the by-laws require the stockholders to meet,<sup>41</sup> and in another case it was held that the personal property was taxable at the place where it was used and the business done.<sup>42</sup> So, it has been held that the legislature may provide, in a proper case, for taxing the rolling stock at some place or places where it is used other than the head office of the company.<sup>43</sup> Questions as to the taxation of property in more than one state, as to taxation of property habitually used elsewhere, and as to the effect of the Federal Constitution, are considered in another chapter.<sup>44</sup>

**§ 895 (744). Discrimination.**—Where the constitution of the state requires equality and uniformity there can not be a material and unjust discrimination against railroad property.<sup>45</sup> This

<sup>40</sup> *Baltimore &c. R. Co. v. Allen*, 22 Fed. 376; *Sangamon &c. R. Co. v. Morgan County*, 14 Ill. 163, 56 Am. Dec. 497; *Commonwealth v. Chesapeake &c. R. Co.*, 25 Ky. L. 1126, 77 S. W. 186; *Appeal Tax Court v. Northern &c. R. Co.*, 50 Md. 417; *Philadelphia &c. R. Co. v. Appeal Tax Court*, 50 Md. 397; *Detroit v. Wayne Circuit Judge*, 127 Mich. 604, 86 N. W. 1032.

<sup>41</sup> *Grundy County v. Tennessee &c. Co.*, 94 Tenn. 295, 29 S. W. 116.

<sup>42</sup> *Atlantic &c. R. Co. v. Lesueur*, 2 Ariz. 428, 19 Pac. 157, 1 L. R. A. 244. And cars of a foreign corporation having no place of business in the state may be taxed under the New Hampshire law when operated by such company in that state. *Vera Chemical Co. v. State*, 78 N. H. 473, 102 Atl. 463. But where a railroad company operated trains over a leased track in interstate commerce to and from a single point in the state, its trains

entering and leaving the state on the same day, it was held that there was no warrant for assessing as rolling stock within the state all of the engines and cars used in one day. *Baltimore &c. R. Co. v. Commonwealth*, 177 Ky. 566, 198 S. W. 35.

<sup>43</sup> *Baltimore &c. R. Co. v. Wilcomico County*, 93 Md. 113, 48 Atl. 853; *State v. Severance*, 55 Mo. 378; *State v. Back*, 72 Nebr. 402, 100 N. W. 952, 69 L. R. A. 447; *Richmond &c. R. Co. v. Alamance*, 84 N. Car. 504. See also *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 25 Sup. Ct. 686, 49 L. ed. 1059; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 14 Sup. Ct. 396, 38 L. ed. 238; *Marye v. Baltimore &c. R. Co.*, 127 U. S. 117, 8 Sup. Ct. 1037, 32 L. ed. 94.

<sup>44</sup> See post, §§ 912, 913.

<sup>45</sup> In *Chicago &c. Co. v. Board*, 54 Kans. 781, 39 Pac. 1039, the court said: "While exact uniform-

is so, independently of any federal questions or rules. The requirement of equality and uniformity is violated by unjustly imposing a burden upon railroad companies heavier than that imposed upon other persons or corporations. We suppose, however, that the burden imposed must be palpably and materially greater than that imposed upon other property, since in all systems of taxation there is some inequality.<sup>46</sup>

§ 896 (745). **Lien of assessment.**—The principle that railroad property is assessed as a unit requires the conclusion that the

ity and equality can not be had, and while mistakes and omissions by assessors may not, in all cases, be the subject of adequate remedy in the courts, yet for the gross injustice and violation of the law complained of, there ought to be some remedy." At another place it was said: "We do not think the courts are powerless to prevent such a gross discrimination in the assessment and taxation of property as is shown in this case, where one class of property is assessed and taxed at its actual value, and all other property in the same county is assessed and taxed at only twenty-five per cent. of its value." See *Stanley v. Supervisors of Albany*, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. ed. 1000; also *Louisville &c. R. Co. v. Bosworth*, 209 Fed. 380; *Missouri &c. R. Co. v. Kone* (Tex. Civ. App.), 122 S. W. 424, and cases cited ante § 889, notes 28, 29.

<sup>46</sup> If property of other persons and corporations is taxed only once, double taxation of railway property would be a discrimination, against which the courts should interpose their power. Cum-

*berland Marine &c. Co. v. Portland*, 37 Maine 444; *Osborn v. New York &c. Co.*, 40 Conn. 491; *Hannibal &c. Co. v. Shacklett*, 30 Mo. 550; *State v. Hannibal &c. Co.*, 37 Mo. 265; *New York &c. R. Co. v. Sabin*, 26 Pa. St. 242. But see *Dunleith &c. Co. v. Dubuque*, 32 Iowa 427; *Orange &c. Co. v. Alexandria*, 17 Grat. (Va.) 176. But enforcement of a tax may be enjoined on the ground of systematic or persistent undervaluation of other taxable property. *Greene v. Louisville &c. R. Co.*, 244 U. S. 499, 37 Sup. Ct. 673, 61 L. ed. 1280, Ann. Cas. 1917E, 88. This general doctrine obtains where there is a constitutional limitation requiring equality and uniformity, but some of the decisions hold that it does not prevail where there is no such limitation. *United States &c. Co. v. State*, 79 Md. 63, 28 Atl. 768. And railroad companies are not discriminated against contrary to the equal protection of the laws clause in the constitution by an excise tax merely because other public utilities are not included. *Ohio Tax Cases*, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. ed. 737.

lien for the taxes assessed attaches to the entire property.<sup>47</sup> The question may, of course, be controlled by statutory provisions, but where there are no statutory provisions prescribing a different rule the lien will fasten upon the entire property within the state. We suppose, however, that taxing officers could not sell the property lying outside of the limits of the state for the reason that a state law can have no extraterritorial effect.

**§ 897 (745a). Taxation of street and interurban railroads.**—Owing largely to the difference in the nature of franchises of railroads and street railways, and to the fact that the value of the different portions of a street railway line vary according to the density of the population of the localities traversed, it has been held that “street railways” are not generally included within the term “railroads,” as used in revenue laws.<sup>48</sup> An interurban railway is defined in the Iowa laws as any railway operated upon the streets of any city or town by other power than steam, and extending beyond the corporate limits to any other city or town. One section of the law provides that such roads and the companies operating them shall be governed by the same laws that govern railroad and railway companies. Another section provides that any interurban railway shall,

<sup>47</sup> *Maricopa &c. R. Co. v. Arizona*, 156 U. S. 347, 15 Sup. Ct. 391, 39 L. ed. 448. Taxes upon the capital stock have been held to constitute a lien on the real property of the company. *Union Trust Co. v. Weber*, 96 Ill. 346. And its personal property is within a statute providing that the state shall have a lien on the railroad and all its appurtenances. *Stevens v. Lake George &c. R. Co.*, 82 Mich. 426, 46 N. W. 730.

<sup>48</sup> *San Francisco &c. R. Co. v. Scott*, 142 Cal. 222, 75 Pac. 575. See also *Savannah &c. R. Co. v. Savannah*, 198 U. S. 392, 25 Sup. Ct. 690, 49 L. ed. 1097. But see

*Philadelphia v. Philadelphia Traction Co.*, 206 Pa. 35, 55 Atl. 762, where it is held that the words “Railroad” and “Railway” as used in the Pennsylvania statute are synonymous, and apply to both steam and street railways, unless the context clearly shows a different intent. The word “railroad” as used in the Texas statute imposing a gross-earning tax on express companies doing business by railroad or water within the state has been held to include interurban railroads run by electricity. *North Texas Transfer &c. Co. v. State* (Tex. Civ. App.), 169 S. W. 1045.

within the limits of any city or town, upon such streets as it shall use for transporting passengers, be deemed a street railway, and be subject to the laws governing street railways. The supreme court of that state, being recently called upon to construe this law, has held that the last section operates merely to render the interurban company liable to the obligations and entitled to the rights of a street railway as to those portions of its lines within the city or town limits, but does not give this portion of the line the character of a street railway, so as to render them subject to assessment as street railroads, instead of railroads as provided in the previous section.<sup>49</sup>

**§ 898 (746). Relinquishment of the power of taxation.**—The general rule is that, where there is no constitutional prohibition interdicting it, the power of taxation may be relinquished in particular instances.<sup>50</sup> It may well be doubted whether the cases which hold this doctrine have not departed from principle since

<sup>49</sup> Cedar Rapids &c. R. Co. v. Cummins, 125 Iowa 430, 101 N. W. 176.

<sup>50</sup> New Jersey v. Wilson, 7 Cranch (U. S.) 164, 3 L. ed. 303; Tomlinson v. Branch, 15 Wall. (U. S.) 460, 21 L. ed. 189; Tomlinson v. Jessup, 15 Wall. (U. S.) 454, 21 L. ed. 204; Home of Friendless v. Rouse, 8 Wall. (U. S.) 430, 19 L. ed. 495; Ohio Life Ins. &c. Co. v. Debolt, 16 How. (U. S.) 416, 14 L. ed. 997; Humphrey v. Pegues, 16 Wall. (U. S.) 244, 21 L. ed. 326; Pacific R. Co. v. Maguire, 20 Wall. (U. S.) 36, 22 L. ed. 282; McGee v. Mathis, 4 Wall. (U. S.) 143, 18 L. ed. 314; Railroad Co. v. Loftin, 105 U. S. 258, 26 L. ed. 1042; Dodge v. Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401; Mobile &c. R. Co. v. Tennessee, 153 U. S. 486, 14 Sup. Ct. 968, 38 L. ed. 793; Franklin Branch Bank v. Ohio, 1 Black

(U. S.) 474, 17 L. ed. 180; Wright v. Sill, 2 Black (U. S.) 544, 17 L. ed. 333; Piqua Bank v. Knoop, 16 How. (U. S.) 369, 14 L. ed. 977; Barnes v. Kornegay, 62 Fed. 671; Louisville &c. v. Gaines, 3 Fed. 266; Mobile v. Stonewall Insurance Co., 53 Ala. 570; State Bank v. People, 5 Ill. 303; Farmers' Bank v. Commonwealth, 6 Bush (Ky.) 127; LeRoy v. East Saginaw Railroad Co., 18 Mich. 233, 100 Am. Dec. 162; Natchez &c. Co. v. Lambert, 70 Miss. 779, 13 So. 33; St. Louis v. Manufacturers' Savings Bank, 49 Mo. 574; South Pacific Co. v. Laclede County, 57 Mo. 147; Gardner v. State, 21 N. J. L. 557; State v. Wright, 41 N. J. L. 478; Commonwealth v. Philadelphia &c. Co., 164 Pa. St. 252, 30 Atl. 145; Columbia &c. Co. v. Chilberg, 6 Wash. 612, 34 Pac. 163.

the power of taxation, being a sovereign one, is incapable of abdication or surrender, but the decisions have settled the question. The presumption is that there has been no relinquishment of the power, and the party who insists that it has been relinquished must clearly and fully establish his assertion, otherwise it will be adjudged that there was no relinquishment.<sup>51</sup>

<sup>51</sup> *Keokuk &c. R. Co. v. Missouri*, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. ed. 450; *Mobile &c. Co. v. Tennessee*, 153 U. S. 486, 14 Sup. Ct. 986, 38 L. ed. 793; *People ex rel. Schurz v. Cook*, 148 U. S. 397, 13 Sup. Ct. 645, 37 L. ed. 498; *Yazoo &c. R. Co. v. Adams*, 180 U. S. 1, 21 Sup. Ct. 240, 45 L. ed. 395; *New Orleans &c. R. Co. v. New Orleans*, 143 U. S. 192, 12 Sup. Ct. 406, 36 L. ed. 121; *Railroad Co. v. Maine*, 96 U. S. 499, 24 L. ed. 836; *Vicksburg &c. R. Co. v. Dennis*, 116 U. S. 665, 6 Sup. Ct. 625, 29 L. ed. 770; *Louisville &c. Co. v. Gaines*, 3 Fed. 266; *Oliver v. Memphis &c. Co.*, 30 Ark. 128; *Atlantic &c. Co. v. Allen*, 15 Fla. 637; *Illinois &c. Co. v. Goodwin*, 94 Ill. 262; *Portland v. Portland &c. Co.*, 67 Maine 135; *State v. Baltimore &c. Co.*, 48 Md. 49; *Wells v. Hyattsville*, 77 Md. 125, 26 Atl. 357, 20 L. R. A. 89; *Mobile &c. Co. v. Moseley*, 52 Miss. 127; *Grand Gulf &c. Co. v. Buck*, 53 Miss. 246; *Scotland Co. v. Missouri &c. Co.*, 65 Mo. 123; *Cook v. State*, 33 N. J. Eq. 474; *Rochester v. Rochester R. Co.*, 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773; *Richmond v. Richmond &c. Co.*, 21 Grat. (Va.) 604; *Wisconsin &c. Co. v. Taylor County*, 52 Wis. 37, 8 N. W. 833, 1 Am. & Eng. Cas. 532. In *Baltimore &c. R. Co. v. Wicomico County Comrs.*, 103 Md. 277, 63 Atl. 678, 681, it

is said: "Every reasonable intendment must be made that it was not the design to surrender the power of taxation or to exempt any property from its due proportion of the burden of taxation." Citing *Memphis &c. R. Co. v. Railroad Comrs.*, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. ed. 837; *Chesapeake &c. R. Co. v. Miller*, 114 U. S. 186, 5 Sup. Ct. 813, 29 L. ed. 121; *Picard v. East Tennessee &c. R. Co.*, 130 U. S. 641, 9 Sup. Ct. 640, 32 L. ed. 1051; *New York v. Cook*, 148 U. S. 409, 13 Sup. Ct. 645, 37 L. ed. 498; *Phoenix Fire &c. Ins. Co. v. Tennessee*, 161 U. S. 174, 16 Sup. Ct. 471, 40 L. ed. 660; *Buchanan v. Talbot Co.*, 47 Md. 293; *State v. Baltimore &c. R. Co.*, 48 Md. 73; *Appeal Tax Court v. Rice*, 50 Md. 312; *Appeal Tax Court v. University*, 50 Md. 465. So, as said by the Supreme Court of the United States, "exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the language used, construed strictissimi juris." *Vicksburg &c. R. Co. v. Dennis*, 116 U. S. 665, 6 Sup. Ct. 625, 29 L. ed. 770; *Yazoo &c. R. Co. v. Thomas*, 132 U. S. 174, 10 Sup. Ct. 68, 33 L. ed. 302. See also *Louisiana &c. R. Co. v. State Board*, 135 La. 69, 64 So. 985.

§ 899 (747). **Exemption from taxation—Consolidation.**—The rule that exemption from taxation does not exist unless the exemption is conferred by clear statutory provisions would seem to require the conclusion that, where two railroad corporations are consolidated, the right to exemption is lost unless expressly or impliedly saved by the statute authorizing the consolidation. The theory of the adjudged cases, however, is that, where the consolidated corporation becomes essentially a new corporation, the right of exemption is lost, but if the identity of the two corporations is preserved the right of exemption is not destroyed.<sup>52</sup> Whether the right of exemption is lost must depend

<sup>52</sup> In the case of *Shields v. Ohio*, 95 U. S. 319, 323, 24 L. ed. 357, the court said, speaking of the consolidation: "It could not occur without their consent. The consolidated company had then no existence. It could have none while the original corporation subsisted. All the old and the new could not co-exist. It was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to a dissolution. This being done, eo instante the new corporation came into existence." In *Keokuk &c. R. Co. v. Missouri*, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. ed. 450, the court held that the consolidated corporation was a new corporation and did not acquire a right of exemption conferred upon one of the constituent companies. The court said: "It follows that when the new corporation came into existence it came precisely as if it had been organized under a charter granted at the date of the consolidation and subject to the constitutional provisions then existing, which required (art. 11,

§ 16) that no property, real or personal, should be exempted from taxation, except such as was used exclusively for public purposes; in other words, that the exemption from taxation contained in section 9 of the original charter of the Alexandria and Bloomfield Railway Company did not pass to the Missouri, Iowa and Nebraska Company. As was said of an Arkansas corporation in *St. Louis &c. R. Co. v. Berry*, 113 U. S. 465, 475, 5 Sup. Ct. 529, 28 L. ed. 1055: 'It came into existence as a corporation in the state of Arkansas, in pursuance of its constitution and laws, and subject in all respects to their restrictions and limitations. Among these was that one which declared that the property of corporations, now existing, or hereafter created, shall forever be subject to taxation the same as property of individuals. This rendered it impossible for the consolidated corporation to receive by transfer from the Cairo and Fulton R. Company, or otherwise, the exemption sought to be enforced in this suit.' See also *Memphis &c. R. Co. v. Railroad*

almost entirely upon the statutes under which the consolidation is effected, but in construing the statutes the court should, we venture to affirm, keep in mind the general principle forbidding the bargaining away of the powers of government, as well as the salutary rule that justice requires that the burden of taxation shall fall equally and uniformly upon all property, and that exemptions cannot exist except when clearly granted by constitutional statutes. The right of exemption does not extend to lines of railroad leased to the corporation to which the exemption is granted.<sup>53</sup> There is no consolidation in such cases, and there cannot be any implication or presumption that leased

Comrs., 112 U. S. 609, 5 Sup. Ct. 299, 28 L. ed. 837; *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357; *Louisville &c. R. Co. v. Palmes*, 109 U. S. 244, 3 Sup. Ct. 193, 27 L. ed. 922. Nor was the exemption saved by section 3 of article 11, providing that 'all statute laws of this state now in force, not inconsistent with this constitution, shall continue in force until they shall expire by their own limitation, or be amended or repealed by the general assembly.' This referred to statutes in force at the time the constitution was adopted, the operation of which is continued, notwithstanding the constitution. In this case, however, the exemption contained in section 9 of the charter of the Alexandria and Bloomfield Railway Company ceased to exist, not by the operation of the constitution, but by the dissolution of the corporation to which it was attached." See also *Tomlinson v. Branch*, 15 Wall. (U. S.) 460, 21 L. ed. 189; *Philadelphia &c. R. Co. v. Maryland*, 10 How. (U. S.) 376, 13 L. ed. 461; *Delaware Railroad Tax*, 18 Wall. (U. S.) 206, 21 L. ed.

888; *Central Railroad &c. Co. v. Georgia*, 92 U. S. 665, 23 L. ed. 757; *Chesapeake &c. R. Co. v. Virginia*, 94 U. S. 718, 24 L. ed. 310; *Railroad Co. v. Maine*, 96 U. S. 499, 24 L. ed. 836; *Railroad Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091; *Railroad Co. v. Georgia*, 98 U. S. 359, 25 L. ed. 185; *Scoville v. Thayer*, 105 U. S. 143, 26 L. ed. 968; *Green Co. v. Conness*, 109 U. S. 104, 3 Sup. Ct. 69, 27 L. ed. 872; *St. Louis &c. R. Co. v. Berry*, 113 U. S. 465, 5 Sup. Ct. 529, 28 L. ed. 1055; *Tennessee v. Whitworth*, 117 U. S. 139, 6 Sup. Ct. 649, 29 L. ed. 833; *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304, 26 Sup. Ct. 261, 50 L. ed. 491; *McMahan v. Morrison*, 16 Ind. 172; *State v. Keokuk &c. Co.*, 99 Mo. 30, 12 S. W. 290, 6 L. R. A. 222; *Rochester v. Rochester Ry. Co.*, 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773.

<sup>53</sup> *Lake Shore &c. Co. v. Grand Rapids*, 102 Mich. 374, 60 N. W. 767. Nor, it seems, does the exemption of the lessor extend to the lessee. *Rochester v. Rochester R. Co.*, 182 N. Y. 99, 74 N. E. 953, 70



property is exempt, for the presumption, in the absence of countervailing facts, is always against exemptions and in favor of equality and uniformity. In Louisiana, by statute, the right to exemption follows the railroad no matter into whose hands it may come, even though by consolidation.<sup>54</sup>

**§ 900 (748). Right of exemption non-assignable.**—The courts have generally manifested a reluctance to extend the doctrine that the power of taxation can be relinquished, and, wherever possible, without denying the doctrine of the earlier cases, have limited the rule. The rule is, in our judgment, not only unwise, but is also opposed to the principle that the powers of government cannot be bargained away, abrogated, or surrendered, and there is, therefore, strong reason for confining its operation within narrow limits. The cases which hold that the right cannot be assigned assert a wise doctrine, but, it must be confessed that it is difficult to see how this result can be logically reached if it be true that the right of exemption is one created by contract, and as such protected by the constitution, since it would seem to necessarily follow that, if the right is one of contract, it may be sold and assigned. The decisions of the court of final resort, however, have settled the question by adjudging that the right is not assignable.<sup>55</sup> Thus, it has been

L. R. A. 773. See also *State v. Northern Pac. R. Co.*, 32 Minn. 294, 20 N. W. 234; *State v. Chicago & C. R. Co.*, 89 Mo. 523, 14 S. W. 552. But compare *State Board v. Morris & C. R. Co.*, 49 N. J. L. 193, 7 Atl. 826. A lease for a thousand years, without reversion, upon consideration of completing the road in a certain time, has been held to extinguish an exemption from taxation. *Commonwealth v. Nashville & C. R. Co.*, 93 Ky. 430, 20 S. W. 383.

<sup>54</sup> *Louisiana & C. R. Co. v. State Board*, 135 La. 69, 64 So. 985. As to when a consolidated corporation

or the like must pay an incorporation tax as for a new corporation, see *Chicago Title & C. Co. v. Doyle*, 259 Ill. 489, 102 N. E. 790, 47 L. R. A. (N. S.) 1066, and note.

<sup>55</sup> The question was considered in *Louisville & C. R. Co. v. Palmes*, 109 U. S. 244, 3 Sup. Ct. 193, 27 L. ed. 922, and the court, referring to the case of *Morgan v. Louisiana*, 93 U. S. 217, 23 L. ed. 860, held the right to not be assignable. In the case first named it was said: "The exemption from taxation, created by the eighteenth section of the internal improvement act of 1855. is in every respect similar to that

held that the purchaser at a mortgage foreclosure sale does not acquire an exemption from taxation which the mortgagor had.<sup>56</sup>

**§ 901 (749). Immunity from taxation not a franchise.**—There is conflict in the cases upon the question whether immunity from

which was declared in *Morgan v. Louisiana*, 93 U. S. 217, 23 L. ed. 860, to be not assignable. No words of assignability are used by the legislature of the state in the language creating it, and from its nature and context it is to be inferred that the exemption of the property of the company was intended to be of the same character as that declared in reference to its capital stock and to its officers, servants and employes, and that all alike were privileges personal to the corporation, or to individuals connected with it, entitled to them by the terms of the law. This exemption, therefore, did not pass from the Alabama and Florida Railroad Company to the Pensacola and Louisville Railroad Company by the conveyances which passed the title to the railroad itself, and to the franchises connected with and necessary in its construction and operation." See also *Wilmington &c. R. Co. v. Alsbrook*, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. ed. 972; *Baltimore &c. R. Co. v. Mayor*, 89 Md. 89, 42 Atl. 922; *Wilmington &c. R. Co. v. Alsbrook*, 110 N. Car. 137, 14 S. E. 652, citing *Southwestern R. Co. v. Wright*, 116 U. S. 231, 6 Sup. Ct. 329, 29 L. ed. 626; *Chicago &c. R. Co. v. Guffey*, 120 U. S. 569, 7 Sup. Ct. 693, 30 L. ed. 732; *Bloxam v. Florida &c. R. Co.*, 35 Fla. 625, 17

*So.* 902; *State v. Mercantile Bank*, 95 Tenn. 212, 31 S. W. 989; *Rochester v. Rochester Ry. Co.*, 182 N. Y. 99, 116, 74 N. E. 953, 70 L. R. A. 773, affirmed in 205 U. S. 236, 27 Sup. Ct. 469, 51 L. ed. 784. In the opinion of the Supreme Court of the United States in the case last cited earlier decisions are reviewed and some of them modified and it is held that a statute authorizing assignment or transfer of "privileges" does not include immunity from taxation. But compare *Detroit &c. R. Co. v. Common Council*, 125 Mich. 673, 85 N. W. 96, 84 Am. St. 589; *Traverse Co. v. St. Paul &c. R. Co.*, 73 Minn. 417, 76 N. W. 217.

<sup>56</sup> *Baltimore &c. R. Co. v. Wicomico County Comrs.*, 103 Md. 277, 63 Atl. 678. But the Federal Court took a different view under the statute there involved. *Wicomico County Comrs. v. Bancroft*, 135 Fed. 977, from which, however, a writ of certiorari has been granted to the Supreme Court of the United States. 26 Sup. Ct. 756. See also to the effect that immunity from taxation does not ordinarily pass on foreclosure sale. *Morgan v. Louisiana*, 93 U. S. 217, 23 L. ed. 860; *Picard v. East Tenn. &c. R. Co.*, 130 U. S. 637, 9 Sup. Ct. 640, 32 L. ed. 1051; *Arkansas &c. R. Co. v. Berry*, 44 Ark. 17.

taxation is a franchise,<sup>57</sup> but the better reason and weight of authority are to the effect that it is not a franchise in the proper sense. We think that the rule should be that the immunity cannot be regarded as a franchise passing by assignment, unless that conclusion is imperatively required by the provisions of the statute, and if there be doubt it must be resolved against the claim that the immunity is a franchise. It is bad enough to permit the immunity to be granted as a contract right, and to extend the erroneous rule beyond what a rigid adherence to the earlier cases require would be to give to a pernicious doctrine a very wide and evil influence.

<sup>57</sup> In *Keokuk &c. R. Co. v. Missouri*, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. ed. 450, the court said: "Whether under the name franchises and privileges an immunity from taxation would pass to the new company may admit of some doubt in view of the decisions of this court, which upon this point are not easy to be reconciled. In *Chesapeake &c. R. Co. v. Miller*, 114 U. S. 176, 5 Sup. Ct. 813, 29 L. ed. 121, it was held that an immunity from taxation enjoyed by the Covington and Ohio Railroad Company did not pass to a purchaser of such road under foreclosure of a mortgage, although the act provided that 'said purchaser shall forthwith be a corporation' and 'shall succeed to all such franchises, rights and privileges . . . as would have been had . . . by the first company but for such sale and conveyance.' It was held, following in this particular, *Morgan v. Louisiana*, 93 U. S. 217, 23 L. ed. 860, that the words 'franchises, rights and privileges' did not necessarily embrace a grant of an exemption or im-

munity. See also *Picard v. East Tennessee &c. R. Co.*, 130 U. S. 637, 9 Sup. Ct. 640, 32 L. ed. 1051. Upon the other hand, it was held in *Tennessee v. Whitworth*, 117 U. S. 139, 6 Sup. Ct. 649, 29 L. ed. 833, that the right to have shares in its capital stock exempted from taxation within the state is conferred upon a railroad corporation by state statutes granting to it 'all the rights, powers and privileges' conferred upon another corporation named, if the latter corporation possesses by law such right of exemption; citing in support of this principle a number of prior cases. See also *Wilmington &c. R. Co. v. Alsbrook*, 146 U. S. 279, 297, 13 Sup. Ct. 72, 36 L. ed. 972." See also *Detroit R. Co. v. Guthard*, 51 Mich. 180. For a full discussion and later authorities, see ante, § 380. And see especially *Buchanan v. Knoxville &c. Co.*, 71 Fed. 324, 334; *Rochester R. Co. v. Rochester*, 205 U. S. 236, 27 Sup. Ct. 469, 51 L. ed. 784; *State v. Chicago &c. R. Co.*, 89 Mo. 523, 14 S. W. 522; *Baltimore &c. R. Co. v. Ocean City*, 89 Md. 89, 42 Atl. 922; and com-

§ 902 (750). **Exemption of property used in operating railroad.**—The cardinal and well-known rule of construction is that a statute exempting property from taxation is to be strictly construed. The general rule is settled and familiar, but its practical application is not always free from difficulty. It would not be profitable to comment upon the cases in which the rule has been applied, for they are numerous, and the statutes to which it has been applied differ in many material particulars.<sup>58</sup> The courts are often called upon to determine the meaning of such phrases as “all property used by a railroad company,” or “all property used for railroad purposes.” In such cases the decisions have generally been that it is only such property as is actually used or required in operating the railroad that is exempt. There is, however, difficulty in determining what is such use as will bring the particular case within the exemption, and there is some confusion among the authorities upon the question.<sup>59</sup> A great diversity of

pare *Given v. Wright*, 117 U. S. 648, 6 Sup. Ct. 907, 29 L. ed. 1021, with *Chesapeake &c. R. Co. v. Miller*, 114 U. S. 176, 5 Sup. Ct. 813, 29 L. ed. 121.

<sup>58</sup> See generally *Atlantic &c. Co. v. Allen*, 15 Fla. 637; *Colorado So. &c. R. Co. v. Crowley*, 134 La. 180, 63 So. 868; *Baltimore v. Baltimore &c. Co.*, 6 Gill (Md.) 288, 26 Am. Dec. 576; *County Com'rs v. Farmers' National Bank*, 48 Md. 117; *Vicksburg &c. Co. v. Bradley*, 66 Miss. 518, 6 So. 321; *Hope Mining Co. v. Kennon*, 3 Mont. 34; *State v. Branin*, 23 N. J. L. 484; *State v. Receiver &c.*, 38 N. J. L. 299, 13 Am. Rep. 50; *Schuylkill &c. Co. v. Commissioners*, 11 Pa. St. 202; *Atlantic &c. Co. v. Lesuer*, 1 L. R. A. 244; 2 Inter. Com. R. 189.

<sup>59</sup> *Wilmington Railroad v. Reid*, 13 Wall. (U. S.) 264, 20 L. ed. 568; *St. Louis &c. Co. v. Loftin*, 30 Ark. 693; *Osborn v. Hartford &c. Co.*,

40 Conn. 498; *Atlanta &c. Co. v. Atlanta*, 66 Ga. 104; *Illinois Central Co. v. Irvin*, 72 Ill. 452; *Swigert, In re*, 119 Ill. 83, 6 N. E. 469, 59 Am. Rep. 789; *Portland &c. R. Co. v. Saco*, 60 Maine 196; *State v. Baltimore &c. Co.*, 48 Md. 49; *Detroit &c. Co. v. Detroit*, 88 Mich. 347, 50 N. W. 302; *Todd Co. v. St. Paul &c. Co.*, 38 Minn. 163, 36 N. W. 109; *Whitcomb v. Ramsey County*, 91 Minn. 238, 97 N. W. 879; *Northern Pac. Co. v. Carland*, 5 Mont. 146, 3 Pac. 134; *State v. Newark*, 26 N. J. 520; *State v. Haight*, 34 N. J. L. 319; *State v. Haight*, 35 N. J. L. 40; *State v. Woodruff*, 36 N. J. L. 94; *State v. Collector &c.*, 38 N. J. L. 270; *State v. Wetherill*, 41 N. J. L. 147; *Railroad Co. v. Berks County*, 6 Pa. St. 70; *Wayne County v. Delaware &c. Co.*, 15 Pa. St. 351; *New York &c. Co. v. Sabin*, 26 Pa. St. 242; *Lackawanna &c. Co. v. Luzerne County*,

opinion prevails, although all the cases profess adherence to the cardinal rule. Some of the courts enforce the rule with rigid strictness, holding that there must be actual use for railroad purposes, and not merely a use for a purpose indirectly connected with the operation of the railroad, while other courts extend the exemption to property incidentally connected with the operation of the railroad.<sup>60</sup> As much as can be safely said is that in each particular case the question is one of legislative intention, that intention being gathered from the particular statute strictly construed against the corporation which claims that its property is exempt from taxation, and it appearing clearly that the property claimed as exempt is essential and not barely convenient to the operation of the railroad.<sup>61</sup> The statement made does not advance us very far, for the question of importance and difficulty which must be solved is as to what property is reasonably necessary to the proper operation of the railroad, but it is not possible to give any general rule which will enable the investigator to work out a solution of the legal problem.

42 Pa. St. 424; Northampton & Co. v. Lehigh & Co., 75 Pa. St. 461; County of Erie v. Erie & Co., 87 Pa. St. 434; De Soto Bank v. Memphis, 6 Baxt. (Tenn.) 415; State v. Nashville & Co., 86 Tenn. 438, 6 S. W. 880; Day v. Joiner, 6 Baxt. (Tenn.) 441; Milwaukee & Co. v. Board of Supervisors, 29 Wis. 116; Milwaukee & Co. v. Milwaukee, 34 Wis. 271; Chicago & Co. v. Board of Supervisors, 48 Wis. 666.

<sup>60</sup> It has been held that an inn used exclusively by passengers and employes traveling on railroad trains comes within the exemption of "property necessarily used in operating the railroad." Milwaukee & Co. v. Board of Supervisors, 29 Wis. 116. But see State v. Mansfield, 23 N. J. L. 510, 57 Am. Dec. 409n, and compare State v.

Baltimore & Co. R. Co., 48 Md. 49. As to grain elevators, see Detroit Union & Co. v. Detroit, 88 Mich. 347, 50 N. W. 302; Illinois Cent. R. Co. v. People, 119 Ill. 137, 6 N. E. 451; Pennsylvania R. Co. v. Jersey City, 49 N. J. L. 540, 9 Atl. 782, 60 Am. Rep. 648, aff'd in 51 N. J. L. 564, 20 Atl. 60; Petersburg R. Co. v. Northampton County, 81 N. Car. 487. But compare Erie County v. Erie & Co. Transp. Co., 87 Pa. St. 434; State v. Nashville & Co. R. Co., 86 Tenn. 438, 6 S. W. 880; Milwaukee & Co. R. Co. v. Milwaukee, 34 Wis. 271; Chicago & Co. R. Co. v. Bayfield, 87 Wis. 188, 58 N. W. 245.

<sup>61</sup> Property not used for railroad purposes is taxable as provided for taxing property of like character, in the hands of ordinary corporations or of individuals. Osborn v.

§ 903 (750a). **Withdrawal of exemption.**—It may be said generally that, where there is no true contract or meeting of the state and the beneficiary of an exemption statute on a basis of bargain and consideration, the statute granting the exemption will be regarded merely as an expression of the present will of the state on the subject, and, like other general laws, subject to modification or repeal in the legislative discretion, though the parties have acted in reliance upon it while it continued in force.<sup>62</sup> Thus, a provision in a general tax law that railroad companies thereafter **building and operating roads in specified districts shall be exempt from taxation for a named period, unless the gross earnings shall exceed a certain sum, was held not to rise to the dignity of a covenant of contract within the meaning of the constitutional provision as to the impairment of contracts.**<sup>63</sup> In the case announcing this principle the court said: "The broad view in a case like this is, that, in view of the subject-matter, the legislature is not making a promise, but forming a scheme of public revenue and public improvement. In announcing its policy and providing for carrying it out it may open a chance for benefit to those who comply with its conditions, but it does not address them, and, therefore, it makes no promises to them. It simply indicates a course of conduct to be pursued until circumstances or its views

Hartford &c. Co., 40 Conn. 498; Santa Clara Co. v. Southern &c. Co., 118 U. S. 394, 6 Sup. Ct. 1132; Chicago &c. Co. v. Paddock, 75 Ill. 616; People v. Chicago &c. Co., 116 Ill. 181, 4 N. E. 480, 24 Am. & Eng. Cas. 612; Toledo &c. Co. v. Lafayette, 22 Ind. 262; Pfaff v. Terre Haute &c. Co., 108 Ind. 144, 153, 9 N. E. 93; Applegate v. Ernst, 3 Bush (Ky.) 648, 96 Am. Dec. 272; United &c. Co. v. Jersey City, 53 N. J. L. 547, 22 Atl. 59; State v. Hancock, 33 N. J. L. 315. The question as to when elevators and other structures upon the right of way are exempt under such statutes and how they should be as-

sessed, if taxable, is considered in Northern Pac. R. Co. v. Morten County, 32 N. Dak. 627, 156 N. W. 226, L. R. A. 1916E, 404, and note carefully reviewing the authorities. See also Lake Tahoe Ry. &c. Co. v. Roberts, 168 Cal. 551, 143 Pac. 786, Ann. Cas. 1916E, 1196; Philadelphia &c. R. Co. v. Woodbridge Twp., 91 N. J. 180, 102 Atl. 392.

<sup>62</sup> Cooley Taxation (3rd ed.), 111. See also Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; Savannah &c. R. Co. v. Savannah, 198 U. S. 392, 25 Sup. Ct. 690, 49 L. ed. 1097.

<sup>63</sup> Wisconsin &c. R. Co. v. Powers, 191 U. S. 379, 24 Sup. Ct. 107, 48 L. ed. 229.

of policy change."<sup>64</sup> But provisions in a state statute for a special rate of taxation in respect to the particular corporation, made with a view of inducing large expenditures, and which are formally accepted and complied with, will amount to a contract, within the protection of the impairment clause of the Federal Constitution, and no other tax can be imposed on the corporation.<sup>65</sup> It is clear that, where property of a railroad company is exempt from taxation, title adverse to the company can not be acquired by a sale for unpaid taxes levied and assessed during the period of exemption.<sup>66</sup> It is held, in a recent case, that a repealable exemption from state taxation was withdrawn by the enactment of a statute which directed a new assessment of all the property in the state and expressly declared that the property of every railroad should be assessed for county and municipal purposes, except where protected by an irrepealable exemption.<sup>67</sup>

§ 904 (751). **Remedies—Injunction.**—We believe the true rule to be that, where the tax sought to be enforced is illegal and void, its enforcement will be restrained by injunction except in cases where an adequate remedy is provided by statute. The rule we have stated is, as we believe, supported by sound principle, and it is well fortified by authority.<sup>68</sup> We can see no reason for hold-

<sup>64</sup> *Wisconsin &c. R. Co. v. Powers*, 191 U. S. 379, 24 Sup. Ct. 107, 48 L. ed. 229.

<sup>65</sup> *Powers v. Detroit &c. R. Co.*, 201 U. S. 543, 26 Sup. Ct. 556, 50 L. ed. 860. See also *Bennett v. Nichols*, 9 Ariz. 138, 80 Pac. 392; *Gulf & S. I. R. Co. v. Adams*, 90 Miss. 559, 45 So. 91; post § 926. Of course it may be otherwise where there is a reserved power to amend or repeal. Post § 928. Exception remains in force until repealing act goes into effect. *Manistee &c. R. Co. v. Com'rs of Railroads*, 118 Mich. 349, 76 N. W. 633.

<sup>66</sup> *Raquette Falls Land Co. v. Hoyt*, 109 App. Div. 119, 95 N. Y. S. 1029.

<sup>67</sup> *Wicomico v. Bancroft*, 203 U. S. 112, 27 Sup. Ct. 21, 51 L. ed. 112.

<sup>68</sup> *People v. Weaver*, 100 U. S. 539, 25 L. ed. 705; *Pelton v. National Bank*, 101 U. S. 143, 25 L. ed. 901; *Cummings v. National Bank*, 101 U. S. 153, 25 L. ed. 903; *Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. 498, 48 Law ed. 761; *Woodruff v. Perry*, 103 Cal. 611, 37 Pac. 526; *Bramwell v. Gukeen*, 2 Idaho 1069, 29 Pac. 110; *Illinois Cent. &c. Co. v. McLean County*, 17 Ill. 291; *Railroad Co. v. Hodges*, 113 Ill. 323; *Keokuk &c. Bridge Co. v. People*, 185 Ill. 276, 56 N. E. 1049; *Chicago &c. Co. v. Vollman*, 213 Ill. 609, 73 N. E. 360; *Small v. Lawrenceburg &c. Co.*, 128 Ind. 231, 27 N. E. 500;

ing that the enforcement of an illegal tax may not be enjoined, although it may be void. Even a void proceeding may cloud title and do injury to a property owner, and there is no remedy except that of injunction, which will effectively prevent or redress the injury. It seems to us that where the entire controversy can be settled by the comprehensive equity remedy, and all complications prevented, the remedy should be applied rather than drive the taxpayer to an action for damages. There is certainly no objection to the employment of the equitable remedy except that which grows out of the old doctrine established when the strife between courts of law and courts of equity was bitter, and, as that doctrine is now of comparatively little practical importance, there is reason for extending, as many courts are doing, the remedy of injunction. We think it wiser to restrain by injunction than to compel an action against the officer whose duty it is to collect the tax. There is, however, conflict of authority upon this ques-

Topeka &c. Co. v. Roberts, 45 Kans. 360, 25 Pac. 854; Stewart v. Hovey, 45 Kans. 708, 26 Pac. 683; Chicago &c. Co. v. Board, 54 Kans. 781, 39 Pac. 1039; Arthur v. School District, 164 Pa. St. 410, 30 Atl. 299; McTwiggan v. Hunter, 18 R. I. 776, 30 Atl. 362; Cook v. Galveston &c. Co., 5 Tex. Civ. App. 644, 24 S. W. 544; Schmidt v. Galveston &c. Co., 24 Tex. Civ. App. 547, 24 S. W. 547; Kerr v. Woolly, 3 Utah 456, 24 Pac. 831; Crim v. Philippi, 38 W. Va. 122, 18 S. E. 466; Leferts v. Board, 21 Wis. 697; Board of Assessors of Parish of New Orleans v. Pullman Co., 60 Fed. 37. See also Meyer v. Wells Fargo &c. Co., 223 U. S. 298, 32 Sup. Ct. 218, 56 L. ed. 445; Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. ed. 738; Illinois Cent. R. Co. v. Greene, 244 U. S. 555, 37 Sup. Ct. 697, 61 L. ed. 1309; Louisville &c.

R. Co. v. Greene, 244 U. S. 522, 37 Sup. Ct. 683, 61 L. ed. 1291. If the statute expressly provides a remedy for relief against taxes illegally assessed and the remedy is adequate injunction will not lie. Albuquerque National Bank v. Perea, 147 U. S. 87, 13 Sup. Ct. 194, 37 L. ed. 91; Bellevue &c. Co. v. Bellevue, 39 Nebr. 876, 58 N. W. 446; Thatcher v. Adams, 19 Nebr. 485, 27 N. W. 729; Caldwell v. Lincoln City, 19 Nebr. 569, 27 N. W. 647; Price v. Lancaster County, 18 Nebr. 199, 24 N. W. 705; Stanley v. Supervisors, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. ed. 1000; Robinson v. Wilmington, 65 Fed. 856, citing Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. ed. 273; Tyler, In re, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. ed. 689.



tion.<sup>69</sup> If there is nothing more than a mere irregularity in the proceedings injunction will not lie.<sup>70</sup>

**§ 905 (751a). Remedies—Injunction — Suit by taxpayer. —**

The decisions are not harmonious on the question of right of an individual taxpayer to institute proceedings to restrain or compel action of tax officers where the interest of the taxpayer is not different from that of other taxpayers. Some courts hold that it requires some individual interest distinct from that which belongs to every inhabitant of a town or county to give the party complaining a standing in court where an alleged delinquency in the administration of public affairs is called in question and the

<sup>69</sup> *Hannewinkle v. Georgetown*, 15 Wall. (U. S.) 547, 548, 21 L. ed. 231; *Gregg v. Sanford*, 65 Fed. 151; *City Council v. Sayre*, 65 Ala. 564; *Dodd v. Hartford*, 25 Conn. 232; *Odlin v. Woodruff*, 31 Fla. 160, 12 So. 227, 22 L. R. A. 699; *Cook Co. v. Chicago &c.*, 35 Ill. 460; *Williams v. Mayor*, 2 Gibbs (Mich.) 560; *Scribner v. Allen*, 12 Minn. 148; *Clarke v. Ganz*, 21 Minn. 387; *Sayre v. Tompkins*, 23 Mo. 443; *Barrow v. Davis*, 46 Mo. 394; *Dusenbury v. Mayor &c.*, 25 N. J. Eq. 295; *Laughlin v. Santa Fe*, 3 N. Mex. 264, 5 Pac. 817; *United States Co. v. Grant*, 137 N. Y. 7, 32 N. E. 1005; *Mayor &c. v. Davenport*, 92 N. Y. 604; *Delaware &c. Co. v. Atkins*, 121 N. Y. 246, 24 N. E. 319; *Lucas County v. Hunt*, 5 Ohio St. 488; *Greene v. Mumford*, 5 R. I. 472, 73 Am. Dec. 79; *Bull v. Read*, 13 Grat. (Va.) 78; *McClung v. Livesay*, 7 W. Va. 329; *Mills v. Gleason*, 11 Wis. 493; *Warden v. Board*, 14 Wis. 672; *Hixon v. Oneida County*, 82 Wis. 515, 52 N. W. 445; *Harkness v. District*, 1 McAr. (D. C.) 121.

<sup>70</sup> *Robinson v. Wilmington*, 65

Fed. 856; *Montgomery v. Sayre*, 65 Ala. 564; *Darling v. Gunn*, 50 Ill. 424; *Jones v. Sumner*, 27 Ind. 510; *Delphi v. Bowen*, 61 Ind. 29; *Ricketts v. Spraker*, 77 Ind. 371; *Hunter Stone Co. v. Woodard*, 152 Ind. 474, 53 N. E. 947; *Litchfield v. Polk Co.*, 18 Iowa 70; *Iowa &c. Co. v. Carroll County*, 39 Iowa 151; *Smith v. Osborn*, 53 Iowa 474, 5 N. W. 681; *Gates v. Barrett*, 79 Ky. 295; *Mayor &c. v. Baltimore &c. Co.*, 21 Md. 50; *Loud v. Charlestown*, 99 Mass. 208; *Whiting v. Mayor &c. Boston*, 106 Mass. 350; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654; *Deane v. Todd*, 22 Mo. 90; *Sayre v. Tompkins*, 23 Mo. 443; *Rockingham &c. v. Portsmouth*, 52 N. H. 17; *Covington v. Rockingham*, 93 N. Car. 134; *Simmons v. Mumford*, 5 R. I. 472, 73 Am. Dec. 79; *Sherman v. Leonard*, 10 R. I. 469; *Douglass v. Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548; *Armstrong v. Taylor*, 41 W. Va. 602, 24 S. E. 993; *Porter v. Milwaukee*, 19 Wis. 625, 88 Am. Dec. 711; *Alexander v. Dennison*, 2 McAr. (D. C.) 562.

fact of owning taxable property is not such a peculiarity as takes the case out of the rule.<sup>71</sup> Elsewhere, notably in Iowa, a different rule obtains, and there an individual taxpayer has this right, and, as intimated in the preceding section, we think this right exists in a proper case.<sup>72</sup> There is also authority to the effect that the holder of mortgaged bonds of a railroad company has such an interest in the property as entitles him to maintain a suit to enjoin illegal taxation of property of railroad companies, where a proper showing is made or the refusal of mortgage trustees to prosecute such a suit.<sup>73</sup>

**§ 906 (751b). Inequality no ground for injunction.**—Railroad taxes will not be enjoined solely because other property in the state is undervalued where the statute is valid and this inequality is not a result of a scheme or agreement against taxing officers. To authorize this remedy it must be shown that the inequality was caused intentionally and systematically.<sup>74</sup> Neither is it a

<sup>71</sup> Doolittle v. Broone Co., 18 N. Y. 155; Roosevelt v. Draper, 23 N. Y. 318; Craft v. Jackson Co., 5 Kans. 518; Wyandotte &c. Bridge Co. v. Wyandotte Co., 10 Kans. 326. See also cases cited in second note to last preceding section.

<sup>72</sup> Collins v. Davis, 57 Iowa 256, 10 N. W. 643; State v. Smith, 7 Iowa 244; Collins v. Ripley Co., 8 Iowa 129. See also authorities cited in the first note to the last preceding section. And see, as to mandamus, Loewenthal v. People, 192 Ill. 222, 61 N. E. 462; State v. Assessors, 52 La. Ann. 223, 26 So. 872; People v. Wilson, 119 N. Y. 515, 23 N. E. 1064.

<sup>73</sup> Wicomico v. Bancroft, 139 Fed. 977.

<sup>74</sup> Chicago &c. R. Co. v. Babcock, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. ed. 636; Coulter v. Louisville &c. R. Co., 196 U. S. 599, 25 Sup.

Ct. 324, 49 L. ed. 615; Louisville &c. R. Co. v. Coulter, 131 Fed. 282; Georgia R. &c. Co. v. Wright, 125 Ga. 589, 54 S. E. 52; Northern Pac. R. Co. v. State, 84 Wash. 510, 147 Pac. 45, Ann. Cas. 1916E, 1166. Unless it is so unequal and discriminating as to violate the law of the land. Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; Semple v. Langlade Co., 75 Wis. 354, 44 N. W. 749. But where there is discrimination against the company arising out of systematic undervaluation of other taxable property the state collecting officers may be enjoined by a federal court. Greene v. Louisville &c. R. Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. ed. 1280, Ann. Cas. 1917E, 88; Illinois Cent. R. Co. v. Greene, 244 U. S. 555, 37 Sup. Ct. 697, 61 L. ed. 1309.

ground for injunction that the law authorizing taxation of railroad property at the average rate of taxation imposed on other property in the states does not make any provisions for an equalization of the railroad property with other property, if the statute expressly names the time and place for sessions of the assessing board and gives interested persons a right to be heard, and authorizes the board to correct valuations.<sup>75</sup> And equity will usually refuse relief unless it is shown that a wrong is about to be inflicted which is not remediable by the special method, if any, pointed out by statute, or that there is no adequate remedy at law.<sup>76</sup>

**§ 907 (752). Tender of amount of taxes owing is required.**—Upon the principle that he who asks equity must do equity, a tender of the amount of the tax owing from the plaintiff is usually, if not invariably, required.<sup>77</sup> Considerations of policy are sometimes urged, and with force, in support of the general rule we have stated,<sup>78</sup> but its chief support is the elementary

<sup>75</sup> *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 26 Sup. Ct. 459, 50 L. ed. 744.

<sup>76</sup> See *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Taylor v. Louisville &c. R. Co.*, 88 Fed. 350; *Houston &c. R. Co. v. Presidio County*, 53 Tex. 518; *Stephens v. Texas &c. R. Co.*, 100 Tex. 177, 97 S. W. 309.

<sup>77</sup> *Albuquerque National Bank v. Perea*, 147 U. S. 87, 13 Sup. Ct. 194, 37 L. ed. 91; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *People's Nat. Bank v. Marye*, 191 U. S. 272, 24 Sup. Ct. 68, 48 L. ed. 180; *Morrison v. Jacoby*, 114 Ind. 84, 14 N. E. 546, 15 N. E. 806; *Hagaman v. Commissioners*, 19 Kans. 394; *Smith v. Humphrey*, 20 Mich. 398; *Baily v. Atlantic &c. Co.*, 1 Cent. L. J. 502. See also *Fargo v. Hart*, 193 U. S. 490, 24

Sup. Ct. 498, 48 L. ed. 761; *Hewin v. Atlanta*, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795; *Buck v. Miller*, 147 Ind. 586, 45 N. E. 647, 37 L. R. A. 384, 62 Am. St. 436n; *Bundy v. Summerland*, 142 Ind. 92, 41 N. E. 322; *Grand Rapids &c. R. Co. v. Auditor General*, 144 Mich. 77, 107 N. W. 1075; *Hacker v. Howe*, 72 Nebr. 385, 101 N. W. 255; *Wead v. Omaha*, 73 Nebr. 321, 102 N. W. 67; *Douglas v. Fargo*, 13 N. Dak. 467, 100 N. W. 919. But compare *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 26 Sup. Ct. 252, 50 L. ed. 477; *Meyer v. Wells Fargo & Co.*, 223 U. S. 298, 32 Sup. Ct. 218, 56 L. ed. 445.

<sup>78</sup> In *State Railroad Tax Cases*, 92 U. S. 575, 616, 23 L. ed. 663, it was said: "It is a profitable thing for corporations or individuals whose taxes are very large to ob-

principle referred to by us. Where no part of the tax is due, the reason of the rule fails, and no tender is required.<sup>79</sup> So, where a statute was invalid because it taxed all the gross receipts of an interstate company, including that on interstate commerce, it was held that a tender of so much of the tax as might have fallen upon receipts from the commerce wholly within the state was not necessary.<sup>80</sup>

tain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when, in the end, it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be

due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted."

<sup>79</sup> *Walla Walla &c. Bank v. Hungate*, 62 Fed. 548; *Guidry v. Broussard*, 32 La. Ann. 924. See also *Yocum v. First Nat. Bank*, 144 Ind. 272, 43 N. E. 231.

<sup>80</sup> *Meyer v. Wells Fargo & Co.*, 223 U. S. 298, 32 Sup. Ct. 218, 219, 220, 50 L. ed. 477.

## CHAPTER XXXI.

### TAXATION AS AFFECTED BY THE FEDERAL CONSTITUTION

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**§ 910 (753). Taxing interstate commerce railroads.**—The power of a state to tax property of all kinds and classes within its territorial limits is broad and comprehensive, but this power, great as it is, is not unlimited. The commerce clause of the federal constitution restrains this power and limits its exercise. It

is not easy to define the extent of the limitation imposed by the federal constitution. It is safe, however, to say the power can not be so exercised as to obstruct commerce between the states, or to restrain or defeat the power of the federal congress to regulate commerce.<sup>1</sup>

<sup>1</sup> In the case of *Brown v. Maryland*, 12 Wheat. (U. S.) 419, 6 L. ed. 678, Chief Justice Marshall, speaking of the taxing power, said: "We admit this power to be sacred, but can not admit that it may be so used as to obstruct the free exercise of a power given to congress. We can not admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the power remaining with the states may be so exercised as to come in conflict with those vested in congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation. It results, necessarily, from this principle, that the taxing power of the state must have some limits." In the *State Freight Tax Case*, 15 Wall. (U. S.) 232, 21 L. ed. 146, Mr. Justice Wayne expressed the same general doctrine in this language: "While on the one hand it is of the utmost importance that the states should possess the power to raise revenue for all the purposes of a state government, by any means and in any manner not inconsistent with the powers which the people of the state have con-

ferred upon the general government, it is equally important that the domain of the latter should be preserved from invasion and that no state legislation should be sustained which defeats the avowed purpose of the federal constitution, or which assumes to regulate or control subjects committed by the constitution exclusively to the regulation of congress." See also *Osborne v. State*, 33 Fla. 162, 14 So. 588, 25 L. R. A. 120, 39 Am. St. 99; *Barrett v. New York*, 232 U. S. 14, 34 Sup. Ct. 203, 58 L. ed. 483. The authorities are collected and classified, and the following propositions laid down in substance in *Atlantic &c. Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. ed. 995: 1. The power of congress in proper cases is exclusive. 2. No state can compel a party, whether individual or corporation, to pay for the privilege of engaging in interstate commerce. 3. This immunity does not prevent a state from imposing ordinary property taxes on property having a situs within its territory. 4. The franchise of a corporation is, as a part of its property, subject to state taxation, at least if it is not derived from the United States. Cited and approved in *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 38 Sup. Ct. 499, 62 L. ed. 1135, Ann. Cas. 1918E, 748. See also *St. Louis &c. R. Co. v. Arkansas*, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. ed. 265.

§ 911 (754). **Interstate commerce—Obstruction of.**—It is settled law that, under the guise of taxing railroads, a state can neither obstruct nor regulate commerce between the states. The power to regulate interstate commerce is in the federal government, not in any state, so that if the tax so operates as to regulate interstate commerce there is an invasion of the domain of the federal government. If a state tax operates so as to obstruct such commerce, then the statute providing for levying the tax is void, since no state can impede or obstruct commerce between the states. The mere form of the statute is not of controlling importance, for its validity depends upon its operation and effect.<sup>2</sup> The general principle is easily understood, but there is difficulty in applying it. Each particular case stands, in a great measure, upon its own facts, and whether in the particular case the statute obstructs or regulates commerce is a question which is not always easy of solution.

<sup>2</sup> State Freight Tax, 15 Wall. (U. S.) 232, 272, 21 L. ed. 146; Commerce v. New York, 2 Black. (U. S.) 620, 17 L. ed. 451; Bank Tax Case, 2 Wall. (U. S.) 200, 17 L. ed. 793; Society for Savings v. Coite, 6 Wall. (U. S.) 594, 18 L. ed. 897; Provident Institution v. Massachusetts, 6 Wall. (U. S.) 611, 18 L. ed. 907. In Fairbank v. United States, 181 U. S. 283, 21 Sup. Ct. 648, 45 L. ed. 862, it is held that a stamp tax imposed on a foreign bill of lading is in effect a tax on the property and invalid. And in Looney v. Crane Co., 245 U. S. 178, 38 Sup. Ct. 85, 62 L. ed. 230, it is held that permit and franchise taxes imposed on foreign corporations engaged in both interstate and domestic commerce, when based on and measured by the capital stock, are a direct burden on interstate commerce. But in New York v. Reardon, 204 U. S. 152, 27

Sup. Ct. 184, 190, 51 L. ed. 415, it is held that a tax on transfers of stock of a foreign railway company as applied to a sale in the state between two non-residents, is valid. And a statute measuring a tax by capital stock representing property within the state though the entire capital stock represents in part property outside the state has been upheld. Kansas City &c. R. Co. v. Botkin, 240 U. S. 227, 36 Sup. Ct. 261, 60 L. ed. 617. See generally as to license taxes held an interference with interstate commerce under the circumstances. Norfolk &c. R. Co. v. Sims, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. ed. 254; McCall v. California, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. ed. 391; Caldwell v. North Carolina, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. ed. 336; Barrett v. New York, 232 U. S. 14, 34 Sup. Ct. 203, 58 L. ed. 483; H. K. Mulford Co. v. Curry, 163 Cal. 276,

**§ 912 (755). Railroad property used in interstate commerce is taxable by the states.**—The fact that property is used in the business of interstate commerce does not exonerate it from taxation by the states.<sup>3</sup> Property within the state may be taxed, although it may be employed exclusively in interstate traffic, but the business of interstate commerce itself cannot be burdened by state taxes. There is a difference between taxing the business done by the company and taxing the property of which it is the owner.<sup>4</sup>

125 Pac. 236. And compare *Heymann v. Southern R. Co.*, 203 U. S. 270, 27 Sup. Ct. 104, 51 L. ed. 178, and other liquor cases there reviewed.

<sup>3</sup> Delaware Railroad Tax, 18 Wall. (U. S.) 206, 232, 21 L. ed. 888; *Telegraph Co. v. Texas*, 105 U. S. 460, 464, 26 L. ed. 1067; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 206, 5 Sup. Ct. 826, 29 L. ed. 158; *Western Union Telegraph Co. v. Attorney-General of Massachusetts*, 125 U. S. 530, 549, 8 Sup. Ct. 961, 31 L. ed. 790; *Marye v. Baltimore & C. R. Co.*, 127 U. S. 117, 124, 8 Sup. Ct. 1037, 32 L. ed. 94; *Leloup v. Mobile*, 127 U. S. 640, 649, 8 Sup. Ct. 1380, 32 L. ed. 311; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 Sup. Ct. 599, 43 L. ed. 899, affirming 24 Colo. 291, 51 Pac. 421, 65 Am. St. 223, 56 L. R. A. 89; *United States Exp. Co. v. Minnesota*, 223 U. S. 335, 32 Sup. Ct. 211, 215, 56 L. ed. 459; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. 532, 41 L. ed. 953; *Sandford v. Poe*, 69 Fed. 546, 60 L. R. A. 641, and elaborate note; *McGuire v. Chicago & C. R. Co.*, 131 Iowa 340, 108 N. W. 902; *Vera Chemical Co. v. State*, 78 N. H. 473, 102 Atl. 463.

<sup>4</sup> *Pullman Palace Car Co. v.*

*Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. ed. 613, 46 Am. & Eng. R. Cas. 236; *Pittsburgh & C. R. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. ed. 1031; *Denver & C. Co. v. Church*, 17 Colo. 1, 28 Pac. 468, 31 Am. St. 252; *People v. State Board*, 166 N. Y. S. 62, 99 Misc. Rep. 532; *Pullman & C. Co. v. Commonwealth*, 107 Pa. St. 156. See generally, *Postal Tel. Cable Co. v. Adams*, 155 U. S. 695, 696, 15 Sup. Ct. 688, 39 L. ed. 311; *Adams Express Co. v. Ohio*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. ed. 683; *Western Un. Tel. Co. v. Taggart*, 141 Ind. 281, 40 N. E. 1051; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *Bain v. Richmond & C. Co.*, 105 N. Car. 363, 11 S. E. 311, 8 L. R. A. 299, and note, 18 Am. St. 912; *Pittsburg & C. Co. v. Commonwealth*, 66 Pa. St. 73, 5 Am. Rep. 344; *Pullman & C. Co. v. Gaines*, 3 Tenn. Ch. 587. Income taxes on the net income of corporations, though derived largely from interstate transactions, are not a direct burden on interstate commerce in violation of the constitution. *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 38 Sup. Ct. 499, 62 L. ed. 1135, Ann. Cas. 1918E, 748; *Peck v. Lowe*, 247 U. S. 165, 38 Sup. Ct. 432, 62 L. ed. 1049.



But to authorize the taxing of property employed in interstate commerce, it is necessary that it should, in a sense at least, have its situs in the state which imposes the tax. Property merely passing through the state, or temporarily there while in actual use for interstate commerce purposes, can not be taxed.<sup>5</sup> The

<sup>5</sup> *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596, 15 L. ed. 254; *St. Louis v. Ferry Co.*, 11 Wall. 423, 20 L. ed. 192; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 2 Sup. Ct. 257, 27 L. ed. 419; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. ed. 158; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 46, 6 Sup. Ct. 635, 29 L. ed. 785; *Tennessee v. Pullman Southern Car Co.*, 117 U. S. 51, 6 Sup. Ct. 643, 29 L. ed. 791; *State v. Stephens*, 146 Mo. 662, 48 S. W. 929, 69 Am. St. 625; *Bain v. Richmond &c. R. Co.*, 105 N. Car. 363, 11 S. E. 311, 8 L. R. A. 299, 18 Am. St. 912. In *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 676, 35 L. ed. 613, the court said: "The cars of this company within the state of Pennsylvania are employed in interstate commerce, but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania it could not be doubted that the state could tax them, like other property within its borders, not-

withstanding they were employed in interstate commerce. The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, can not affect the power of the state to levy a tax upon them. The state having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were in its borders. The route over which the cars travel extending beyond the limits of the state, particular cars may not remain within the state; but the company has at all times substantially the same number of cars within the state, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the state. The mode which the state of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that state was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to

doctrine we have stated is peculiarly applicable to vessels traversing navigable waters, but we suppose it must apply to all the agencies of interstate commerce where it is clear that such agencies are temporarily in the state and have a fixed and known situs elsewhere. We do not mean, of course, that a mileage basis of valuation and assessment may not be adopted where the corporation owning the property regularly or generally uses it in the state; what we mean is that where a car or locomotive is brought into a state for a purely temporary purpose, and is owned by a railroad company which does not regularly or generally conduct business in that state, it is not subject to taxation. A different rule would probably obtain if the car or locomotive were generally, habitually, or regularly used in the state, although it might not permanently be kept or used therein.<sup>6</sup> Property, even of a domestic corporation, can not be taxed if it is permanently out of the state,<sup>7</sup> but it is otherwise if it only leaves the state during

the whole number of miles in that and other states over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more. The validity of this mode of appropriating such a tax is sustained by several decisions of this court in cases which came up from the circuit courts of the United States, and in which, therefore, the jurisdiction of this court extends to the determination of the whole case, and was not limited, as upon writs of error to the state courts, to questions under the constitution and laws of the United States." See also *City of Bessemer v. Southern Ry. Co.*, 157 Ala. 428, 48 So. 103, 105 (citing text),

<sup>6</sup> See authorities cited in notes to

last preceding section, also *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 20 Sup. Ct. 631, 44 L. ed. 708; *Marye v. Baltimore & C. R. Co.*, 127 U. S. 117, 8 Sup. Ct. 1037, 32 L. ed. 94; *Reinhart v. McDonald*, 76 Fed. 403; as to this rule of "average habitual use," and the right now established to tax as suggested in the text. See also *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299, 25 Sup. Ct. 686, 49 L. ed. 1059; *Wisconsin & C. R. Co. v. Powers*, 191 U. S. 379, 24 Sup. Ct. 107, 48 L. ed. 229; *Morrell Refrigerator Car Co. v. Commonwealth*, 32 Ky. L. 1383, 108 S. W. 926; *Baltimore & C. R. Co. v. Commonwealth*, 177 Ky. 566, 198 S. W. 35.

<sup>7</sup> *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 Sup. Ct. 36, 50 L. ed. 150; *Louisville & C. Ferry Co. v. Kentucky*, 188 U. S. 385, 23 Sup. Ct. 468, 47 L. ed. 513;

part of the taxing year, for "the state of origin remains the permanent situs of the property notwithstanding its occasional excursions to foreign parts."<sup>8</sup>

§ 913 (756). **Interstate commerce—Taxation of property brought from one state into another.**—Where property is brought from one state into another, the latter state being its destination, it may be there taxed.<sup>9</sup> This must be the rule, otherwise property might entirely escape taxation. The doctrine, as declared by the Supreme Court of the United States, is a broad one, since it authorizes taxation of property by the state into which it is brought, although taxes were paid upon it in the state from which it came.<sup>10</sup> It is, as we suppose, always to be understood that

Delaware &c. R. Co. v. Pennsylvania, 198 U. S. 341, 25 Sup. Ct. 669, 49 L. ed. 1077. See also Fargo v. Hart, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. ed. 761.

<sup>8</sup> New York &c. R. Co. v. Miller, 202 U. S. 584, 26 Sup. Ct. 714, 717, 50 L. ed. 1155; Ayer &c. Tie Co. v. Kentucky, 202 U. S. 409, 26 Sup. Ct. 679, 50 L. ed. 1082.

<sup>9</sup> Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. ed. 257. Citing Woodruff v. Parham, 8 Wall. (U. S.) 123, 19 L. ed. 382; Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678; Cooley v. Board of Wardens, 12 How. (U. S.) 299, 13 L. ed. 996; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Pittsburgh &c. Coal Co. v. Bates, 156 U. S. 577, 15 Sup. Ct. 415, 39 L. ed. 539. But a state has no jurisdiction to tax property where neither it nor its owner is within the state and has no situs or domicile there. Yost v. Lake Erie &c. Transp. Co., 112 Fed. 746; St. Louis v. Wiggins Ferry Co., 11 Wall. (U. S.) 425, 20 L. ed. 194; Young v. South Tredegar &c. Co.,

85 Tenn. 189, 2 S. W. 202, 4 Am. St. 752.

<sup>10</sup> In Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. ed. 257, the court said: "Of course the assessment should be a general one, and not discriminative of goods between different states. The taxing of goods coming from other states, as such or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom which congress has seen fit should remain undisputed. But if, after their arrival in the state, that being their destination for use or trade—if after this they are subjected to a general tax laid on all alike, we fail to see how such a tax can be deemed a regulation of commerce which would have the objectionable feature referred to." The court discriminated the case from that of Woodruff v. Parham, 8 Wall. (U. S.) 123, 19 L. ed. 382, and marked, in a general way, the line of difference.

taxes can not be so levied as to unlawfully restrict interstate commerce.<sup>11</sup>

**§ 914 (757). Railroad in more than one state.**—The decisions affirm that, in valuing railway property for taxation, the taxing officers may take into consideration the part lying in an adjoining state for the purpose of determining the value of the entire line. This, unless carefully limited to the portion within the state, although considered in relation to the whole, seems to us very much like an unjust discrimination. It is somewhat difficult to conceive why it is not unequal taxation and an unwarrantable burden upon instrumentalities of interstate commerce. The owner of a large manufacturing establishment situated in one state can only be taxed in that state, although the principal part of his business may be done in another state, and yet, according to the decisions, a railway company may be taxed in two or more states. The question is, however, settled by the adjudged

<sup>11</sup> *Moran v. New Orleans*, 112 U. S. 69, 5 Sup. Ct. 38, 28 L. ed. 653, citing *Sinnot v. Davenport*, 22 How. (U. S.) 227, 16 L. ed. 243; *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Case of State Freight Tax*, 15 Wall. (U. S.) 232, 21 L. ed. 146; *Crandall v. Nevada*, 6 Wall. (U. S.) 35, 18 L. ed. 745; *Osborne v. Mobile*, 16 Wall. (U. S.) 479, 21 L. ed. 470; *Transportation Co. v. Wheeling*, 99 U. S. 273, 25 L. ed. 412; *Morgan v. Parham*, 16 Wall. (U. S.) 471, 21 L. ed. 303; *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596, 15 L. ed. 254; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 2 Sup. Ct. 257, 27 L. ed. 419. Temporary detention of grain in transit without abandoning the original movement beyond the state limits, does not deprive the transportation of its character of interstate shipment. *Coe v. Errol*, 116 U. S. 517, 6 Sup.

Ct. 475, 29 L. ed. 715; *Kelley v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. ed. 359; *General Oil Co. v. Crain*, 209 U. S. 211, 28 Sup. Ct. 475, 52 L. ed. 754. But where such intention is abandoned and the grain is stored in an elevator awaiting sale or indefinitely, it is taxable there even though a railroad company has agreed to carry it beyond the state if the owner so desires. *People v. Bacon*, 243 Ill. 313, 90 N. E. 686, 44 L. R. A. (N. S.) 586, 227 U. S. 504, 33 Sup. Ct. 299. See also *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665, 33 Sup. Ct. 712; *Globe Elevator Co. v. Patterson*, 134 Wis. 214, 114 N. W. 441. And see generally as to when transportation is or is not deemed to be terminated or so interrupted as to render the goods taxable, note to *Merchants Transfer Co. v. Des Moines*, 2 L. R. A. (N. S.) 662.

cases.<sup>12</sup> But it is held that one state can not tax a franchise granted by another state and having its situs in the latter.<sup>13</sup>

<sup>12</sup> *Pittsburgh &c. R. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. ed. 1031, citing *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Columbus &c. R. Co. v. Wright*, 151 U. S. 470, 14 Sup. Ct. 396, 38 L. ed. 238; *Delaware Railroad Tax*, 18 Wall. (U. S.) 206, 21 L. ed. 888; *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492, 22 L. ed. 595; *Western Union Tel. Co. v. Attorney-General of Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. ed. 790; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 12 Sup. Ct. 121, 35 L. ed. 613; *Charlotte &c. R. Co. v. Gibbs*, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. ed. 1051; *Franklin County v. Nashville &c. R. Co.*, 12 Lea (Tenn.) 521. To the same effect is the decision in *Cleveland &c. R. Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. ed. 1041. See also *State v. New York &c. R. Co.*, 60 Conn. 326, 22 Atl. 765; *Adams Express Co. v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. ed. 960; *State v. United States Exp. Co.*, 114 Minn. 346, 131 N. W. 489, 37 L. R. A. (N. S.) 1127, affirmed in 223 U. S. 335, 32 Sup. Ct. 211, 56 L. ed. 459; *In re Assessment of Western Union Tel. Co.*, 35 Okla. 626, 130 Pac. 685. It is evident that the rule sanctioned by the supreme court must lead to confusion and that under it double taxation of a vicious character is almost unavoidable, at least where the value of the different parts is not equally distributed or in proportion to the mileage, and, as a matter of fact,

it seldom is. In *Pittsburgh &c. Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. ed. 1041, the court says that "there may be exceptional cases," and granting this it seems difficult to see how double and unequal taxation can be avoided, since so much is left to the judgment or discretion of the taxing officers of the different states through which the railroad runs. It is held, however, that the presumption is that all the property is part of the plant or system and that all the property, both tangible and intangible, is equally distributed throughout its mileage. *Atchison &c. R. Co. v. Sullivan*, 173 Fed. 456.

<sup>13</sup> *Louisville &c. Ferry Co. v. Kentucky*, 188 U. S. 385, 23 Sup. Ct. 463, 47 L. ed. 513. Although the general rule is that a state can not tax property beyond its borders, much may depend upon the circumstances of each case, and in a proper case it may measure a tax within its authority by capital stock which in part represents property outside of the taxing power of the state. *Kansas City &c. R. Co. v. Bothni*, 240 U. S. 227, 36 Sup. Ct. 261, 60 L. ed. 617. But compare *Southern R. Co. v. Greene*, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. ed. 536; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. ed. 355. But a state can not tax property of a foreign interstate railway company outside of its jurisdiction. *Illinois Cent. R. Co. v. Greene*, 244 U. S. 555, 37 Sup. Ct. 697, 61 L. ed. 1309.

§ 915 (758). **Mileage basis of valuation.**—The doctrine of the court of last resort is that the taxing officers may make a valuation upon a mileage basis although the property assessed is used as an instrumentality of commerce between the states.<sup>14</sup> A distinction is made between the cases which deny the right of a state to lay a tax upon the business of interstate commerce itself and those which affirm that a tax may be laid on property within the limits of the state. The doctrine is, indeed, extended, as we have elsewhere shown, to property beyond the state boundaries.<sup>15</sup> But it has recently been held that interstate commerce is

<sup>14</sup> *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. ed. 790; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. ed. 613; *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. ed. 994; *Charlotte &c. Co. v. Gibbs*, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. ed. 1051; *Pittsburgh &c. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. ed. 1031. See also *Western Union Tel. Co. v. Missouri*, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. ed. 1116; *Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. ed. 761; *Commonwealth v. U. S. Exp. Co.*, 149 Ky. 755, 149 S. W. 1037, Ann. Cas. 1914B, 196; *West Shore R. Co. v. State Board*, 82 N. J. L. 37, 81 Atl. 351; note in Ann. Cas. 1916E, 1185.

<sup>15</sup> In the case of *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. ed. 613, it was said: "Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one state can not be taxed by another state for a license or privilege to carry on interstate

or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. *Moran v. New Orleans*, 112 U. S. 69, 74, 5 Sup. Ct. 38, 28 L. ed. 653; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 43, 6 Sup. Ct. 635, 29 L. ed. 785; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 497, 7 Sup. Ct. 592, 30 L. ed. 694; *Leloup v. Mobile*, 127 U. S. 640, 644, 8 Sup. Ct. 1380, 32 L. ed. 311. For the same reason, a tax upon the gross receipts derived from the transportation of passengers and goods between one state and other states or foreign nations has been held to be invalid. *Fargo v. Michigan*, 121 U. S. 230, 7 Sup. Ct. 867, 30 L. ed. 888; *Philadelphia &c. Steamship Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. ed. 1200. The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on or because of the transportation or the right

not unlawfully interfered with by a franchise tax on a domestic railway corporation because no deduction is allowed from the capital stock, taken as the basis of the tax, notwithstanding a considerable proportion of the rolling stock is generally absent from the state in the usual course of railway business.<sup>16</sup>

§ 916 (759). **License tax.**—A license tax imposed upon an interstate railroad for carrying on interstate business is invalid. Such a tax is not a tax upon property, nor is it the exaction of a fee for the privilege of becoming a corporation, or of effecting a consolidation under the laws of the state.<sup>17</sup> As we shall pres-

of transit of persons or property through the state, to other states or countries. The tax is imposed equally on corporations doing business within the state, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation on account of its property within the state is, in substance and effect, a tax on that property. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 209, 5 Sup. Ct. 826, 29 L. ed. 158; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 552, 8 Sup. Ct. 961, 31 L. ed. 790. This is not only admitted, but insisted on by the plaintiff in error."

<sup>16</sup> *New York &c. R. Co. v. Miller*, 202 U. S. 584, 26 Sup. Ct. 714, 50 L. ed. 1155. Under the Kentucky statute controlled mileage within and without the state, and not operated mileage, is what must be considered in valuing the intangible property of an interstate railroad, and so much of the mileage as is not represented by stock should be included, but, to avoid double taxation, then must be de-

ducted from the Kentucky apportionment of value of stock the value of the Kentucky portion of mileage. *Louisville &c. R. Co. v. Greene*, 244 U. S. 522, 37 Sup. Ct. 683, 61 L. ed. 1291, Ann. Cas. 1917E, 97.

<sup>17</sup> *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. ed. 391; *Norfolk &c. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. ed. 394; *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. ed. 311; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. ed. 649; *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 24 L. ed. 118; *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Norfolk &c. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. ed. 394; *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. ed. 719; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. ed. 694; *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. 725, 34 L. ed. 150; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. ed. 368; *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 Sup. Ct.

ently show, a privilege tax can not be imposed, and we regard a license tax as substantially the same as a privilege tax, but a decision in regard to what is called an excise tax has produced some confusion.<sup>18</sup> A license tax, assigning to the term license tax the meaning generally given by the authorities, and this is the meaning in which we employ the term, is a tax imposed as a condition of permitting business to be conducted within the state, and hence is a tax upon commerce between the states. But a franchise tax on a railroad company for carrying on a cab service wholly within the taxing state, for the purpose of conveying its passengers to and from its ferry landing, the charges for which are entirely separate from those for its railroad and interstate transportation, is held valid, and not a burden on interstate commerce.<sup>19</sup>

256, 32 L. ed. 637. In the case of *Crutcher v. Commonwealth*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. ed. 649, the court said: "We have repeatedly decided that a state law is unconstitutional which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it." This is quoted and approved in *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 195, 54 L. ed. 355. In the case of *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. ed. 720, the court said: "The case of *Ficklen v. Shelby County Taxing Dist.*, 145 U. S. 1, 12 Sup. Ct. 810, 36 L. ed. 601, is no departure from the rule of decision so firmly settled by the prior decisions." See also *Atlantic &c. Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. ed. 995. State may, however, impose on foreign corporation for privilege of doing business a different tax from that on domestic corpo-

rations. *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 38 Sup. Ct. 295, 62 L. ed. 632; *Kansas City &c. R. Co. v. Stiles*, 242 U. S. 111, 37 Sup. Ct. 58, 61 L. ed. 176; *International Paper Co. v. Massachusetts*, 246 U. S. 135, 38 Sup. Ct. 292, 62 L. ed. 624.

<sup>18</sup> *Maine v. Grand Trunk &c. Co.*, 142 U. S. 217, 12 Sup. Ct. 163, 35 L. ed. 994. See also *New York &c. R. Co. v. Pennsylvania*, 158 U. S. 431, 15 Sup. Ct. 896, 39 L. ed. 1043; *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. ed. 586; *State v. Galveston &c. R. Co.*, 100 Tex. 153, 97 S. W. 71.

<sup>19</sup> *New York v. Knight*, 192 U. S. 21, 24 Sup. Ct. 202, 48 L. ed. 325. In the course of the opinion it is said: "Wherever a separation in fact exists between transportation service wholly within the state and that between states, a like separation may be recognized between the control of the state and that of the nation. *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. 214, 41



§ 917 (760). **Privilege tax on interstate railroads.**—The settled rule that a state has no power to regulate or burden interstate commerce precludes a state from taxing a railroad company for the privilege of conducting the business of interstate commerce within its territorial limits. Exacting a license from such companies, as a condition precedent to the right to do business in the state, is, it seems to us, substantially the same thing as imposing a tax upon the privilege of doing business in the state, but there is a shade of difference between the two classes of cases. The attempt to restrict or regulate interstate commerce is always abortive no matter in what form it is made, but the difficulty is to determine what is a restriction or regulation and what is a property tax.<sup>20</sup>

L. ed. 586; *Pullman Co. v. Adams*, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. ed. 877." See also *Detroit & C. R. Co. v. Interstate Commerce Comm.*, 74 Fed. 803, 167 U. S. 633, 17 Sup. Ct. 986, 42 L. ed. 306; *Baltimore & C. R. Co. v. Commonwealth*, 177 Ky. 566, 198 S. W. 35.

<sup>20</sup> *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 6 Sup. Ct. 635, 29 L. ed. 785, citing *Almy v. California*, 24 How. (U. S.) 169, 16 L. ed. 644; *Woodruff v. Parham*, 8 Wall. (U. S.) 123, 138, 19 L. ed. 382; *Crandall v. Nevada*, 6 Wall. (U. S.) 35, 18 L. ed. 745; *State Freight Tax Case*, 15 Wall. (U. S.) 232, 21 L. ed. 146; *Railroad Co. v. Maryland*, 21 Wall. (U. S.) 456, 22 L. ed. 678; *Head Money Cases*, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. ed. 798; *Guy v. Baltimore*, 100 U. S. 434, 25 L. ed. 743; *Moran v. New Orleans*, 112 U. S. 69, 5 Sup. Ct. 38, 28 L. ed. 653. See *Tennessee v. Pullman Southern Car Co.*, 117 U. S. 51, 6 Sup. Ct. 643, 29 L. ed. 791; *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171, 24 Sup. Ct. 39,

48 L. ed. 134; *People v. Wemple*, 138 N. Y. 1, 33 N. E. 720, 19 L. R. A. 694, with which compare *People v. Wemple*, 131 N. Y. 64, 29 N. E. 1002, 27 Am. St. 542, and *People v. Knight*, 171 N. Y. 354, 64 N. E. 152, 98 Am. St. 610. The decision in the case of *Pullman & C. Co. v. Gaines*, 3 Tenn. Ch. 587, was overruled or rather reversed in the case of *Tennessee v. Pullman Southern Car Co.*, 117 U. S. 51, 6 Sup. Ct. 643, 29 L. ed. 791. See also *Pullman & C. Co. v. Nolan*, 22 Fed. 276. In the paragraph which follows we have referred to a case which discriminates between a property tax and a privilege tax, and it must be confessed that the distinction made in that case is a very fine one, and much that is there said is not easily harmonized with rulings in other cases. The Supreme Court of the United States has often stated the general rule and commented upon the difficulty of determining what are legitimate attempts to exert the taxing power of the state and at-

**§ 918 (761). Privilege tax discriminated from a property tax.**—A statute laying a tax on property as property, where the property is within the state, does not violate the federal constitution, but a privilege tax is not, as we have seen in the preceding section, a property tax. Whether the tax is laid upon property or imposed upon a corporation for the privilege of conducting business in the state is to be determined from the operation and practical effect of the state statute, and not from its mere form. The distinction between a privilege tax and a property tax is a subtle one, and it is not easy to plainly mark the line which separates them.<sup>21</sup> As already intimated, it is difficult to deter-

tempts, on the other hand, under the guise of taxation, to impose real burdens on interstate commerce. *United States Exp. Co. v. Minnesota*, 223 U. S. 335, 32 Sup. Ct. 211, 215, 56 L. ed. 459; *Galveston &c. R. Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 639, 640, 52 L. ed. 1031.

<sup>21</sup> The question received consideration in the case of the *Postal Tel. Cable Co. v. Adam*, 155 U. S. 688, 15 Sup. Ct. 268, 39 L. ed. 311, where it was held that a tax of a designated sum per mile of telegraph wire in the state was a tax on property and not a mere privilege tax. The court used this language: "As pointed out by Mr. Justice Field in *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. ed. 164, the right of a state to tax the franchise or privilege of being a corporation as personal property has been repeatedly recognized by this court, and this, whether the corporation be domestic or a foreign corporation, doing business by its permission within the state. But a state can not exclude from its

limits a corporation engaged in interstate or foreign commerce, or a corporation in the employment of the general government, either directly in terms or indirectly by the imposition of inadmissible conditions. Nevertheless the state may subject it to such property taxation as only incidentally affects its occupation, as all business, whether of individuals or corporations, is affected by common governmental burdens. *Ashley v. Ryan*, 153 U. S. 436, 14 Sup. Ct. 865, 38 L. ed. 773, and cases cited. Doubtless no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax or the privilege of using, constructing or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitability of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor,

mine the exact state of the law upon this subject, and to reconcile all the decisions of the Supreme Court of the United States. This is shown in several recent cases by the fact that different judges took different views.<sup>22</sup> It may be that, as to local business, which the company is permitted to do or not to do, at its own option, an interstate company may be made to pay for the privilege if it chooses to exercise it;<sup>23</sup> but we think it can not thus

ascertained by reference thereto, it is not open to attack as inconsistent with the constitution. *Cleveland &c. R. Co. v. Backus*, 154 U. S. 439, 445, 14 Sup. Ct. 1122, 38 L. ed. 1041. The method of taxation by 'a tax on privileges' has been determined by the supreme court of Mississippi to be in harmony with the constitution of that state, and that 'where the particular arrangement of taxation, provided by legislative wisdom, may be accounted for on the assumption of compromising or commuting for a just equivalent, according to the determination of the legislature, in the general scheme of taxation, it will not be condemned by the courts as violative of the (state) constitution.' *Vicksburg Bank v. Worrell*, 67 Miss. 47, 7 So. 219. In that case privilege taxes imposed on bank of deposit or discount, which varied with the amount of capital stock or assets, and were declared to be 'in lieu of all other taxes, state, county or municipal, upon the shares and assets of said bank,' came under review, and it was decided that the privilege tax, to be effectual as a release from liability for all other taxes, must be measured by the capital stock, and entire assets or wealth of the bank; and that real

estate bought with funds of the bank was exempt from the ordinary ad valorem taxes, but was part of the assets of the bank to be considered in fixing the basis of its privilege tax."

<sup>22</sup> In *State v. Chicago &c. R. Co.*, 128 Wis. 449, 108 N. W. 594, a majority of the court held that an exaction tax based on the business of the road, in lieu of exemption from ordinary taxation, was valid and not a tax on property. But a minority dissented and held it was a tax on property. See also *Delaware &c. R. Co. v. Pennsylvania*, 198 U. S. 341, 25 Sup. Ct. 669, 49 L. ed. 1077. So, in *State v. Galveston &c. R. Co.*, 100 Tex. 153, 97 S. W. 71 (reversed in 28 Sup. Ct. 638 with four justices dissenting), the supreme court of Texas held such a tax an occupation tax and valid, whereas the civil court of appeals had held the other way in 93 S. W. 436.

<sup>23</sup> *Pullman Co. v. Adams*, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. ed. 877; *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. ed. 586. See also *S. S. White Dental Mfg. Co. v. Commonwealth*, 212 Mass. 35, 98 N. E. 1056, Ann. Cas. 1913C, 804; *State v. Northern Express Co.*, 80 Wash. 309, 141 Pac. 751.

be made to pay for carrying on interstate commerce, and this is certainly true as to federal corporations.<sup>24</sup>

§ 919 (762). **Excise tax.**—The court of last resort has adjudged that an excise tax may be imposed upon an interstate railroad company. The cases denying the power to levy a privilege tax are not expressly denied, but it is held that a state is not precluded from levying an excise tax.<sup>25</sup> We suppose that if a state, under

<sup>24</sup> *State v. Texas &c. R. Co.*, 100 Tex. 279, 98 S. W. 834. See also *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1, 45 So. 91; and compare *State v. Northern Express Co.*, 80 Wash. 309, 141 Pac. 751; *Williams v. Talladega*, 226 U. S. 404, 33 Sup. Ct. 116, 57 L. ed. 275.

<sup>25</sup> In the case of *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 12 Sup. Ct. 163, 35 L. ed. 994, the court said: "The tax, for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the state of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the power of the state to levy there can be no question. The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings, or to deal in special commodities, or to exercise particular franchises. It is used more frequently, in this country, in the latter sense than in any other. The privilege of exercising the franchises of a corporation within a state is generally one of

value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the state, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the state, in its judgment, may deem most conducive to its interest or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period, or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the state in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently rea-

the guise of imposing an excise tax, should levy a direct privilege tax, the statute providing for such a tax would be ineffective. The difference between an excise tax of the character contained in the case referred to in the note is not a very plain one, and there is, it seems to us, great difficulty in giving the doctrine of the majority, in the case mentioned, practical effect. We venture to say, and with utmost deference, that the doctrine of the minority opinion is the sounder and better one,<sup>28</sup> at least if the tax was in effect a tax on the receipts of the company derived

sonable, and likely to produce the most satisfactory results, both to the state and the corporation taxed." See also to the same effect, *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. ed. 586; *State v. Northern Exp. Co.*, 81 Wash. 701, 143 Pac. 99; *State v. Galveston & C. R. Co.*, 100 Tex. 153, 97 S. W. 71 (reversed in *Galveston & C. R. Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. ed. 1031). See as to recent U. S. excise law, *Flint v. Stone Tracy Co.*, 220 U. S. 107, 31 Sup. Ct. 342, 55 L. ed. 389, Ann. Cas. 1912B, 1312, and note; *New York Cent. & C. R. Co. v. Gill*, 219 Fed. 184; *Anderson v. Morris & F. R. Co.*, 216 Fed. 83; *White's Supp. Thomp. Corp.* §§ 5898-5902.

<sup>28</sup> Mr. Justice Bradley, who wrote the minority opinion (concurring in by Harlan, Lamar and Brown, JJ.), said: "But passing this by, the decisions of this court for a number of years past have settled the principle that taxation (which is a mode of regulation) of interstate commerce, or of the revenues derived therefrom (which is the same thing), is contrary to the constitution. Going no further back than *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 6 Sup. Ct. 635,

29 L. ed. 785, we find that principle laid down. There a privilege tax was imposed upon Pullman's Palace Car Company by general legislation, it is true, but applied to the company, of \$50 per annum on every sleeping car going through the state. It was well known, and appears by the record, that every sleeping car going through the state carried passengers from Ohio and other northern states to Alabama, and vice versa, and we held that Tennessee had no right to tax those cars. It was the same thing as if they had taxed the amount derived from the passengers in the cars. So, also, in the case of *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. ed. 311, we held that the receipts derived by the telegraph companies from messages sent from one state to another could not be taxed. So in the case of *Norfolk & C. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. ed. 394, where the railroad was a link in a through line by which passengers and freight were carried into other states, the company was held to be engaged in the business of interstate commerce, and could not be taxed for the privilege of keep-

from interstate transportation.<sup>27</sup> And in a recent case it is held that an excise or privilege tax upon sleeping-car companies doing business in the state, and whose principal business is interstate, which makes no distinction between cars used in interstate traffic and those used wholly within the state is invalid as an attempt by the state to impose a burden on interstate commerce, but that an annual tax upon sleeping-car companies which carry one or more local passengers, on cars operating within the state, is not void where the company is free to decline all local business if it sees fit.<sup>28</sup>

ing an office in the state. And in the case of *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. ed. 649, we held that the taxation of an express company for doing an express business between different states was unconstitutional and void. And in the case of *Philadelphia &c. Steamship Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. ed. 1200, we held that a tax upon the gross receipts of the company was void, because they were derived from interstate and foreign commerce. A great many other cases might be referred to showing that in the decisions and opinions of this court this kind of taxation is unconstitutional and void. We think that the present decision is a departure from the line of these decisions. The tax, it is true, is called a 'tax on a franchise.' It is so called, but what is it in fact? It is a tax on the receipts of the company derived from international transportation. This court and some of the state courts have gone a great length in sustaining various forms of taxes upon corporations. The train of reasoning upon which

it is founded may be questionable. A corporation, according to this class of decisions, may be taxed several times over. It may be taxed for its charter, for its franchises, for the privilege of carrying on its business; it may be taxed on its capital, and it may be taxed on its property. Each of these taxations may be carried to the full amount of the property of the company." See *Adams Express Co. v. Ohio*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. ed. 683. And see *Galveston &c. R. Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. ed. 1031, reviewing the case first cited in this note and stating that at first sight the decision seems erroneous but that it may possibly be upheld on a theory suggested.

<sup>27</sup> See *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 38 Sup. Ct. 126, 62 L. ed. 295.

<sup>28</sup> *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171, 24 Sup. Ct. 39, 48 L. ed. 134. See *State v. Northern Express Co.*, 27 Mont. 419, 71 Pac. 404; *State v. Northern Express Co.*, 80 Wash. 309, 141 Pac. 757.

§ 920. **Excise, license and privilege taxes—Review of recent decisions.**—Recent decisions of the Supreme Court of the United States have made it plain that a state can not directly tax interstate commerce under the guise of a license, privilege or excise tax, and that the courts, looking through the form of a statute to its substance and effect, will ascertain whether in truth the impost is a tax on interstate commerce, no matter under what guise it is levied. Under this rule they hold that statutes requiring of all foreign corporations payment of a certain percentage of their entire capital stock, and the like, are a burden upon the corporate capital engaged in such commerce and consequently void.<sup>29</sup> But it is difficult to determine just when it has this effect, and many “nice distinctions” have been made, and some of the state courts have differed as to the application of these decisions. In one case a state tax imposing an annual license tax on the authorized capital stock of a foreign corporation was held void, under the decision above referred to, as to a corporation engaged in both interstate and intrastate commerce.<sup>30</sup> In another, however, the court distinguished such decisions of the Supreme Court of the United States and held that an excise tax on the par value of the authorized capital stock of a foreign corporation engaged in ordinary business within the state was not invalid where the intrastate business could be separated from the interstate and the former could be given up without impairing the ability of the corporation to transact the latter.<sup>31</sup> And the Supreme Court of

<sup>29</sup> *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. ed. 355; *Pullman Co. v. Kansas*, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. ed. 378; *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146, 30 Sup. Ct. 280, 54 L. ed. 423; *Western Union Tel. Co. v. Andrews*, 216 U. S. 165, 30 Sup. Ct. 286, 54 L. ed. 430; *Atchison &c. R. Co. v. O'Connor*, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. ed. 436; *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298, 32 Sup. Ct. 218, 56 L. ed. 445; *Crew Levick Co. v. Pennsylvania*,

245 U. S. 292, 38 Sup. Ct. 126, 62 L. ed. 295; *Looney v. Crane Co.*, 245 U. S. 178, 38 Sup. Ct. 85, 62 L. ed. 230. See also *City Council of Augusta v. Augusta &c. R. Co.*, 130 Ga. 815, 61 S. E. 992, 124 Am. St. 197; *Barrett v. New York*, 232 U. S. 14, 34 Sup. Ct. 203, 58 L. ed. 483.

<sup>30</sup> *H. K. Mulford Co. v. Curry*, 163 Cal. 276, 125 Pac. 236.

<sup>31</sup> *S. S. White Dental Co. v. Com.*, 212 Mass. 35, 98 N. E. 1056, Ann. Cas. 1913C, 805. See also *State v. Illinois Cent. R. Co.*, 246

the United States has held that an intention to tax receipts from interstate commerce merely because it is not excepted by a statute imposing an excise tax on gross receipts where the statute also provides for measuring the tax only by the earnings on intrastate business.<sup>32</sup> But a foreign railway company which has come into the state in compliance with its laws and has acquired property of a fixed and permanent nature, upon which it has paid all state taxes, is a person within the equal protection clause of the United States Constitution and entitled to such protection as against the imposition upon it of an additional franchise tax for the privilege of doing business within the state, where no such tax is imposed upon domestic corporations carrying on the same business in character and kind.<sup>33</sup>

**§ 921 (763). Tax on passengers carried.**—It results from the doctrine of the cases that a tax can not be levied upon each passenger carried by an interstate railroad through a state.<sup>34</sup> To permit this to be done would be to authorize a tax upon commerce itself. The carriage of passengers is commerce, and to impose a tax upon each passenger would be just as much a restriction or regulation of commerce as a tax upon each ton of freight carried through the state would be.

Ill. 188, 92 N. E. 814; *People v. Glynn*, 25 App. Div. 328, 109 N. Y. Supp. 869. License must be so imposed on intrastate as not to impair right to carry on interstate commerce. *Northern Pac. R. Co. v. Gifford*, 25 Idaho 196, 136 Pac. 1131.

<sup>32</sup> *Ohio River &c. R. Co. v. Dittney* (Ohio Tax Cases), 232 U. S. 576, 34 Sup. Ct. 372, 58 L. ed. 738. See also *United States Exp. Co. v. Minnesota*, 223 U. S. 335, 32 Sup. Ct. 211, 56 L. ed. 459; *Williams v. Talladega*, 226 U. S. 404, 33 Sup. Ct. 116, 57 L. ed. 275 (ordinances imposing tax on business); *Ewing v. Leavenworth*, 226 U. S. 464, 33 Sup. Ct. 157, 57 L. ed. 303 (ordi-

nances). An occupation tax on domestic business of a terminal company is held valid in *State v. Houston Belt &c. R. Co.* (Tex. Civ. App.), 166 S. W. 83.

<sup>33</sup> *Southern R. Co. v. Greene*, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. ed. 536. Followed in *Louisville &c. R. Co. v. Gaston*, 216 U. S. 418, 30 Sup. Ct. 291, 54 L. ed. 542. But compare *International Paper Co. v. Massachusetts*, 246 U. S. 135, 38 Sup. Ct. 292, 62 L. ed. 624.

<sup>34</sup> *Head Money Cases*, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. ed. 798; *The Passenger Cases*, 7 How. (U. S.) 282; *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543; *People v. Compagnie Generale Transat-*



§ 922 (764). **Tax on interstate freight.**—It has been held in numerous cases that a state can not lay a tax on freight transported in interstate commerce traffic.<sup>35</sup> Such a tax is regarded as laid upon interstate commerce itself, and in some of the cases it is said that, where such a tax is enforced, it falls upon those for

lantique, 107 U. S. 59, 2 Sup. Ct. 87, 27 L. ed. 383; Tennessee v. Pullman Southern Car Co., 117 U. S. 51, 6 Sup. Ct. 643, 29 L. ed. 791; State v. Woodruff & Co., 114 Ind. 155, 15 N. E. 814. In the case last cited the court quoted with approval from the State Freight Tax Case, 15 Wall. (U. S.) 232, 21 L. ed. 146, the statement that "a tax upon freights and fares is a tax upon the transportation itself." In Tennessee v. Pullman & Co., 117 U. S. 51, 6 Sup. Ct. 643, 29 L. ed. 791, the court said, "The principles which governed the decisions in Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Guy v. Baltimore, 100 U. S. 434, 25 L. ed. 743; Moran v. New Orleans, 112 U. S. 69, 5 Sup. Ct. 38, 28 L. ed. 653, holding unlawful the state taxes on interstate commerce in merchandise, are equally applicable to the tax in this case on the transit of passengers." See also Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. ed. 257; Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550; Piek v. Chicago & Co., 6 Biss. (U. S.) 177; Crandall v. Nevada, 6 Wall. (U. S.) 35; Sweatt v. Boston & Co., 3 Cliff. (U. S.) 339; People v. Pacific Co., 16 Fed. 344; Pullman & Co. v. Nolan, 22 Fed. 276; People v. Downer, 7 Cal. 169; People v. Raymond, 34 Cal. 492; State v. Steamship & Co., 42 Cal. 578, 10 Am. Rep. 303; Clarke v. Philadelphia & Co., 4

Houst. (Del.) 158; Council Bluffs v. Kansas City & Co. R. Co., 45 Iowa 338, 24 Am. Rep. 773. But compare State v. Delaware & Co. R. Co., 30 N. J. L. 473.

<sup>35</sup> Woodruff v. Parham, 8 Wall. (U. S.) 123, 19 L. ed. 382; The Daniel Ball v. United States, 10 Wall. (U. S.) 557, 19 L. ed. 999; State Freight Tax Case, 15 Wall. (U. S.) 232, 21 L. ed. 146; Osborne v. Mobile, 16 Wall. (U. S.) 479, 21 L. ed. 470; Railroad Co. v. Maryland, 21 Wall. (U. S.) 456, 472, 22 L. ed. 678; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Hall v. DeCuir, 95 U. S. 485, 34 L. ed. 547; Howe Machine Co. v. Gage, 100 U. S. 676, 25 L. ed. 754; Head Money Cases, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. ed. 798; Moran v. New Orleans, 112 U. S. 69, 5 Sup. Ct. 826, 28 L. ed. 653; Wabash & Co. R. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244; Fargo v. Michigan, 121 U. S. 230, 7 Sup. Ct. 857, 30 L. ed. 888; Ogilvie v. Crawford Co., 7 Fed. 745; Koehler, Ex parte, 30 Fed. 867; United States & Co. v. Hemmingway, 39 Fed. 60; Baird v. St. Louis & Co., 41 Fed. 592; Brumagin v. Tillinghast, 18 Cal. 265, 79 Am. Dec. 176; State v. Cumberland & Co., 40 Md. 22; Erie Co. v. State, 31 N. J. L. 531, 86 Am. Dec. 226; State v. Engle, 34 N. J. L. 425; State v. Carrigan, 39 N. J. L. 35.

whom the property is carried. But whatever doubt there may be as to the true reason for the rule there is no doubt as to its existence and effect. Freight destined to a point within the state and placed on the cars at a point in the same state has been held not to be interstate freight, although in the course of continuous transit it may pass through parts of another state.<sup>36</sup>

**§ 923 (765). Tax on gross receipts of interstate commerce corporations.**—The decisions are uniformly to the effect that a tax can not be laid on the business of interstate commerce. There is, however, some difficulty in giving practical effect to the general rule. Taxes may be assessed upon a mileage basis and upon tangible property having its situs within the state, since these methods of taxation are not regarded as a tax upon the business of interstate commerce itself.<sup>37</sup> It has been held, however, that a tax can not be laid upon the gross receipts of an interstate company for the reason that such a method is a tax upon interstate commerce.<sup>38</sup> It was held by the Texas court

<sup>36</sup> *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 205, 12 Sup. Ct. 806, 36 L. ed. 672; *Campbell v. Chicago &c. Co.*, 86 Iowa 641, 53 N. W. 351. Citing the above case and the cases of *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 189, 6 L. ed. 68. See also *Ewing v. Leavenworth*, 226 U. S. 464, 33 Sup. Ct. 157 (affg. 80 Kans. 58). But compare ante § 812. If destined to a consignee in another state by continuous trip it is held interstate commerce although the initial carrier only contracted to carry to a point within the state. *Mexican Nat. R. Co. v. Savage* (Tex. Civ. App.), 41 S. W. 663. See also *State v. Southern Kans. R. Co.* (Tex. Civ. App.), 49 S. W. 252. So, for other purposes than taxation, if

part of the route is in another state, although the transportation begins and ends in the same state, it has lately been regarded as interstate commerce. See post, § 2550. *Hanley v. Kansas City &c. R. Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. ed. 333.

<sup>37</sup> Or on the property and business within the state. *Wisconsin &c. R. Co. v. Powers*, 191 U. S. 379, 24 Sup. Ct. 107, 48 L. ed. 229.

<sup>38</sup> *State Freight Tax*, 15 Wall. (U. S.) 232, 21 L. ed. 146; *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Philadelphia &c. S. Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. ed. 1200; *Fargo v. Michigan*, 121 U. S. 230, 7 Sup. Ct. 857, 30 L. ed. 888; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. ed. 229; *Gloucester Ferry Co. v. Pennsylvania Co.*, 114 U. S. 196, 5

that a law imposing a tax on railroads equal to one per cent. of their gross receipts was an occupation tax, and not a tax on the gross receipts of railroads, and, hence, not an interference with interstate commerce. In this case the reference to the gross receipts was regarded merely as a convenient method of ascertaining the amount of the tax,<sup>39</sup> and there are some statements in opinions of the Supreme Court of the United States that tend very strongly to support this view; but the decision in question has been reversed by the Supreme Court of the United States.<sup>40</sup>

Sup. Ct. 826, 29 L. ed. 158; *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. ed. 392; *Norfolk & C. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. ed. 394; *New York & C. R. Co. v. Pennsylvania*, 158 U. S. 431, 15 Sup. Ct. 896, 39 L. ed. 1043; *Commonwealth v. Lehigh Valley R. Co. (Pa.)*, 17 Atl. 179; *Northern Pac. R. Co. v. Raymond*, 5 Dak. 356, 40 N. W. 538, 1 L. R. A. 732, 37 Am. & Eng. R. Cas. 379; *Vermont & C. R. Co. v. Vermont Cent. R. Co.*, 63 Vt. 1, 21 Atl. 262, 731, 10 L. R. A. 562. The decisions are not harmonious. *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284, 21 L. ed. 164, is opposed to the later decisions, and there are some expressions in other cases which seem to indicate that gross receipts may be taxed. We do not understand that the cases which declare that a mileage basis is valid authorize the conclusion that a state may tax gross receipts. We think the court intended to make a distinction between the two methods, and that it has done so. We can see no escape from the conclusion that a tax upon gross receipts is a tax upon interstate commerce itself, and if it be, it is certainly

levied in violation of the commerce clause of the constitution. In the case of *Philadelphia & C. Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 1123, 30 L. ed. 1200, the court said: "A review of the question convinces us that the first ground on which *State Tax on Railway Gross Receipts* was placed is not tenable, that it is not supported by anything decided in *Brown v. Maryland*. but, on the contrary, that the reasoning in that case is decidedly against it." See also *Atchison & C. R. Co. v. O'Connor*, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. ed. 436; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. ed. 355, and other cases reviewed ante § 920. But see as to tax on gross earnings where there is no question of contract or interstate commerce. *McHenry v. Alford*, 168 U. S. 651, 18 Sup. Ct. 242, 42 L. ed. 614; and see notes to preceding sections.

<sup>39</sup> *State v. Galveston & C. R. Co.*, 100 Tex. 153, 97 S. W. 71. But see *Galveston & C. R. Co. v. Davidson*, 100 Tex. Civ. App. 177, 93 S. W. 436; and see ante, § 919.

<sup>40</sup> *Galveston & C. R. Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. ed. 1031. The subject has al-

**§ 924 (766). Fees for the right to be a corporation not taxes.**

—A state has power to exact fees of an association which asks the right or privilege of being a corporation, and the exaction of such fees is not the imposition of a tax upon interstate commerce.<sup>41</sup> The court concedes that the exaction of such fees may incidentally affect interstate commerce, but denies that such an exaction is a regulation of commerce between the states, in such a sense as to be within the inhibition of the constitution. The theory of the court is that the state has power to grant or refuse a charter, and hence may prescribe the terms upon which it will grant the corporate privileges and franchises asked by the persons who desire to organize a corporation under its laws.

ready been sufficiently considered and the recent cases are cited in § 825 ante; but we also call attention to the opinion of the court in *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 38 Sup. Ct. 499, 62 L. ed. 1135, Ann. Cas. 1918E, 748, 749, 750, where the difference in effect between a tax measured by gross receipts and one measured by net income is pointed out and said to afford a convenient and workable basis of distinction between a direct and immediate burden upon the business effected and charge that is only indirect and incidental. Money received from operation of railroads under Federal control is not necessarily exempt from state taxation. *Wabash R. Co. v. Board of Review of Cook County (Ill.)*, 123 N. E. 259.

<sup>41</sup> *Ashley v. Ryan*, 153 U. S. 436, 14 Sup. Ct. 865, 38 L. ed 773, citing *California v. Central Pacific R. Co.*, 127 U. S. 1, 40, 8 Sup Ct. 1073, 32 L. ed. 150; *Home Ins. Co. v. New York*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. ed. 1025; *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L.

ed. 274; *Lafayette Insurance Co. v. French*, 18 How. (U. S.) 404, 15 L. ed. 451; *Paul v. Virginia*, 8 Wall. (U. S.) 168, 19 L. ed. 357; *Ducat v. Chicago*, 10 Wall. (U. S.) 410, 19 L. ed. 972; *Railroad Co. v. Maryland*, 21 Wall. (U. S.) 456, 22 L. ed. 678; *Philadelphia Fire Assn. Co. v. New York*, 119 U. S. 110, 30 L. ed. 342. The court marks the distinction between a tax imposed upon the privilege of doing business in the state and the exaction of a fee for the privilege of becoming a corporation, saying: "The question here is not the power of the state of Ohio to lay a charge on interstate commerce, or to prevent a foreign corporation from engaging in interstate commerce within its confines, but simply the right of the state to determine upon what conditions its laws as to the consolidation of corporations may be availed of." See also *Chicago & C. R. Co. v. State*, 153 Ind. 134, 51 N. E. 924, and compare *Pullman's Palace Car Co. v. Hayward*, 141 U. S. 36, 11 Sup. Ct. 883, 35 L. ed. 621. But see as to taxing franchise

**§ 925 (767). Municipal tax as compensation for use of streets.**

—The right of a municipal corporation to impose a tax as compensation for the use of its streets was asserted in a comparatively recent case.<sup>42</sup> The court adjudged that such a tax was neither a license tax nor a privilege tax. There is reason for discriminating between a privilege or license tax and a requirement that compensation be paid for the use of city streets, or for

of federal corporation, *Keokuk &c. Bridge Co. v. Illinois*, 175 U. S. 626, 20 Sup. Ct. 205, 44 L. ed. 299; *California v. Central Pac. R. Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. ed. 150; *State v. Texas &c. R. Co.*, 100 Tex. 279, 98 S. W. 834. And see for tax held invalid where company had already fully complied with the law and made permanent investments, and was discriminated against. *Southern R. Co. v. Greene*, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. ed. 536 (reviewed in § 825 ante).

<sup>42</sup> *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. ed. 380. In the course of the opinion in that case, it was said: "And first with reference to the ruling that this charge was a privilege or license tax. To determine this question, we must refer to the language of the ordinance itself, and by that we find that the charge is imposed for the privilege of using the streets, alleys and public places, and is graduated by the amount of such use. Clearly, this is no privilege or license tax. The amount to be paid is not graduated by the amount of the business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the city—that which may properly

be called rental. 'A tax is a demand of sovereignty; a toll is a demand of proprietorship.' *State Freight Tax Case*, 15 Wall. (U. S.) 232, 278, 21 L. ed. 146. If, instead of occupying the streets and public places with its telegraph poles, the company should do what it may rightfully do, purchase ground in the various blocks from private individuals, and to such ground remove its poles, the section would no longer have any application to it. That by it the city receives something which it may use as revenue does not determine the character of the charge or make it a tax. The revenues of a municipality may come from rentals as legitimately and as properly as from taxes. Supposing the city of St. Louis should find its city hall too small for its purposes, or too far removed from the center of business, and should purchase or build another more satisfactory in this respect, it would not therefore be forced to let the old remain vacant or to immediately sell it, but might derive revenue by renting its various rooms. Would an ordinance fixing the price at which those rooms could be occupied be in any sense one imposing a tax? Nor is the character of the charge changed by reason of the fact that

local governmental supervision,<sup>43</sup> and this doctrine is now pretty well settled but the difference between such cases is somewhat indistinct and shadowy. Properly limited and applied the doctrine seems correct, but unless restrained by clearly defined rules there is danger of great abuse. It is always a delicate thing for courts to interfere in cases where the existence of the power asserted is conceded and the suitor seeks assistance solely upon the ground that the power has been abused or transcended, and it is so in dealing with municipal taxation of the character of that under consideration in the case cited.

§ 926 (768). **Impairing obligation of a contract.**—We have elsewhere discussed the question of the effect of a provision in the charter of a railroad corporation exempting it from taxation, and have said that under the federal decisions it is to be regarded as a contract right protected by the clause of the federal constitution forbidding the impairment of the obligation of a contract.<sup>44</sup> The question is, of course, a federal one, and the decisions of the Supreme Court of the United States are final and conclusive. It is true that, so far as concerns purely local questions and matters involving the construction of state constitutions and statutes, the general rule is that the federal courts follow the decisions of the

it is not imposed upon such telegraph companies as by ordinances are taxed on their gross income for city purposes. In the illustration just made in respect to a city hall, suppose that the city, in its ordinance fixing a price for the use of rooms, should permit persons who pay a certain amount of taxes to occupy a portion of the building free of rent, that would not make the charge upon others for their use of rooms a tax." See also *Savannah &c. R. v. Mayor*, 198 U. S. 392, 25 Sup. Ct. 690, 49 L. ed. 1097; *Mobile Light & R. Co. v. Mobile*, 200 Ala. 141, 75 So. 889.

<sup>43</sup> See *Atlantic &c. Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. ed. 995; *Western U. Tel. Co. v. New Hope*, 187 U. S. 419, 23 Sup. Ct. 204, 47 L. ed. 240; *Savannah &c. R. Co. v. Savannah*, 198 U. S. 392, 25 Sup. Ct. 690, 49 L. ed. 1097.

<sup>44</sup> *Pacific R. Co. v. Maguire*, 20 Wall. (U. S.) 36, 22 L. ed. 282; *State v. Winona &c. Co.*, 21 Minn. 315; *State v. Miller*, 1 Vroom (N. J.), 368, 86 Am. Dec. 188. See also the elaborate note to *Adams v. Yazoo &c. R. Co.*, 60 L. R. A. 33, et seq.

state courts.<sup>45</sup> Those decisions, indeed, become part of the statutes much to the same extent as if written in the text.<sup>46</sup> But the statute or charter must contain a contract in all that the term implies.<sup>47</sup> There must, of course, be a consideration for the contract, but it is held that no consideration beyond that which is to be expected to result from the formation of the corporation is required.<sup>48</sup> It is not every charter which provides for exemption that can be considered as a contract, since the exemption may be in the nature of a mere donation, or bounty, and if there is nothing more than a gift or a provision for a bounty there is

<sup>45</sup> *Nesmith v. Sheldon*, 7 How. (U. S.) 812, 12 L. ed. 925; *Green v. Neal*, 6 Peters (U. S.) 291, 8 L. ed. 402; *Suydam v. Williamson*, 24 How. (U. S.) 427, 16 L. ed. 742; *Cross v. Allen*, 141 U. S. 528, 12 Sup. Ct. 67, 35 L. ed. 843; *Shelly v. Guy*, 11 Wheat. (U. S.) 361, 6 L. ed. 495; *Stutsman County v. Wallace*, 142 U. S. 293, 12 Sup. Ct. 227, 35 L. ed. 1018; *Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. ed. 260; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 8 Sup. Ct. 974, 31 L. ed. 795; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. ed. 359; *Claiborne v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. ed. 470; *Chicago &c. Co. v. Stahley*, 62 Fed. 363, and cases cited. See also *Northern C. R. Co. v. Maryland*, 187 U. S. 258, 23 Sup. Ct. 62, 47 L. ed. 167; *Gulf &c. R. Co. v. Hewes*, 183 U. S. 66, 22 Sup. Ct. 26, 46 L. ed. 86. But the federal court, while leaning to the construction of the state court, on writ of error, to the state court, determines for itself the power of the state and existence or non-existence of the contract the obligation of which al-

leged to have been impaired. *Stearns v. Minnesota*, 179 U. S. 223, 21 Sup. Ct. 73, 45 L. ed. 162, and authorities cited.

<sup>46</sup> *Douglas v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Anderson v. Santa Anna*, 116 U. S. 356, 6 Sup. Ct. 413, 29 L. ed. 633; *Ohio &c. Insurance Co. v. Debolt*, 16 How. (U. S.) 416, 14 L. ed. 997; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175, 17 L. ed. 520; *Olcott v. Supervisors*, 16 Wall. (U. S.) 678, 21 L. ed. 382; *Taylor v. Ypsilanti*, 105 U. S. 60, 26 L. ed. 1008.

<sup>47</sup> "It is to be kept in mind that it is not the charter which is protected, but any contract which the charter may contain. If there is no contract there is nothing on which the constitution can act." *Per Waite, C. J.*, in *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079.

<sup>48</sup> *Home of the Friendless v. Rouse*, 8 Wall. (U. S.) 430, 19 L. ed. 495. See also *Powers v. Detroit &c. R. Co.*, 201 U. S. 543, 26 Sup. Ct. 556, 558, 50 L. ed. 860; *Citizens Bank v. Parker*, 192 U. S. 73, 24 Sup. Ct. 181, 48 L. ed. 346.

no contract upon which the constitution can operate.<sup>49</sup> Federal courts do not accept the decision of the state tribunals as to what is or is not a contract. That is a question which the federal court will determine for itself.<sup>50</sup> The federal court must, therefore, determine whether the particular statute granting the exemption does or does not constitute an inviolable contract in every case where the state court has denied that it does constitute a con-

<sup>49</sup> *Christ's Church v. Philadelphia*, 24 How. (U. S.) 300, 16 L. ed. 602; *Wisconsin &c. R. Co. v. Powers*, 191 U. S. 379, 24 Sup. Ct. 107, 48 L. ed. 229; *East Saginaw Salt Co. v. East Saginaw*, 13 Wall. (U. S.) 373, 20 L. ed. 611; *East Saginaw &c. Co. v. East Saginaw*, 19 Mich. 259, 2 Am. Rep. 82; *Detroit v. Plankroad Co.*, 43 Mich. 140, 5 N. W. 275; *Welch v. Cook*, 97 U. S. 541, 24 L. ed. 1112. In the case last cited the court, in speaking of the act of congress under consideration, said: "This is a bounty law, which is good as long as it remains unrepealed, but there is no pledge that it shall not be repealed at any time." See note in 60 L. R. A. 64, et seq.

<sup>50</sup> This question received careful consideration in the case of *Mobile &c. R. Co. v. Tennessee*, 153 U. S. 486, 14 Sup. Ct. 968, 38 L. ed. 793. In that case it was said: "It is well settled that the decision of a state court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which the court will determine for itself, the established rule being that where the judgment of the

highest court of a state, by its terms or necessary operation, gives effect of some provision of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of, impairs its obligation. A brief reference to some of the authorities is sufficient to show this: In *Jefferson Bank v. Skelly*, 1 Black (U. S.), 436, 443, 17 L. ed. 173, it was said by this court: "Its (the supreme court) rule of interpretation has invariably been that the constructions given by courts of the states to state legislation and to state constitutions have been conclusive upon this court, with a single exception, and that is when it has been called upon to interpret the contracts of states, though they had been made in the forms of law, or by the instrumentality of a state's authorized functionaries, in conformity with state legislation. It has never been denied, nor is it now, that the supreme court of the United States has an appellate power to revise the judgment of the supreme court of a state whenever such court shall adjudge that not to be a contract which has been



tract between the state and the corporation. In several cases, as already shown, although not without question, it has been held that an exaction tax, or charge for the privilege of exercising the franchises in the state, in lieu of all ordinary taxes, may become a matter of contract.<sup>51</sup>

**§ 927 (769). Impairing obligation of contracts—Tax on bonds.**—A state has no power to compel an interstate railroad company doing business within the state boundaries, by permission granted by statute, to deduct from the interest on its bonds, issued prior to the enactment of the statute, the tax levied by the

alleged, in the forms of legal proceedings, by a litigant, to be one within the meaning of that clause of the constitution of the United States which inhibits the states from passing laws impairing the obligation of contracts. Of what use would the appellate power be to a litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication by the supreme court of a state, whether or not the phraseology of an instrument in controversy was expressive of a contract, and within the protection of the constitution of the United States, and that its obligation should be enforced notwithstanding a contrary decision by the supreme court of a state?" See also *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 38, 8 Sup. Ct. 741, 31 L. ed. 607; *Wilmington &c. R. Co. v. Alsbrook*, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. ed. 972; *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123; *East Hartford v. Hartford Bridge Co.*, 10 How. (U. S.) 536, 13 L. ed. 528; *Univer-*

*sity v. People*, 99 U. S. 309, 321, 25 L. ed. 389; *Louisville Gas Co. v. Citizens Gas Co.*, 115 U. S. 683, 6 Sup. Ct. 265, 29 L. ed. 510; *Vicksburg &c. R. Co. v. Dennis*, 116 U. S. 665, 6 Sup. Ct. 625, 29 L. ed. 770; *Yazoo &c. R. Co. v. Thomas*, 132 U. S. 174, 10 Sup. Ct. 68, 33 L. ed. 302; *Bryan v. Board of Education*, 151 U. S. 639, 14 Sup. Ct. 465, 38 L. ed. 297; *Stearns v. Minnesota*, 179 U. S. 223, 21 Sup. Ct. 73, 45 L. ed. 162.

<sup>51</sup> *State v. Chicago &c. R. Co.*, 128 Wis. 449, 108 N. W. 594. See also *Powers v. Detroit &c. R. Co.*, 201 U. S. 543, 26 Sup. Ct. 556, 50 L. ed. 860, (also holding that where the supreme court of the state has held that the statute is valid and applicable and a valid contract is created, the United States Supreme Court accepts that decision, where a valid contract appears, and starts with the question as to the contract); *Jersey City &c. Co. v. United &c. Co.*, 46 Fed. 264; *Bain v. Seaboard &c. R. Co.*, 52 Fed. 450; *Standard &c. Cable Co. v. Attorney-General*, 46 N. J. Eq. 270, 19 Atl. 733, 19 Am. St. 394.

state, and pay such tax to the state. The court held that the statute assuming to require the company to assess and collect the tax impaired the obligation of the contract between the state and the company. The statute under which the company obtained the right to enter and do business in the state was held to be a contract, and to preclude the state from imposing any additional burdens on the corporation.<sup>52</sup>

**§ 928 (770). Exemption of railroad property—Contract—Alteration of charter.**—As we have elsewhere shown, the exemption of the property of a railroad company may constitute a part of the contract and be within the provision of the federal constitution forbidding the states from impairing the obligation of contracts.<sup>53</sup> The rule which protects an exemption clause as part of the contract does not preclude a state from enacting a statute subjecting the property of the railroad company to taxation in cases where the power to alter or amend the charter or act of incorporation is expressly reserved. The reservation of the right to alter, amend or repeal, invests the state with ample power to

<sup>52</sup> *New York &c. R. Co. v. Pennsylvania*, 153 U. S. 628, 14 Sup. Ct. 952, 38 L. ed. 846, citing *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. ed. 649; *Railroad Co. v. Jackson*, 7 Wall. (U. S.) 262, 19 L. ed. 88; *St. Louis v. Ferry Co.*, 11 Wall. (U. S.) 423, 20 L. ed. 192; *State Tax on Foreign Held Bonds*, 15 Wall. (U. S.) 300, 21 L. ed. 179; *Delaware Railroad Tax Case*, 18 Wall. (U. S.) 206, 21 L. ed. 888; *Clark v. Iowa City*, 20 Wall. (U. S.) 583, 22 L. ed. 427; *Hartman v. Greenhow*, 102 U. S. 672, 684, 26 L. ed. 271; *Koshkonong v. Burton*, 104 U. S. 668, 26 L. ed. 886. *Cases of Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. ed. 892; *Jennings v. Coal Ridge Imp. &c. Co.*, 147 U. S. 147,

13 Sup. Ct. 282, 37 L. ed. 116, were distinguished. See generally *Dewey v. Des Moines*, 173 U. S. 193, 19 Sup. Ct. 379, 43 L. ed. 665; *Commonwealth v. New York &c. R. Co.*, 129 Pa. St. 463, 18 Atl. 412, 15 Am. St. 724; *South Nashville St. R. Co. v. Morrow*, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853. But compare *Detroit &c. R. Co. v. Fuller*, 205 Fed. 86.

<sup>53</sup> See upon the general subject the elaborate note to *Adams v. Yazoo &c. R. Co.*, 60 L. R. A. 33, et seq., and see also *King v. Madison*, 17 Ind. 48; *Duluth &c. R. Co. v. St. Louis County*, 179 U. S. 302, 21 Sup. Ct. 124, 45 L. ed. 201; *Wilmington &c. R. Co. v. Alsbrook*, 146 U. S. 279, 13 Sup. Ct. 92, 36 L. ed. 972.

withdraw the exemption,<sup>54</sup> but where the rights of third persons intervene, and the alteration, amendment or repeal would destroy those rights, the power to withdraw the exemption can not, as it has been held, be exercised.<sup>55</sup> We suppose, however, that the rights of third persons must be property rights, and

<sup>54</sup> *Tomlinson v. Jessup*, 15 Wall. (U. S.) 454, 21 L. ed. 204, cited with approval in *New York &c. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. ed. 269; *Holyoke &c. Co. v. Lyman*, 15 Wall. (U. S.) 500, 21 L. ed. 133; *Hoge v. Richmond &c. R. Co.*, 99 U. S. 348, 25 L. ed. 303; *New York &c. Co. v. Waterbury*, 60 Conn. 1, 22 Atl. 439; *State v. Atlantic &c. Co.*, 60 Ga. 268; *State v. Miller*, 1 Vroom (N. J. L.) 368, 86 Am. Dec. 188; *State v. Miller*, 2 Vroom (N. J. L.), 561; *State v. Chambersburg*, 8 Vroom (N. J. L.), 228; *West &c. Co. v. Supervisors*, 35 Wis. 257. See generally *Close v. Glenwood Cemetery*, 107 U. S. 466, 2 Sup. Ct. 267, 27 L. ed. 408; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. ed. 173; *Pennsylvania College Cases*, 13 Wall. (U. S.) 190, 20 L. ed. 550; *Maine R. Co. v. Maine*, 96 U. S. 499, 24 L. ed. 836; *State v. Maine &c. Co.*, 66 Maine 488; *State v. Northern &c. Co.*, 44 Md. 131; *Roxbury v. Boston &c. Co.*, 6 Cush. (Mass.) 424, note in 60 L. R. A. 69, et seq.; *St. Paul v. St. Paul &c. Co.*, 23 Minn. 469.

<sup>55</sup> In *Tomlinson v. Jessup*, 15 Wall. (U. S.) 454, 458, 21 L. ed. 204, the court said: "There is no subject over which it is of greater moment for the state to preserve its power than that of taxation. It

has nevertheless been held by this court, not, however, without occasional earnest dissent from a minority, that the power of taxation over particular parcels of property, or over property of particular persons or corporations, may be surrendered by one legislative body, so as to bind its successors and the state. It was so adjudged at an early day in *New Jersey v. Wilson*, 7 Cranch (U. S.), 164, 3 L. ed. 303; the adjudication was affirmed in *Jefferson Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173, and has been repeated in several cases within the past few years, and notably so in the cases of *The Home of the Friendless v. Rouse*, 8 Wall. (U. S.) 430, 19 L. ed. 495, and *Wilmington Railroad v. Reid*, 13 Wall. (U. S.) 264, 20 L. ed. 568. In these cases, and in others of a similar character, the exemption is upheld as being made upon considerations moving to the state which give to the transaction the character of a contract. It is thus that it is brought within the protection of the federal constitution. In the case of a corporation the exemption, if originally made in the act of incorporation, is supported upon the consideration of the duties and liabilities which the corporators assume by accepting the charter. When made, as in the present case, by an amendment of the charter,

in the nature of vested rights, in order to preclude a state from withdrawing or annulling the exemption granted by the corporate charter.<sup>56</sup> And the reserved power to repeal, alter or amend does not include power to arbitrarily violate fundamental principles and deprive a corporation of the equal protection of the laws, or authorize the taking of property without due process of law.<sup>57</sup>

**§ 929 (771). Due process of law in tax proceedings.**—The federal constitution requires due process of law in tax proceedings, as well as in other proceedings where property rights are involved. The requirement of due process of law does not demand that the person upon whose property a tax is imposed shall be present when the assessment is made. Notice of some kind is

it is supported upon the consideration of the greater efficiency with which the corporation will thus be enabled to discharge the duties originally assumed by the corporators to the public, or of the greater facility with which it will support its liabilities and carry out the purposes of its creation. Immunity from taxation constituting in these cases a part of the contract with the government, is by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state. Rights acquired by third parties, and which have become vested, un-

der the charter, in the legitimate exercise of its powers stand upon a different footing."

<sup>56</sup> *Brightman v. Kirner*, 22 Wis. 54.

<sup>57</sup> *Stearns v. Minnesota &c. R. Co.*, 179 U. S. 223, 21 Sup. Ct. 73, 45 L. ed. 162; *Louisville Water Co. v. Clark*, 143 U. S. 1, 12 Sup. Ct. 346, 36 L. ed. 55; *St. Louis &c. R. Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. ed. 746. It was held in the first case cited that the power to amend or repeal a statute exempting a railroad company from all other taxes on payment of a percentage of its gross earnings can not be so exercised as to continue in full the obligation as to payment of such percentage and at the same time deny to the company the exemption conferred by the contract. See also *Duluth &c. R. Co. v. St. Louis County*, 179 U. S. 302, 21 Sup. Ct. 124, 45 L. ed. 201.

necessary, but it need not be personal notice.<sup>58</sup> Where provision is made for the establishment of a board or tribunal to value and assess property, and the taxpayer is by law required to report or return his property to such board or tribunal, the sittings of which are designated by law, the requirements of the constitution as to notice are satisfied.<sup>59</sup>

<sup>58</sup> *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Hurtado v. California*, 110 U. S. 535, 536, 4 Sup. Ct. 292, 28 L. ed. 238; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. ed. 569; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. ed. 414; *Spencer v. Merchant*, 125 U. S. 345, 356, 8 Sup. Ct. 921, 31 L. ed. 763; *Palmer v. McMahon*, 133 U. S. 660, 10 Sup. Ct. 324, 33 L. ed. 772; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637; *San Mateo County v. Southern Pac. R. Co.*, 13 Fed. 722; *Santa Clara Co. v. Southern Pacific R. Co.*, 18 Fed. 385; *Scott v. Toledo*, 36 Fed. 385, 1 L. R. A. 688; *Johnson v. Joliet &c. Co.*, 23 Ill. 124; *Garvin v. Daussman*, 114 Ind. 429, 16 N. E. 826, 5 Am. St. 637; *Kuntz v. Sumption*, 117 Ind. 1, 9 N. E. 474, 2 L. R. A. 665, and note; *Weimer v. Bunbury*, 30 Mich. 201; *Trustees, Matter of*, 31 N. Y. 574; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Ford, Matter of*, 6 Lans (N. Y.) 92; *Minard v. Douglas Co.*, 9 Ore. 206; *Cooper v. Board*, 108 Eng. C. L. R. 181. As to notice of publication of the like, see *Lent v. Tillson*, 140 U. S. 316, 11 Sup. Ct. 825, 35 L. ed. 419; *Campbellsville &c. Co. v. Hubbert*, 112 Fed. 718; *Wabash Eastern R. Co. v. East Lake &c. Dist.*, 134 Ill. 384, 25 N. E. 781, 10 L. R. A. 285, and note.

<sup>59</sup> *Pittsburgh &c. R. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. ed. 1031; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. ed. 892; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 331, 6 Sup. Ct. 57, 29 L. ed. 414; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *State Railroad Tax Cases*, 92 U. S. 609, 23 L. ed. 669; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 14 Sup. Ct. 396, 38 L. ed. 238; *Weyerhaeuser v. Minnesota*, 176 U. S. 550, 20 Sup. Ct. 477, 44 L. ed. 583; *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 26 Sup. Ct. 459, 50 L. ed. 744; *St. Louis &c. Co. v. Worthen*, 52 Ark. 529, 13 S. W. 254, 7 L. R. A. 374; *Adsit v. Lieb*, 76 Ill. 198; *Porter v. Railroad Co.*, 76 Ill. 561; *Smith v. Rude &c. Co.*, 131 Ind. 150, 30 N. E. 947; *Hyland v. Brazil &c. Co.*, 128 Ind. 335, 26 N. E. 672; *Railroad Co. v. Commonwealth*, 81 Ky. 492; *Hannibal &c. Co. v. State Board*, 64 Mo. 294; *State v. Runyon*, 41 N. J. L. 98; *Oregon &c. R. Co. v. Lane Co.*, 23 Ore. 386, 31 Pac. 964. See also *Corry v. Baltimore*, 196 U. S. 466, 25 Sup. Ct. 297, 49 L. ed. 556. \*But see generally *Ormsby v. Louisville*, 79 Ky. 197. So it has been held under an Indiana statute that where a railroad company returns a schedule and valuation of its personal property to the county auditor, and

§ 930 (772). **Equal protection of the laws.**—The fourteenth amendment to the federal constitution prohibits the states from denying to citizens the equal protection of the laws, and a state statute which violates the provisions of the amendment is, of course, invalid. There is no difficulty in declaring the general rule, and in asserting that there may be a denial of the equal protection of the laws by a statute subjecting railroad property to taxation,<sup>60</sup> but there is real difficulty in determining what constitutes a denial of the equal protection guaranteed by the federal constitution. It may be said, generally, that where there is a palpably unjust and arbitrary discrimination against railroad companies, the result of which is to put upon them an oppressive burden much greater and essentially different from that placed upon other property subject to taxation, there is a violation of the constitutional provision, but merely providing different methods of assessing railroad corporations or providing different boards or tribunals from those provided for assessing the property of other corporations or persons is not a violation of the constitutional provision under consideration.<sup>61</sup>

he submits it to the assessor for assessment, the company is not entitled to notice before the assessor can make the assessment at a greater valuation than that returned by the company. *Chicago &c. R. Co. v. John*, 150 Ind. 113, 48 N. E. 640. See also *Hubbard v. Goss*, 157 Ind. 485, 62 N. E. 36. Collection has been enjoined for want of an opportunity to be heard. *Negley v. Henderson Bridge Co.*, 107 Ky. 414, 54 S. W. 171.

<sup>60</sup> In *Santa Barbara Co. v. Southern Pacific R. Co.*, 18 Fed. 385, 399, the question was ably discussed by Mr. Justus Field, who said inter alia: "It is a matter of history that unequal and discriminating taxation, leveled against special classes, **has been the fruitful means of oppression, and the cause of more**

commotions and disturbances in society, of insurrections and revolutions than any other cause in the world. It would indeed be a charming spectacle to present to the civilized world, as counsel in the *San Mateo* ironically observed, if the amendment were to read, as contended it does in law, 'Nor shall any state deprive any person of his property without due process of law, except it be in the form of taxation, nor deny to any person within its jurisdiction the equal protection of the law, except it be by taxation.'"

<sup>61</sup> *Cincinnati &c. Co. v. Kentucky*, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. ed. 414; *Missouri v. Lewis*, 101 U. S. 22, 30, 25 L. ed. 989; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 14 Sup. Ct. 396, 38 L. ed.

**§ 931 (772a). Equal protection of the laws—Continued.**—On this subject it has been very aptly observed by one court "that it was not designed by the fourteenth amendment to the constitution to prevent a state from changing its system of taxation in all proper and reasonable ways, nor to compel states to adopt an iron rule of equality, to prevent the classification of property for purposes of taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice."<sup>62</sup> Thus, it has been held that a street rail-

238; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Charlotte &c. R. Co. v. Gibbes*, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. ed. 1051; *Minneapolis &c. R. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. ed. 585; *Columbus &c. Co. v. Wright*, 89 Ga. 574, 15 S. E. 293; *Cleveland &c. Co. v. Backus*, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729; *Cincinnati &c. Co. v. Commonwealth*, 81 Ky. 492. See also *Western Union Tel. Co. v. Indiana*, 165 U. S. 304, 17 Sup. Ct. 345, 41 L. ed. 725; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. ed. 619; *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 26 Sup. Ct. 459, 462, 50 L. ed. 744, and authorities there cited. Ante §§ 888, 890, 906.

<sup>62</sup> Wanty, J., in *Michigan Railroad Tax Cases*, 138 Fed. 223, citing: *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. ed. 892; *Giozza v. Tiernan*, 148 U. S. 657-662, 13 Sup. Ct. 721, 37 L. ed. 599; *Adams Express Co. v. Ohio*, 165 U. S. 194-288, 17 Sup. Ct. 305, 41 L. ed. 683; *Magoun v. Illinois &c. Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. ed. 1037; *Bilings v. Illinois*, 188 U. S. 97, 23

Sup. Ct. 272, 47 L. ed. 400; *Merchants' &c. Bank v. Pennsylvania*, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. ed. 236; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. ed. 414; *Home Ins. Co. v. New York*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. ed. 1025; *Gulf &c. R. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. ed. 666; *Clark v. Titusville*, 184 U. S. 329, 22 Sup. Ct. 382, 46 L. ed. 569; *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 21 Sup. Ct. 43, 45 L. ed. 102; *New York v. Barker*, 179 U. S. 279, 21 Sup. Ct. 121, 45 L. ed. 194; *Charlotte &c. R. Co. v. Gibbes*, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. ed. 1051; *Traveler's Ins. Co. v. Connecticut*, 185 U. S. 364, 22 Sup. Ct. 673, 46 L. ed. 949; *Kidd v. Alabama*, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. ed. 669; *Turpin v. Lemon*, 187 U. S. 51, 23 Sup. Ct. 20, 47 L. ed. 70; *Florida &c. R. Co. v. Reynolds*, 183 U. S. 471, 22 Sup. Ct. 176, 46 L. ed. 283. Judge Wanty's opinion, from which we have quoted, is approved in *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 26 Sup. Ct. 459, 462, 50 L. ed. 744.

way company was not denied the equal protection of the laws by a municipal tax on its business at a specified rate per mile, or fraction of a mile of its trackage in the city streets, because a steam railway making an extra charge for local deliveries on freight brought over its road from outside the city was not also subjected to this tax.<sup>63</sup>

**§ 932 (773). Equal protection of the laws—Corporations are persons.**—Railroad corporations are persons within the meaning of the constitution, and can not be denied the equal protection of the laws.<sup>64</sup> Corporations are not, however, within the constitutional provision which declares that "citizens of each state shall be entitled to all privileges and immunities of citizens of the several states."<sup>65</sup> The distinction made between the two clauses of the federal constitution is an important one, but does not exert a direct influence upon the subject under immediate discussion, yet it seems necessary to refer to it in order to prevent possible confusion.

<sup>63</sup> Savannah &c. R. Co. v. Savannah, 198 U. S. 392, 25 Sup. Ct. 690, 49 L. ed. 1097. The application to railroad property of the average rate of taxation of other property has also been upheld. Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 26 Sup. Ct. 459, 50 L. ed. 744. See also Boston &c. R. Co. v. State, 60 N. H. 87; Gottlieb v. Metropolitan Street R. Co., 161 Mo. 189, 199, 61 S. W. 603.

<sup>64</sup> Pembina &c. Mining Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. ed. 650; Southern R. Co. v. Greene, 216 U. S. 400, 30 Sup. Ct. 287, 289, 54 L. ed. 536; Santa Clara County v. Southern Pacific R. Co., 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. ed. 118; Minneapolis &c. R. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. ed. 585;

Cleveland &c. R. Co. v. Backus, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729. See also Atchison &c. R. Co. v. Clark, 60 Kans. 826, 58 Pac. 477, 47 L. R. A. 77. But compare Northwestern Nat. Life Ins. Co. v. Riggs, 203 U. S. 243, 27 Sup. Ct. 126, 51 L. ed. 168.

<sup>65</sup> Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357; Railroad Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643; Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1, 19, 24 L. ed. 708; Ducat v. Chicago, 10 Wall. (U. S.) 410, 19 L. ed. 972; Lafayette Ins. Co. v. French, 18 How. (U. S.) 404, 15 L. ed. 340; Doyle v. Continental Ins. Co., 94 U. S. 535, 539, 24 L. ed. 148; Elston v. Piggott, 94 Ind. 14, 17; People v. Fire Association, 92 N. Y. 311, 44 Am. Rep. 380, and note.



§ 933 (774). **Equal protection of the laws**—What is a denial of.—We suppose that a tax designedly made unequal and intended to impose upon a special class a burden clearly unjust and plainly beyond that imposed upon other classes of persons would come within the prohibition of the fourteenth amendment, for a tax which would burden a **special class grossly** more than other classes would be a denial of the fundamental principle of law that the burden of taxation shall be equalized as nearly as practicable. We do not mean, of course, that there must be absolute equality, nor, indeed, that there must be substantial equality or uniformity. There probably never was a tax levied that was truly uniform and equal, and, certainly, the federal tribunals would not interfere where nothing more than inequality was shown, even though the inequality be manifest and material. It can not be justly said that there is a denial of the equal protection of the laws where there is a simple error of judgment or an unwise or even unjust exercise of legislative discretion, but there may be a denial of the equal protection of the laws where there is a design and purpose to relieve from taxation many classes by placing an unjust, oppressive and unequal burden upon a special class.<sup>66</sup> It

<sup>66</sup> In the case of *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. ed. 892, the court said: "The provision in the fourteenth amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways." It was also said: "It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for the payment

of money; it may allow deductions for indebtedness or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature or the people of the state in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character and unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be unwise and impracticable to lay down any general rule or definition on the subject that would include

may be true that, where the statute so operates as to place an unjust and oppressive burden upon a special class, it will be held invalid, although it can not be said that there was a formed design or purpose to make an unjust discrimination,<sup>67</sup> but this could be true only in an extreme case, where, to permit the statute to stand, would be to practically authorize confiscation of property or to uphold an enforced and unequal contribution to the revenue of the state. A recent Missouri case seems to disclose a plain contravention of the equal protection clause of the federal constitution. The voters of that state in 1900 ratified an amendment to the state constitution which authorized the county courts, in the several counties in the state not under township organization, and the township board of directors in counties under township organization, in their discretion, to levy an additional tax of fifteen mills, to be used for road and bridge purposes, and exempted from its operation the cities of St. Louis, Kansas City and St. Joseph. Two of the cities—Kansas City and St. Joseph—were located in counties containing other towns and villages not subject to the exemption, which made the provision a plain violation of the rule that taxes must be uniform and equal, co-extensive with the territory to which the tax applies. The state Supreme Court found no difficulty in holding that the amendment denied to some of the persons within the state the equal protection of the laws guaranteed by the constitution.<sup>68</sup>

all cases. They must be decided as they arise." The court adopted the rule stated in *Barbier v. Connolly*, 113 U. S. 27, 31, 5 Sup. Ct. 357, 28 L. ed. 923. See also *Greene v. Louisville &c. R. Co.*, 244 U. S. 499, 37 Sup. Ct. 673, 61 L. ed. 1280 (injunction granted against state officers); *Louisville &c. R. Co. v. Greene*, 244 U. S. 522, 37 Sup. Ct. 683, 61 L. ed. 1291, (also stating rules for valuation of intangible property and for mileage).

<sup>67</sup> The operation of a statute, rather than its form, determines

its character. *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220; *Westerfield*, Ex parte, 55 Cal. 550, 36 Am. Rep. 47; *Nichols v. Walters*, 37 Minn. 264, 33 N. W. 800; *State v. Hermann*, 75 Mo. 340; *State v. The Judges*, 21 Ohio St. 1. See also *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543; *Hannibal &c. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Easton v. Iowa*, 188 U. S. 220, 23 Sup. Ct. 288, 47 L. ed. 452.

<sup>68</sup> *State v. Chicago &c. R. Co.*, 195 Mo. 228, 93 S. W. 784.

**§ 934 (775). Fourteenth amendment — Unequal taxation — Generally.**—It is difficult to precisely define the line which separates the rightful domain of a state from the domain of the federal government in the field of taxation for general revenue purposes and declare when the federal judiciary may rightfully interfere. That a tax levied by a state legislature may be so grossly unequal and so palpably unjust that the federal tribunals will overthrow the statute which levies the tax seems clear, but what will constitute the inequality or unjust discrimination that will authorize the exercise of the federal jurisdiction is as yet clouded by confusion and doubt. There must be inequality great enough to be justly characterized as a denial of the equal protection of the laws, for, manifestly, if all persons are treated alike, although the burdens imposed may be unjust and oppressive, the jurisdiction of the federal tribunals can not be successfully invoked.<sup>69</sup> It is not a question of hardship or oppression, but of unjust discrimination against a class of persons or property resulting in an inequality of taxation, constituting a denial of the equal protection of the laws.

**§ 935 (776). Classification not a denial of equal protection.**—A state is not bound to provide the same method of taxing all classes of property, but, as we have elsewhere shown, the legislature has a choice of methods, so that in classifying property for taxation and prescribing modes for valuing and assessing it there is no transgression of the fourteenth amendment, provided there is no hostile and unjust discrimination. It is possible to prescribe a method that necessarily discriminates against a special class to such an extent as to deprive it of the equal protection of the laws, but this result does not follow simply because the method adopted is unwise or leads to some inequality.<sup>70</sup> It is

<sup>69</sup> In the case of *San Mateo County v. Southern Pacific R. Co.*, 13 Fed. 722, Mr. Justice Field said: "It is undoubtedly true that the hardship and injustice of a tax levied by the state, considered with reference to its amount, are not subjects of federal cognizance."

See also *Merchants' &c. Bank v. Pennsylvania*, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. ed. 236; *Peacock v. Pratt*, 121 Fed. 772.

<sup>70</sup> *Home Ins. Co. v. New York*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. ed. 1025; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct.

not enough, as we believe, to bring a case within the constitutional prohibition that there be some discrimination, for mere discrimination can not be said to be, of itself, a denial of the equal protection of the laws. But there may be such discrimination and arbitrary classification as to bring the case within the provisions of the fourteenth amendment and entitle the corporation to its protection.

**§ 986. (777) Fourteenth amendment—Tax for salaries of railroad commissioners.**—The extent to which a state may go without violating the provisions of the fourteenth amendment is strikingly illustrated by the cases which adjudge that railroad companies may be taxed to pay the salaries of the members of a railroad commission.<sup>72</sup> This seems to us a very strong assertion of the power of the states, and, with all deference to the great tribunal which asserted the doctrine, a very dangerous and doubtful rule. The reasoning of the court necessarily leads to the conclusion that like commissions may be created for all classes of corporations having duties and powers of a public nature, and the business of maintaining them imposed on such corporations, and this would be to put upon them a much heavier and essentially

250, 35 L. ed. 1035; *Charlotte &c. R. Co. v. Gibbes*, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. ed. 1051; *Missouri &c. R. Co. v. Mackey*, 127 U. S. 207, 8 Sup. Ct. 1161, 32 L. ed. 105. See generally *Kentucky Railroad Tax Cases*, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. ed. 414; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Brushaber v. Union Pac. R. Co.*, 240 U. S. 1, 36 Sup. Ct. 236, 60 L. ed. 493, L. R. A. 1917D, 414; *Pittsburgh &c. R. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. ed. 1031; *Cleveland &c. R. Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. ed. 1041; *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. ed. 841; *Michigan Cent. R. Co. v. Powers*, 201 U. S.

245, 26 Sup. Ct. 459, 50 L. ed. 744, and authorities there cited; *Coulter v. Louisville &c. R. Co.*, 196 U. S. 599, 25 Sup. Ct. 342, 49 L. ed. 615; *Cleveland &c. R. Co. v. Backus*, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729.

<sup>71</sup> A recent case illustrating this is *Southern R. Co. v. Greene*, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. ed. 536, already reviewed in another section.

<sup>72</sup> *Charlotte &c. R. Co. v. Gibbes*, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. ed. 1051. Citing *Georgia &c. Banking Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. ed. 377; *New York v. Squire*, 145 U. S. 175, 12 Sup. Ct. 880, 36 L. ed. 666.

different burden from that imposed upon other bodies, politic and corporate. It is to be noted, we may properly say in passing, that the decisions of the Supreme Court go only to the federal side of the question, and have no direct influence upon a question arising under a state constitution forbidding special legislation and requiring equality and uniformity of taxation.<sup>73</sup>

**§ 937 (778). Corporations deriving rights from the United States.**—The property of a private corporation having its situs in a state may be taxed by the state, although the corporation may derive privileges and franchises from the United States. It is the property that is the subject of taxation, for in the case of an interstate corporation the business or operations can not be taxed by the state, since that would be to tax interstate commerce itself. It is important, in all phases of the subject, to keep in mind the distinction between taxing the property of an interstate corporation situated within the boundaries of a state and taxing the business or operation of the corporation engaged in carrying articles of commerce from state to state, for confusion will result if this distinction is not observed.<sup>74</sup>

**§ 938 (779). Land grants.**—Land granted to a railroad company by the United States is subject to taxation by the state in which the land is situated, and this is true, although the railroad company transports freight and passengers for the government.<sup>75</sup> The conclusion stated seems to us the just one, but there was stubborn conflict of opinion upon the question when it was be-

<sup>73</sup> See *Atchison &c. R. Co. v. Howe*, 32 Kans. 737, 5 Pac. 397.

<sup>74</sup> *Railroad Co. v. Peniston*, 18 Wall. (U. S.) 5, 21 L. ed. 787; *Thomson v. Pacific R. Co.* 9 Wall. (U. S.) 579, 19 L. ed. 792; *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 14 Sup. Ct. 1060, 38 L. ed. 1028; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. ed. 790; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L.

ed. 380. That the franchise granted by congress can not be taxed by a state, see *California v. Central Pac. R. Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. ed. 150; *Keokuk &c. Bridge Co. v. Illinois*, 175 U. S. 626, 20 Sup. Ct. 205, 44 L. ed. 299.

<sup>75</sup> *Railroad Company v. Peniston*, 18 Wall. (U. S.) 5, 21 L. ed. 787; *Lane County v. Oregon*, 7 Wall. (U. S.) 71, 19 L. ed. 101; *Thomson v. Pacific Railroad*, 9 Wall. (U. S.) 579, 19 L. ed. 792; *Reagan v. Mer-*

fore the court. If land becomes the property of a private corporation, yielding to that corporation revenue and profits, it is justly taxable, no matter from what grantor the land was derived, nor is the question, as we believe, changed by the fact that use is made of the railroad by the general government, for, after all, the corporation exists, and its business is conducted for the private benefit of its stockholders.

**§ 939 (780). Domestic commerce.**—Intrastate or domestic commerce is under the dominion of the state, for it is only commerce between the states upon which the commerce clause of the federal constitution operates.<sup>76</sup> The state may regulate domestic commerce alone as it deems proper, unaffected by the clause of

cantile Trust Co., 154 U. S. 413, 14 Sup. Ct. 1060, 38 L. ed. 1028; Reagan v. Farmers' Loan & Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014; citing Railroad Commission Cases, 116 U. S. 307, 6 Sup. Ct. 334, 29 L. ed. 636; Mercantile Trust Co. v. Texas R. Co., 51 Fed. 529. See generally Chicago & Co. v. Davenport, 51 Iowa 451, 1 N. W. 720; West & Co. R. Co. v. Supervisors, 35 Wis. 257. But where land is granted by the United States, it is not taxable by the state until the title vests in the grantee. Railway Co. v. Prescott, 16 Wall. (U. S.) 603, 21 L. ed. 373; Cass Co. v. Morrison, 28 Minn. 257, 9 N. W. 761; Wheeler v. Merriam, 30 Minn. 372, 15 N. W. 665. See upon the general subject, McGregor & Co. v. Brown, 39 Iowa 655; Grant v. Iowa & Co. R. Co., 54 Iowa 673, 7 N. W. 113; Doe v. Iowa & Co. R. Co., 54 Iowa 657, 7 N. W. 118; Hunnewell v. Cass County, 22 Wall. (U. S.) 464, 22 L. ed. 752; Colorado Co. v. Commissioners, 95 U. S. 259, 24 L. ed. 495; Litchfield

v. Webster County, 101 U. S. 773, 25 L. ed. 925; Central & Co. v. Howard, 52 Cal. 227.

<sup>76</sup> Postal Tel. Cable Co. v. Charleston, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. ed. 871; Home Ins. Co. v. Augusta, 93 U. S. 116, 23 L. ed. 825; Ratterman v. Western Union Tel. Co., 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. ed. 229; Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. ed. 672; Western Union Tel. Co. v. Alabama State Board, 132 U. S. 472, 10 Sup. Ct. 161, 33 L. ed. 409; Pacific Express Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. ed. 1035; Western Union Tel. Co. v. Charleston, 56 Fed. 419, citing Western Union Tel. Co. v. Massachusetts, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. ed. 790; Knoxville & Co. R. Co. v. Harris, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921; Delaware & Co. v. Commonwealth, 2 Inters. Com. R. 222, 1 L. R. A. 232. But see People v. Morgan, 168 N. Y. 1, 60 N. E. 1041. In the case of Western Union Tel. Co. v.

the national constitution, which governs the subject of interstate commerce, but a state can not, of course, enact any statute in reference to domestic commerce which will impair the obligation of a contract, deny the equal protection of the laws, or violate any other provisions of the federal constitution.

Texas, 105 U. S. 460, 26 L. ed. 1067, a distinction between interstate and domestic commerce was drawn and it was held that property within the state was subject to taxation. The question was considered in the case of *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. ed. 672, where it was said: "Taxation is undoubtedly one of the forms of regulation, but the power of each state to tax its own commerce, and the franchises, property or business of its own corporations engaged in such commerce has always been recognized, and the particular mode

of taxation in this instance is conceded to be in itself not open to objection, and while interstate commerce can not be regulated by a state by the laying of taxes thereon in any form, yet whenever the subject of taxation can be separated, so that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the distinction will be acted upon by the courts, and the state permitted to collect that arising upon commerce solely within its own territory."

## CHAPTER XXXII

### LOCAL ASSESSMENTS

Sec.	Sec.
945. Assessments and taxes—Distinction.	953. Right of way—Mode of assessing.
946. Local assessments—Power to levy.	954. Assessment for drainage purposes.
947. Statute must be complied with.	955. Bridges over natural water courses utilized for drainage purposes.
948. Property subject to local assessment—General rule.	956. Lien of the assessment—Personal liability.
949. Property of railroad companies.	957. Property secondarily liable—Back-lying property.
950. Right of way—Whether subject to assessment.	958. Assessment of right of way—Enforcing assessment.
951. Abutting property—Right of way is not.	959. Procedure.
952. Whether street railroads are subject to assessment.	

§ 945 (781). **Assessments and taxes—Distinction.**—There is a broad distinction between a local assessment and a tax levied for the purpose of raising governmental revenue.<sup>1</sup> The principal ground for the distinction is that local assessments are founded upon the theory that there is a special benefit resulting from the expenditure of the money derived from the assessment, while in the case of ordinary taxes there is a common benefit. Taxes proper, or ordinary taxes, are levied upon all property except certain classes specially exempted, such as property used for religious, charitable and kindred purposes, in order to secure

<sup>1</sup> *Roosevelt Hospital v. Mayor*, 84 N. Y. 108. In *Mix v. Ross*, 57 Ill. 121, it is said: "There is a plain distinction between taxes, which are burdens or charges imposed upon persons or property to raise money for public purposes, and assessments for city or village im-

provements, which are not regarded as burdens, but as an equivalent or compensation for the enhanced value which the property of the person assessed has derived from the improvement." See also *Elliott Roads and Streets* (3d ed.), §§ 662, 667, 670.



revenue to defray the expenses of the general government.<sup>2</sup> No special benefit accrues to anyone from the payment of taxes; the benefit is general, and accrues to all citizens and property alike, and consists in the general benefits which the government guarantees in the protection and enjoyment of life and property, and the promotion of those institutions which have for their object the welfare of all. Local assessments are not levied in order to raise general revenue for the purposes of government, but are charges assessed against the property of some particular locality because that property derives some special benefit from the expenditure of the money collected by the assessment in addition to the general benefit accruing to all property or citizens of the commonwealth.<sup>3</sup> The distinction is very clearly pointed out in those

<sup>2</sup> *Loan Association v. Topeka*, 20 Wall. (U. S.) 655, 664, 22 L. ed. 455; *Illinois Central R. Co. v. Decatur*, 147 U. S. 190, 13 Sup. Ct. 293, 37 L. ed. 132; *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255; *Elliott Roads and Streets* (3d ed.), § 662, et seq.

<sup>3</sup> *Willard v. Presbury*, 14 Wall. (U. S.) 676, 20 L. ed. 719; *Illinois &c. Co. v. Decatur*, 147 U. S. 190, 13 Sup. Ct. 293, 37 L. ed. 132; *McGehee v. Mathis*, 21 Ark. 40; *Emery v. San Francisco &c. Co.*, 28 Cal. 345; *Denver v. Knowles*, 17 Colo. 204, 30 Pac. 1041, 17 L. R. A. 135; *Speer v. Athens*, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402; *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255; *Chicago &c. Co. v. Joliet*, 154 Ill. 522, 39 N. E. 1077; *New Albany v. McCulloch*, 127 Ind. 500, 26 N. E. 1074; *Palmer v. Stumph*, 29 Ind. 329; *Hines v. Leavenworth*, 3 Kans. 186; *Lexington v. McQuillan*, 9 Dana (Ky.) 514; *Charnock v. Levee Co.*, 38 La. Ann. 323; *Moale v. Baltimore*, 5 Md. 314, 61 Am. Dec. 276; *Hoyt v. East Sagi-*

*naw*, 19 Mich. 39, 2 Am. Rep. 76; *Sewall v. St. Paul*, 20 Minn. 511; *Palmyra v. Morton*, 25 Mo. 593; *Sheehan v. Good Samaritan &c.*, 50 Mo. 155, 11 Am. Rep. 412; *Farrar v. St. Louis*, 80 Mo. 379; *Hurford v. Omaha*, 4 Nebr. 336; *State v. Dean*, 23 N. J. L. 335; *People v. Mayor*, 4 N. Y. 419, 55 Am. Dec. 266, and note; *Cain v. Commissioners*, 86 N. Car. 8; *King v. Portland*, 2 Ore. 146; *Commonwealth v. Woods*, 44 Pa. St. 113; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Cleveland v. Tripp*, 13 R. I. 50; *Winona &c. Co. v. Watertown*, 1 S. Dak. 46, 44 N. W. 1072; *Allen v. Galveston*, 51 Tex. 302; *Richmond &c. Co. v. Lynchburg*, 81 Va. 473; *Norfolk City v. Ellis*, 26 Grat. (Va.) 224; *Hale v. Kenosha*, 29 Wis. 599; *Cooley Taxation* (3d ed.), 1153, 1154. "Taxes are impositions for purposes of general revenue; assessments are special and local impositions upon property in the immediate vicinity for an improvement for the public welfare, which are necessary to

cases which hold that a statute exempting property from taxation does not exempt it from local assessments,<sup>4</sup> and also in those

pay for the improvement, and laid with reference to the special benefit which such property derives from such expenditure." *Reeves v. Treasurer*, 8 Ohio St. 333. The distinction between tax and a local assessment is very clearly pointed out by Chief Justice George in the case of *Macon v. Patty*, 57 Miss. 378, 386, 34 Am. Rep. 451, as follows: "A local assessment can only be levied on land; it can not, as a tax can, be made a personal liability of the tax-payer; it is an assessment on the thing supposed to be benefited. A tax is levied on the whole state or a known political subdivision, as a county or a town. A local assessment is levied on property situated in a district created for the express purpose of the levy, and possessing no other function, or even existence, than to be the thing on which the levy is made. A tax is a continuing burden, and must be collected at stated short intervals for all times, and without it government can not exist. A local assessment is exceptional, both as to time and locality—it is brought into being for a particular occasion, and to accomplish a particular purpose, and dies with the passing of the occasion and the accomplishment of the purpose. A tax is levied, collected and administered by a public agency, elected by and responsible to the community upon which it is imposed; a local assessment is made by an authority *ab extra*, yet it is like a tax in that it is imposed

under an authority derived from the legislature, and is an enforced contribution to the public welfare, and its payment may be enforced by the summary method allowed for the collection of taxes. It is like a tax in that it must be levied for a public purpose, and must be apportioned by some reasonable rule among those upon whose property it is levied. It is unlike a tax in that the proceeds of the assessment must be expended in an improvement from which a benefit clearly exceptive and plainly perceived must inure to the property upon which it is imposed."

<sup>4</sup> *Bridgeport v. New York &c. R. Co.*, 36 Conn. 255, 4 Am. Rep. 63; *Chicago &c. Co. v. People*, 120 Ill. 104, 11 N. E. 418; *Illinois &c. Co. v. Decatur*, 126 Ill. 92, 18 N. E. 315, 1 L. R. A. 613, and note, affirmed in 147 U. S. 190, 13 Sup. Ct. 293, 37 L. ed. 132; *First Presbyterian Church v. Fort Wayne*, 36 Ind. 338, 10 Am. Rep. 35; *Edwards &c. Co. v. Jasper County*, 117 Iowa 365, 90 N. W. 1006, 94 Am. St. 301; *Mt. Sterling v. Montgomery Co.*, 152 Ky. 637, 153 S. W. 952; *Mullins v. Mt. St. Mary's &c. Assn.*, 239 Mo. 681, 144 S. W. 109; *Mayor &c. of Baltimore v. Greenmount Cemetery*, 7 Md. 517; *Buffalo Cemetery v. Buffalo*, 46 N. Y. 506; *Roosevelt Hospital v. Mayor*, 84 N. Y. 108; *Olive Cemetery v. Philadelphia*, 93 Pa. St. 129, 39 Am. Rep. 732, and note. See also *State v. Binnering*, 42 N. J. 528, 1 Am. & Eng. R. Cas. 410; *Ford v. Delta*

which hold that the levy of a local assessment does not violate constitutional provisions requiring uniformity of taxation.<sup>5</sup>

**§ 946 (782). Local assessments—Power to levy.**—The authority or power to levy local assessments has for its foundation the general taxing power of the commonwealth.<sup>6</sup> The power to levy general taxes and local assessments comes from the same source. The power is usually conferred through legislative enactments upon local governmental instrumentalities, such as counties, cities, towns, and the like. For a time there was much

&c. Land Co., 164 U. S. 662, 17 Sup. Ct. 230, 41 L. ed. 590; *Seattle v. Mt. Pleasant &c. Co.*, 59 Wash. 41, 109 Pac. 1052, Ann. Cas. 1912A, 1047; *Arnold v. Knoxville*, 115 Tenn. 195, 90 S. W. 469, 3 L. R. A. (N. S.) 837, and note. But compare *Nova Scotia Car Works v. Halifax*, 47 Can. Sup. Ct. 406, Ann. Cas. 1913D, 1107; *Illinois Cent. Co. v. Decatur*, 154 Ill. 173, 38 N. E. 626; *Winona &c. Co. v. Watertown*, 1 S. Dak. 46, 44 N. W. 1072; *Whittaker v. Deadwood*, 23 S. Dak. 538, 122 N. W. 590, 139 Am. St. 1076.

<sup>5</sup> *Mayor of Birmingham v. Klein*, 89 Ala. 461, 8 L. R. A. 369; *Denver v. Knowles*, 17 Colo. 204, 30 Pac. 104, 17 L. R. A. 135; *Zanesville v. Richards*, 5 Ohio St. 589; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Reeves v. Treasurer*, 8 Ohio St. 333; *Arnold v. Knoxville*, 115 Tenn. 195, 90 S. W. 469, 3 L. R. A. (N. S.) 837 (citing Elliott on Roads & Sts. (3d ed.) § 663, and elaborately reviewing authorities.

<sup>6</sup> *Monticello v. Banks*, 48 Ark. 251; *Walsh v. Mathews*, 29 Cal. 123; *Adams County v. Quincy*, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155; *Hines v. Leavenworth*, 3 Kans. 186; *New Orleans Praying for Opening of*

*Streets*, 20 La. Ann. 497; *Baltimore v. Greenmount Cemetery*, 7 Md. 517; *Motz v. Detroit*, 18 Mich. 494; *McComb v. Bell*, 2 Minn. 256; *Glasgow v. Rowse*, 43 Mo. 479; *Sheehan v. Good Samaritan &c.*, 50 Mo. 155, 11 Am. Rep. 412; *St. Louis v. Allen*, 53 Mo. 44; *Keith v. Bingham*, 100 Mo. 300, 13 S. W. 683; *State v. Fuller*, 34 N. J. L. 227; *State v. Newark*, 35 N. J. L. 168; *People v. Mayor*, 4 N. Y. 419, 55 Am. Dec. 266, and note; *Van Antwerp*, In re, 56 N. Y. 261; *Reeves v. Treasurer*, 8 Ohio St. 333; *Pray v. Northern Liberties*, 31 Pa. St. 69; *Winona &c. Co. v. Watertown*, 1 S. Dak. 46, 44 N. W. 1072; *Austin v. Austin &c. Co.*, 69 Tex. 180, 2 S. W. 852; *Allen v. Drew*, 44 Vt. 174; *Weeks v. Milwaukee*, 10 Wis. 242. In the case of *Vacation of Centre Street*, In re, 115 Pa. St. 247, 8 Atl. 56, it is said: "Municipal assessments for grading, paving, opening, widening or vacating streets, and other purposes for which, within proper limits, they may be authorized, are referable solely to the taxing power. Indeed, there is nothing else upon which they can be sustained."

doubt as to the validity of statutes conferring upon municipalities the power to levy assessments to pay for local improvements, but the validity of such statutes is now so firmly established by judicial decisions as to be no longer considered an open question.<sup>7</sup> The right to levy a local assessment proceeds, and is justified, upon the theory that the property against which the assessment is placed is enhanced in value by the construction of the improvement to an amount equal to the assessment exacted.<sup>8</sup> It has been held that if the property against which an assessment has been levied has not been benefited by the improvement, the collection of the assessment may be enjoined,<sup>9</sup> but this doctrine is to be taken with careful qualification, for it is only in very clear

<sup>7</sup> *Wilmington v. Yopp*, 71 N. Car. 76; *Raleigh v. Peace*, 110 N. Car. 32, 14 S. E. 521, 17 L. R. A. 330; *Stroud v. Philadelphia*, 61 Pa. St. 255; *Elliott Roads and Streets* (3d ed.), § 662. "The subject has been thoroughly discussed and every principle bearing upon it severely analyzed in almost every state of the Union where the power has been exercised; and it is now as firmly established as any other doctrine of American law." *Palmyra v. Morton*, 25 Mo. 593.

<sup>8</sup> *Illinois Central R. Co. v. Decatur*, 147 U. S. 190, 13 Sup. Ct. 293, 37 L. ed. 132; *Davies v. Los Angeles*, 86 Cal. 37, 24 Pac. 771; *Fort Wayne v. Shoaff*, 106 Ind. 66; *Mock v. Muncie*, 9 Ind. App. 536, 37 N. E. 281, 32 N. E. 718; *Preston v. Rudd*, 84 Ky. 150; *Municipality No. 2 v. Dunn*, 10 La. Ann. 57; *New Orleans Praying for Opening of Streets*, 20 La. Ann. 497; *Auburn v. Paul*, 84 Maine 212, 24 Atl. 817; *Wright v. Boston*, 9 Cush. (Mass.) 233; *State v. Judges*, 51 Minn. 539, 53 N. W. 800; *Lockwood v. St. Louis*, 24 Mo. 20;

*Paterson v. Society*, 24 N. J. L. 385; *Litchfield v. Vernon*, 41 N. Y. 123; *Oregon &c. Co. v. Portland*, 25 Ore. 229, 35 Pac. 452, 22 L. R. A. 713; *Philadelphia v. Tryon*, 35 Pa. St. 401; *McGonigle v. Allegheny City*, 44 Pa. St. 118; *Mt. Pleasant v. Baltimore &c. R. Co.*, 138 Pa. St. 365, 20 Atl. 1052, 11 L. R. A. 520; *Allen v. Drew*, 44 Vt. 174. "The principle upon which rests that numerous class of statutes which charge lots of ground with the expense of grading and paving the streets in front of them is, that the value of the lots is enhanced by the public expenditure." *Schenley v. Commonwealth*, 36 Pa. St. 29, 78 Am. Dec. 359, and note.

<sup>9</sup> *Oregon &c. Co. v. Portland*, 25 Ore. 229, 35 Pac. 452, 22 L. R. A. 713. See *New York &c. R. Co. v. New Haven*, 42 Conn. 279, 19 Am. Rep. 534; *Bloomington v. Chicago &c. R. Co.*, 134 Ill. 451, 26 N. E. 366; *Mount Pleasant v. Baltimore &c. Co.*, 138 Pa. St. 365, 20 Atl. 1052, 11 L. R. A. 520.

cases that the courts can interfere.<sup>10</sup> Since the power to levy a local assessment depends upon a statutory enactment, it can have no existence unless there be a valid statute conferring it upon the municipality which claims the right to exercise it.<sup>11</sup> The general authority to levy taxes for municipal purposes is not broad enough to confer the right to levy assessments for local improvements.<sup>12</sup> A statute conferring such a power upon a municipality must be strictly construed in favor of the person against whom the assessment is levied.<sup>13</sup>

<sup>10</sup> Where the question of the amount of the benefit is committed to the judgment of the municipal officers, the courts can not control the assessment in that respect. *Motz v. Detroit*, 18 Mich. 494; *Ft. Wayne v. Cody*, 43 Ind. 197; *Le Roy v. Mayor*, 20 Johns. (N. Y.) 430, 11 Am. Dec. 289; *Mayor &c. Ex parte*, 23 Wend. (N. Y.) 277; *Mooers v. Smedley*, 6 Johns. Ch. (N. Y.) 28; *Brooklyn v. Meserole*, 26 Wend. (N. Y.) 132; *Lyon v. Brooklyn*, 28 Barb. (N. Y.) 609; *Commonwealth v. Woods*, 44 Pa. St. 113. See also *French v. Barber Asphalt Pav. Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. ed. 879; *Schaefer v. Werling*, 188 U. S. 516, 23 Sup. Ct. 449, 47 L. ed. 570; *Seattle v. Kelleher*, 195 U. S. 351, 25 Sup. Ct. 44, 49 L. ed. 232; *Louisville &c. R. Co. v. Barber Asphalt Pav. Co.*, 197 U. S. 430, 25 Sup. Ct. 466, 49 L. ed. 819; *Chadwick v. Kelley*, 187 U. S. 540, 23 Sup. Ct. 175, 47 L. ed. 293. See generally upon this subject, note to *Chicago &c. R. Co. v. Janesville*, 137 Wis. 7, as reported in 28 L. R. A. (N. S.) 1124.

<sup>11</sup> *Marion Trust Co. v. Indianapolis*, 37 Ind. App. 672, 75 N. E. 834, 836; *Niklaus v. Conkling*, 118 Ind. 289, 20 N. E. 797; *Second Ave.*

*Church, Matter of*, 66 N. Y. 395; *Griswold v. Pelton*, 34 Ohio St. 482.

<sup>12</sup> *Lott v. Ross*, 38 Ala. 156; *Hare v. Kennerly*, 83 Ala. 608, 3 So. 683; *Mayor &c. of Savannah v. Hartridge*, 8 Ga. 23; *Chicago v. Wright*, 32 Ill. 192; *Drake v. Phillips*, 40 Ill. 388; *Kyle v. Malin*, 8 Ind. 34; *Fairfield v. Ratcliff*, 20 Iowa 396; *Leavenworth v. Norton*, 1 Kans. 432; *Annapolis v. Harwood*, 32 Md. 471, 3 Am. Rep. 151; *Minn. &c. Co. v. Palmer*, 20 Minn. 468; *Board of Winston v. Taylor*, 99 N. Car. 210, 6 S. E. 114; *Cincinnati v. Bryson*, 15 Ohio 625, 45 Am. Dec. 593; *Mays v. Cincinnati*, 1 Ohio St. 268; *Richmond v. Daniel*, 14 Grat. (Va.) 385; *Green v. Ward*, 82 Va. 324; *Comrs. of Asheville v. Means*, 7 Ired. (Law) 406.

<sup>13</sup> *Walker v. District of Columbia*, 6 Mackey (D. C.) 352, 12 Cent. R. 408; *Augusta v. Murphey*, 79 Ga. 101, 3 S. E. 326; *Niklaus v. Conkling*, 118 Ind. 289, 20 N. E. 797; *Second Avenue Church, Matter of*, 66 N. Y. 395; *Reed v. Toledo*, 18 Ohio 161; *Griswold v. Pelton*, 34 Ohio St. 482; *Allentown v. Henry*, 73 Pa. St. 404; *Oshkosh &c. R. Co. v. Winnebago County*, 89 Wis. 435, 61 N. W. 1107.

§ 947 (783). **Statute must be complied with.**—Where the statute prescribes the mode in which the improvements shall be made and the assessment levied, that mode must be strictly pursued by the municipal authorities in making the levy.<sup>14</sup> “The mode,” it is said, “constitutes the measure of power.”<sup>15</sup> But the rule of construction is not so strict that a literal compliance with the statute in immaterial matters is necessary in every case. If there is a substantial compliance with the mode prescribed the assessment will usually be held valid.<sup>16</sup> So where the statute does not prescribe in detail the manner or mode in which an improvement shall be made and the assessment to pay for the same levied, but does in general terms grant the principal power to levy the assessment, the courts have held that all subordinate and incidental powers necessary to a valid exercise of the rights conferred by the statute pass with the grant of the principal power.<sup>17</sup>

<sup>14</sup> Taylor v. Downer, 31 Cal. 480; Smith v. Davis, 30 Cal. 536; Chicago v. Wright, 32 Ill. 192; Butler v. Nevin, 88 Ill. 575; Hager v. Burlington, 42 Iowa 661; Newman v. City, 32 Kans. 456, 4 Pac. 815; Lexington v. Headley, 5 Bush (Ky.) 508; Fayssoux v. Succession of Baroness De Chaurand, 36 La. Ann. 547; Bouldin v. Baltimore, 15 Md. 18; White v. Saginaw, 67 Mich. 33, 34 N. W. 255; Sewall v. St. Paul, 20 Minn. 511; Leach v. Cargill, 60 Mo. 316; St. Louis v. Ranken, 96 Mo. 497, 9 S. W. 910; Hurford v. Omaha, 4 Nebr. 336; State v. Bayonne, 44 N. J. L. 114; Merritt v. Portchester, 71 N. Y. 309, 27 Am. Rep. 47; Brophy v. Landman, 28 Ohio St. 542; Cambria Street, In re, 75 Pa. St. 357; Allen v. Galveston, 51 Tex. 302; Massing v. Ames, 37 Wis. 645. The provisions of the statute conferring the power to levy assessments should be construed as mandatory rather than directory. Mer-

ritt v. Portchester, 71 N. Y. 309, 27 Am. Rep. 47; Starr v. Burlington, 45 Iowa 87; State v. Jersey City, 38 N. J. L. 85; Cambria Street, 75 Pa. St. 357; Lux & Co. v. Donaldson, 162 Ind. 481, 68 N. E. 1014; Tulare Dist. v. Shepard, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. ed. 773; Elliott Roads & Sts. (3rd ed.) § 665.

<sup>15</sup> Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96, and note. See also Murphy v. Louisville, 9 Bush (Ky.) 189; Nicolson Paving Co. v. Painter, 35 Cal. 699.

<sup>16</sup> Springfield v. Sale, 127 Ill. 359, 20 N. E. 86; Jenkins v. Stetler, 118 Ind. 275, 20 N. E. 788; Lynam v. Anderson, 9 Nebr. 367, 2 N. W. 532; State v. South Orange, 46 N. J. L. 317; Stebbins v. Kay, 4 N. Y. S. 566; Parish v. Golden, 35 N. Y. 462.

<sup>17</sup> Cook Co. v. McCrea, 93 Ill. 236; Smith v. Madison, 7 Ind. 86; McNamara v. Estes, 22 Iowa 246; Spaulding v. Lowell, 23 Pick.

As the power to improve streets and the like is a continuing one, it has been held that the levy of one local assessment does not exhaust the power of the municipality, and second and subsequent assessments may be levied against the same property to pay for repairs, repaving, additional improvements, and the like.<sup>18</sup> It is obvious that if this power were not a continuing one it would be impossible to repair, replace or extend an improvement when the same becomes out of repair, or inadequate for the purposes for which it was made.

**§ 948 (784). Property subject to local assessment—General rule.**—The general rule is that all lands lying within the designated limits of the district or locality for which a local improvement is made, by whomsoever held or owned, are subject and liable to an assessment to aid in paying the cost of constructing such improvement,<sup>19</sup> and this rule is enforced, even though there be a statute exempting particular property from taxation. Thus it has been held that statutes exempting cemeteries, churches, charitable institutions and the like from taxation, does not relieve them from assessments to pay for local improvements from

(Mass.) 71; *Bigelow v. Perth Amboy*, 26 N. J. L. 297; *State v. Jersey City*, 30 N. J. L. 148; *Smith v. Newbern*, 70 N. Car. 14, 16 Am. Rep. 766; *Schenley v. Commonwealth*, 36 Pa. St. 29, 78 Am. Dec. 359, and note.

<sup>18</sup> *Goszler v. Georgetown*, 6 Wheat. (U. S.) 593, 5 L. ed. 339; *Chicago &c. Co. v. Quincy*, 136 Ill. 563, 27 N. E. 192, 29 Am. St. 334; *Board v. Fullen*, 111 Ind. 410; *Wilkins v. Detroit*, 46 Mich. 120, 8 N. W. 701; *Sheley v. Detroit*, 45 Mich. 431, 8 N. W. 52; *Farrar v. St. Louis*, 80 Mo. 379; *Estes v. Owen*, 90 Mo. 113; *State v. Hotaling*, 44 N. J. L. 347; *Burmeister*, *In re*, 76 N. Y. 174.

<sup>19</sup> *Elliott Roads and Streets* (3d ed. § 669, et seq.). See Broad-

way Church v. McAtee, 8 Bush (Ky.) 508, 8 Am. Rep. 480. In *Louisville Transfer Co. v. Obst* (Ky.), February, 1875, the court said: "Real property held by railroad companies within the corporate limits of the city of Louisville is not exempt from street taxation. The terms of the grant of the power to tax for such purposes includes all real estate, and that held by railroad companies, like that held by churches, colleges, hospitals, and other institutions of like character, must bear its proportion of the local burden. There is no constitutional restriction to impose local taxation upon railroad companies. It is merely a question of local policy."

which they derive a special benefit.<sup>20</sup> Statutes under which an exemption from local assessment is asserted must be strictly construed against the person claiming the exemption, and liberally in favor of the assessment.<sup>21</sup> The enforcement of such assessment is placed on the ground that the statutes are intended only to relieve from the burdens of general taxation, and that local assessments are a species of special taxation not included in the general term taxation. But where the statutes provide that the property shall be exempt from taxation and assessments of every kind, it has been held that local assessments can not be levied against such property.<sup>22</sup>

**§ 949 (785). Property of railroad companies.**—As to the liability of lands owned by railroad companies as part of their right of way, or as necessary to the operation of their roads, to local assessments, there is some conflict among the authorities.<sup>23</sup> Some of the authorities make a distinction on the ground of the nature of the uses to which the lands are put. For the purposes of our discussion we will divide the lands owned by railroads into two classes, viz., that occupied by and used as a right of way, and that used for other purposes, such as shops, warehouses, depots,

<sup>20</sup> *Illinois Central Co. v. Decatur*, 147 U. S. 190, 13 Sup. Ct. 293, 37 L. ed. 132; *Chicago &c. Co. v. People*, 120 Ill. 104, 11 N. E. 418; *Worcester Agricultural Society v. Worcester*, 116 Mass. 189; *Sheehan v. Good Samaritan*, 50 Mo. 155, 11 Am. Rep. 412; *Paterson v. Society*, 24 N. J. L. 385; *State v. Newark*, 27 N. J. L. 185; *Harvey v. South Chester*, 99 Pa. St. 565; *Sewickley &c. Church's Appeal*, 165 Pa. St. 475, 30 Atl. 1007; *Beals v. Providence Rubber Co.*, 11 R. I. 381, 23 Am. Rep. 472; *Allen v. Galveston*, 51 Tex. 302; *Chicago &c. R. Co. v. Milwaukee*, 89 Wis. 506, 62 N. W. 417, 28 L. R. A. 249. And it has been held that a railway is not a "public highway" within a stat-

ute exempting public highways from local assessments. *Nevada v. Eddy*, 123 Mo. 546, 27 S. W. 471. Authorities, ante § 945.

<sup>21</sup> *Roosevelt Hospital v. Mayor*, 84 N. Y. 108.

<sup>22</sup> *First Division St. Paul &c. Co. v. St. Paul*, 21 Minn. 526; *Brightman v. Kirner*, 22 Wis. 54. A statute providing that "no tax or impost" shall be levied does not exempt from local assessments. *State v. Jersey City*, 42 N. J. L. 97, 1 Am. & Eng. R. Cas. 406; *State v. Elizabeth*, 37 N. J. L. 330.

<sup>23</sup> There can be no doubt that property held by a railroad company for purposes not connected with the operation of the road is subject to assessment in a proper



depot grounds, and the like. The liability of the right of way to local assessments will be considered in the next and succeeding sections. While there may be some conflict in the decisions, the overwhelming weight of authority is that depots, depot grounds, and other lands owned by railway companies and not occupied as a right of way, are subject to local assessments the same as the lands owned by an individual.<sup>24</sup>

case. Where the property is not used in operating the road the company holds it substantially as property is held by individuals or strictly private corporations.

<sup>24</sup> *Bradley v. New York &c. Co.*, 21 Conn. 294; *New York &c. R. Co. v. New Britain*, 49 Conn. 40; *Chicago &c. Co. v. Chicago*, 139 Ill. 573, 28 N. E. 1108; *Chicago &c. Co. v. People*, 120 Ill. 104, 11 N. E. 418; *Burlington &c. Co. v. Spearman*, 12 Iowa 112. *Ludlow v. Cincinnati Southern*, 78 Ky. 357, 7 Am. & Eng. R. Cas. 231; *Nevada v. Eddy*, 123 Mo. 546, 27 S. W. 471; *Erie R. Co. v. Paterson*, 72 N. J. 83, 59 Atl. 1031; *New Jersey &c. Co. v. Mayor*, 42 N. J. L. 97; *Morris &c. R. Co. v. Jersey City*, 65 N. J. L. 683, 48 Atl. 1117; *Alexander Ave. In re*, 17 N. Y. S. 933; *Mt. Pleasant v. Baltimore &c. Co.*, 138 Pa. 365, 20 Atl. 1052, 11 L. R. A. 520; *Chicago &c. R. Co. v. Milwaukee*, 89 Wis. 506, 28 L. R. A. 249; *Reopening of Berks St.*, 12 W. N. C. 10. See also *Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190, 13 Sup. Ct. 293, 37 L. ed. 132; *Illinois Cent. R. Co. v. People*, 170 Ill. 224, 48 N. E. 215; *Pittsburgh &c. R. Co. v. Hays*, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597; *Atchison &c. R. Co. v. Peterson*, 58 Kans. 818, 51 Pac. 290; *Drainage Dist. v. Chicago &c. R. Co.*, 96 Nebr. 1, 146 N. W. 1055; *Philadelphia v. Philadelphia &c. R. Co.*, 177 Pa. St. 292, 35 Atl. 610, 34 L. R. A. 564. In the case of *Chicago &c. Co. v. People*, 120 Ill. 667, 12 N. E. 207, 31 Am. & Eng. R. Cas. 487, the court said: "Whatever may be said in regard to the mere track of the railway, it is impossible to see why depot grounds, and other real estate used by the company, may not be benefited by improvements of the character here contemplated, at least, as much as may be the public square occupied by the county court-house, the canal lands, and the lot occupied by the church, by like improvements; and since the question of jurisdiction turns upon the right of inquiry, and not upon the correctness of decision, it is enough that railroad property may sometimes, under certain circumstances, be specially benefited by improvements of the general character of the present." "We are of the opinion that, while the road-bed or right of way of a railroad company is not the subject of the claim for paving, it does not follow that a passenger depot or freight depot, the ground belonging to the company and used as a lumber yard, or other purpose,

**§ 950 (786). Right of way—Whether subject to assessment.**—As said in the preceding section, there is a conflict in the adjudicated cases as to whether or not the right of way of a railroad company is subject to local assessments. The question has been discussed in a great number of instances, and different conclusions reached in apparently similar cases. The latest authorities on the subject, however, recognize what we believe to be the true rule, and that is, that, where the right of way receives a benefit from the improvement for which the assessment is levied, and there is no statute exempting the railroad company from local assessments in clear and unequivocal terms, it is subject to assessment.<sup>25</sup>

may not be subject to such a charge." *Mt. Pleasant v. Baltimore &c. Co.*, 138 Pa. 365, 20 Atl. 1052, 11 L. R. A. 520. *Contra*, *New York &c. Co. v. New Haven*, 42 Conn. 279, 19 Am. Rep. 534. The decision in this case, it seems, was placed on the ground that it was not shown that the railway company reaped any advantage from the improvement.

<sup>25</sup> *Illinois Central Co. v. Decatur*, 147 U. S. 190, 13 Sup. Ct. 293, 37 L. ed. 132, 54 Am. & Eng. R. Cas. 282; *Chicago v. Baer*, 41 Ill. 306; *Jacksonville R. Co. v. Jacksonville*, 114 Ill. 562, 2 N. E. 478; *Chicago &c. Co. v. People*, 120 Ill. 104, 11 N. E. 418; *Illinois Central v. Decatur*, 126 Ill. 92, 18 N. E. 315, 1 L. R. A. 613, and note; *Illinois Central v. Mattoon*, 141 Ill. 32, 30 N. E. 773; *Kuehner v. Freeport*, 143 Ill. 92, 32 N. E. 372, 17 L. R. A. 774; *Lightner v. Peoria*, 150 Ill. 80, 37 N. E. 69; *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255; *Illinois Cent. R. Co. v. People*, 170 Ill. 224, 48 N. E. 215; *Little v. Chicago*, 46 Ill. App. 534; *Peru &c. Co. v. Hanna*, 68 Ind.

562; *Pittsburgh &c. R. Co. v. Taber*, 168 Ind. 419, 77 N. E. 741; *Burlington &c. Co. v. Spearman*, 12 Iowa 112; *Muscatine v. Chicago &c. R. Co.*, 79 Iowa 645, 44 N. W. 909; *Atchison &c. R. Co. v. Peterson*, 58 Kans. 818, 51 Pac. 290; *Ludlow v. Cincinnati &c. R. Co.*, 78 Ky. 357; *Heman &c. Co. v. Wabash R. Co.*, 206 Mo. 172, 104 S. W. 67, 12 L. R. A. (N. S.) 112, 121 Am. St. 649, 659 (quoting text); *Transportation Co. v. Elizabeth*, 37 N. J. L. 330; *Railroad Co. v. Jersey City*, 42 N. J. L. 97; *State v. Passaic*, 54 N. J. L. 340, 23 Atl. 945; *Northern Pac. R. Co. v. Richland County*, 28 N. Dak. 172, 148 N. W. 545, Ann. Cas. 1916E, 574 (quoting text); *Northern &c. Co. v. Connelly*, 10 Ohio St. 159, 36 Am. Dec. 82, and note. See *Trustees v. Chicago*, 12 Ill. 403. See also *Louisville &c. R. Co. v. Barber Asphalt Pav. Co.*, 197 U. S. 430, 25 Sup. Ct. 466, 49 L. ed. 821; note in 12 L. R. A. (N. S.) 112, 40 L. R. A. (N. S.) 935; and in Ann. Cas. 1916E, 581. In *Northern &c. R. Co. v. Connelly*, 10 Ohio St.

But some of the authorities hold that the making of a local improvement, such as a street, along or near a railway right of way, cannot possibly be a benefit to the company; that it can run its trains as well without the improvement as with it, and therefore that no assessment can be levied.<sup>26</sup> One court, addressing

159, it was said: "If railroad tracks are taxable, for general purposes, it is difficult to perceive why they should not be subject also to special taxes or assessments. The company, to advance its own interests, has seen fit to appropriate to its use grounds within the corporate limits of the city of Toledo, and over which the city had the power of making assessments to defray the expense of local improvements, and why should not the company be held to have taken it cum onere? A citizen would scarcely claim exemption, because he had devoted his lot to uses which the improvement could not in any way advance, and we see no good reason why a railroad company should be permitted to do so. The company have the exclusive right to the possession, so long as it is used for the road, and if the road-bed was exempt from taxation for general purposes, it would by no means follow that it was not liable for such special assessments." See also *City of Lincoln v. Chicago &c. R. Co.*, 262 Ill. 11, 104 N. E. 277; *City of Lincoln v. Chicago &c. R. Co.*, 262 Ill. 98, 104 N. E. 282. In *Chicago &c. Co. v. Joliet*, 153 Ill. 649, 39 N. E. 1079, it was said: "Where a railway is contiguous to a proposed street improvement, it falls within the designation of property that may

be specially taxed for the making of the local improvement." *Contra Allegheny &c. Co. v. Western &c. Co.*, 138 Pa. St. 375.

<sup>26</sup> *Bridgeport v. New York &c. Co.*, 36 Conn. 255, 4 Am. Rep. 63; *Detroit &c. R. Co. v. Grand Rapids*, 106 Mich. 13, 63 N. W. 1007, 28 L. R. A. 793; *Lake Shore &c. R. Co. v. Grand Rapids*, 102 Mich. 374, 60 N. W. 767, 29 L. R. A. 195; *Public Parks, Matter of*, 47 Hun (N. Y.) 302; *Philadelphia v. Philadelphia &c. Co.*, 33 Pa. St. 41; *Chicago &c. R. Co. v. Milwaukee*, 89 Wis. 506, 62 N. W. 417, 28 L. R. A. 249. In *Mt. Pleasant v. Baltimore &c. Co.*, 138 Pa. St. 365, 20 Atl. 1052, the court said: "It requires no argument to show that the paving of a footway by the side of a railroad track can confer no possible benefit upon the property known as the right of way, hence the whole theory which justifies such charges fails in this instance. But this reason does not apply to a railroad station where passengers assemble to take a train; much less does it apply to ground used as a freight station or lumber yard." It has also been held that the right of way of an interurban railway along a city street is not real estate on which the company can be assessed under the Indiana law for a drain or sewer. *Haynes Automobile Co. v.*

itself to this subject, has said: "Where we can declare as a matter of law no such benefit can arise, the legislature is powerless to impose such a burden. It would not be a tax in any proper sense of the term; it would be in the nature of a forced loan, and would practically amount to confiscation."<sup>27</sup> Thus, where a street crosses a railway right of way at right angles, it has been held that no benefit accrues to the railway company from the improvement of the street, and that no assessment can be levied.<sup>28</sup> And where a railway company has a mere right of way across a lot to which it does not hold title, it cannot be assessed for the construction of an improvement adjoining the

Kokomo, 186 Ind. 9, 114 N. E. 758. See also *South Park Borough v. Pennsylvania R. Co.*, 251 Pa. 261, 96 Atl. 710. But compare *Marion & C. Trac. Co. v. Simmons*, 180 Ind. 289, 102 N. E. 132; *Pittsburgh & C. R. Co. v. Taber*, 168 Ind. 419, 77 N. E. 741; *Des Moines City R. Co. v. Des Moines*, 183 Iowa 984, 159 N. W. 450, L. R. A. 1918D, 839.

<sup>27</sup> *Allegheny City v. West Pennsylvania R. Co.*, 138 Pa. St. 375, 21 Atl. 763. See also *Farmers' & C. Co. v. Ansonia*, 61 Conn. 76, 23 Atl. 705; *Boston v. Boston & C. R. Co.*, 170 Mass. 95, 49 N. E. 95; *Detroit & C. R. Co. v. Grand Rapids*, 106 Mich. 13, 63 N. W. 1007, 28 L. R. A. 793, 58 Am. St. 466.

<sup>28</sup> *State v. Elizabeth*, 37 N. J. L. 330; *New York & C. Co. v. Morrisania*, 7 Hun (N. Y.) 652; *Junction & C. Co. v. City*, 88 Pa. St. 424; *Great Eastern & C. Co. v. Hackney District*, L. R. 8 App. Cas. 687. See *Salem v. Henderson*, 13 Ind. App. 563, 41 N. E. 1062. If the right of way is broader than necessary for the track, the surplus may be assessed. *New York & C. Co. v. Morrisania*, 7 Hun (N. Y.) 652.

Compare *Northern & C. Co. v. Connelly*, 10 Ohio St. 159, 36 Am. Dec. 82, and note; *Chicago & C. Co. v. Chicago*, 139 Ill. 573, 28 N. E. 1108. The doctrine of the text was declared and enforced in the recent case of *Detroit & C. R. Co. v. Grand Rapids*, 106 Mich. 13, 63 N. W. 1007, 28 L. R. A. 793, 58 Am. St. 466, where it was said: "The right of way so assessed contains the main track and one side track. It has nothing else upon it, and is used for no other purpose. It has already been dedicated to a public use, and the question is presented whether a railroad right of way can be assessed by municipal corporations for public improvements. So far from being any benefit, it is established by the evidence that the opening and paving of the street were a damage to the complainant. A right of way can not be benefited by the opening and paving of a street across it. None of the buildings of the complainant are within two blocks of this crossing. We can see no benefits, immediate or prospective, to the complainant. The division of the

lot.<sup>29</sup> In many of the cases in which it was held that the right of way could not be assessed, the improvement, to pay for which the assessment was sought to be levied, was a street, and it clearly appeared that no benefit resulted to the right of way, but where it clearly appears that a benefit results from the improvement, such as the benefit derived from the construction of a street drain, sewer, or the like, the levy of the assessment may be proper and valid.<sup>30</sup> So, it has been held that the fact that the

right of way into three parcels was arbitrary, as were also the valuations and supposed benefits. The point is so clearly and concisely stated by the court of Pennsylvania, that we quote the opinion in *Philadelphia v. Philadelphia W. & B. R. Co.*, 33 Pa. St. 41: "The municipal authorities paved the Gray's Ferry road for a considerable distance, at a place where it lies side by side with the defendant's railroad; and now seek to charge them with the half of the cost of it; but they can not do it. Their claim has no foundation, either in the letter of the law or in its spirit, or in the form of the remedy. Not in the letter, because the defendants do not own the land sought to be charged, and have only their right of way over it. Not in the spirit, because the paving laws are means of compulsory contribution among the common sharers in a common benefit, and as a railroad can not, from its very nature, derive any benefit from the paving, while all the rest of the neighborhood may, we can not presume that the compulsion was intended to be applied to them. Not in the form of the remedy, because the execution of this sort of claim is, *levari facias*, a writ

not commonly allowed against corporations, and which would hardly produce much when directed against a public right of way. It would be strange legislation that would authorize the soil of one public road to be taxed in order to raise funds to make or improve a neighboring one." The same doctrine is held in *Junction R. Co. v. Philadelphia*, 88 Pa. 424; *State v. Elizabeth*, 37 N. J. L. 331; *New York & C. R. Co. v. Morrisania Trustees*, 7 Hun (N. Y.) 652; *Bloomington v. Chicago & A. R. Co.*, 134 Ill. 451, 26 N. E. 366; *Bridgeport v. New York & C. R. Co.*, 36 Conn. 255, 4 Am. Rep. 63; *South Park Comrs. v. Chicago & C. R. Co.*, 107 Ill. 105; *New York & C. R. Co. v. New Haven*, 42 Conn. 279, 19 Am. Rep. 534." See *Pittsburgh & C. R. Co. v. Taber*, 168 Ind. 419, 77 N. E. 741, where it is held that the abutting railroad right of way is subject to assessment for improvement of the part of a street through the right of way, though the fee of such land is in the railroad company subject to the easement of the street.

<sup>29</sup> *Muscatine v. Chicago & C. Co.*, 88 Iowa 291, 55 N. W. 100.

<sup>30</sup> *North Beach & C. Co.*, Appeal of, 32 Cal. 499; *Bloomington v.*

only use made of a lot abutting on a street improvement is for a railroad right of way, does not make an assessment thereon invalid on the alleged ground that there can be no benefit.<sup>31</sup> But it is evident the special benefit for which the assessment is made must often be more restricted in some railroad cases than in the case of an ordinary landowner whose lands may be devoted to many uses or purposes.<sup>32</sup>

**§ 951 (787). Abutting property—Right of way is not.**—Where a railway company has its track or right of way in a street, it has been held that the right of way is not assessable as property "abutting on the street,"<sup>33</sup> or as property "bordering on or touch-

Railroad Co., 134 Ill. 451, 26 N. E. 366; *Louisville &c. Co. v. Boney*, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435, and note; *Louisville &c. Co. v. State*, 122 Ind. 443, 24 N. E. 350; *Troy &c. Co. v. Kane*, 9 Hun (N. Y.) 506; *Northern Pac. R. Co. v. Richland County*, 28 N. Dak. 172, 148 N. W. 545, Ann. Cas. 1916E, 574, and elaborate note. Thus a street railway has been held liable to an assessment for the widening of a street. *North Beach &c. R. Co., Appeal of*, 32 Cal. 499.

<sup>31</sup> *Louisville &c. R. Co. v. Barber Asphalt Pav. Co.*, 197 U. S. 430, 25 Sup. Ct. 466, 49 L. ed. 819. Compare *Chicago &c. R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. ed. 979; *Martin v. District of Columbia*, 205 U. S. 135, 27 Sup. Ct. 440, 51 L. ed. 743. And a few courts hold that the right of way, at least in ordinary cases, will be conclusively presumed to be benefited. See note in Ann. Cas. 1916E, 579.

<sup>32</sup> See *City of Lincoln v. Chicago &c. R. Co.*, 262 Ill. 11, 104

N. E. 277; *City of Lincoln v. Chicago &c. R. Co.*, 263 Ill. 114, 104 N. E. 1022. The whole subject of this section is considered and the authorities on both sides of the main question and its various phases are reviewed in note to *Heman &c. Co. v. Wabash R. Co.*, 206 Mo. 172, in 12 L. R. A. (N. S.) 112; and note to *Georgia R. &c. Co. v. Decatur*, 137 Ga. 537, 73 S. E. 830, in 40 L. R. A. (N. S.) 935.

<sup>33</sup> *South Park Commissioners v. Chicago &c. Co.*, 13 Am. & Eng. R. Cas. 415; *State v. Mayor* (N. J.), 50 Atl. 620 (citing text). See also *State v. District Court*, 31 Minn. 354, 17 N. W. 954; *O'Reilly v. Kingston*, 114 N. Y. 439, 21 N. E. 1004; *People v. Gilon*, 126 N. Y. 147, 27 N. E. 282; *Oshkosh City R. Co. v. Winnebago Co.*, 89 Wis. 435, 61 N. W. 1107. But see post, § 953. See generally as what is meant by "abutting." *City of Shreveport v. Shreveport Trac. Co.*, 134 La. 568, 64 So. 414; *Texas Bitulithic Co. v. Abilene St. R. Co.* (Tex. Civ. App.), 166 S. W. 433.

ing the street.”<sup>34</sup> It is held that where the only interest a railway company has in a right of way laid in a street is the right to run its trains over the track, it cannot be assessed for a local improvement.<sup>35</sup> But where the tracks of a company are laid in a street the company is liable to assessment for keeping the street in repair.<sup>36</sup> And it has also been held that a railroad right of way located in a public street is liable to assessment for a local improvement under the Illinois statute, providing for local improvements by special assessment of “contiguous property.”<sup>37</sup> But it is held in Iowa that a railroad right of way alongside, but not in a street, cannot be assessed under a statute authorizing assessments against lots and parcels of land fronting on the highway or upon a railroad occupying a portion of a street, and that a lessee which has agreed to pay all taxes and assessments is not liable to a city or contractor, neither of whom is in privity with it, for the amount of a local assessment.<sup>38</sup> The same court, however, has held that the interest of an inter-urban or street railway company in a strip of land granted to it for the operation of its road, to revert on cessation of such

<sup>34</sup> *O'Reilly v. Kingston*, 114 N. Y. 439, 21 N. E. 1004. Statutes conferring authority to levy and enforce are, as we have seen, to be strictly construed, and it is difficult to perceive any valid reason for holding a right of way on which tracks are laid to be property or lots fronting, abutting or bordering on a street.

<sup>35</sup> *Louisville &c. Co. v. East St. Louis*, 134 Ill. 656, 25 N. E. 962.

<sup>36</sup> *Fair Haven &c. Co. v. New Haven*, 38 Conn. 422, 9 Am. Rep. 399; *Chicago v. Baer*, 41 Ill. 306. See also *Page v. Chicago*, 60 Ill. 441; *People v. Chicago &c. R. Co.*, 67 Ill. 118; *Louisville &c. R. Co. v. State*, 3 Head (Tenn.) 524; *Memphis &c. R. Co. v. State*, 87 Tenn. 746, 11 S. W. 946; *Eyler v.*

*Allegheny Co.*, 49 Md. 257, 33 Am. Rep. 249; *Elliott Roads and Streets*, 591. 592 (3rd ed.), § 985, et seq. *Contra*, *Mayor v. Royal &c. Co.*, 45 Ala. 322. The question as to the liability of street railway companies and the distinction between improvements and repairs in such cases will be treated in another chapter.

<sup>37</sup> *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255. See also *Chicago &c. R. Co. v. Joliet*, 153 Ill. 649, 39 N. E. 1077, 1079; *Chicago &c. R. Co. v. Elmhurst*, 165 Ill. 148, 152, 46 N. E. 437. Compare also *International &c. R. Co. v. Boles* (Tex. Civ. App.), 161 S. W. 914.

<sup>38</sup> *Chicago &c. R. Co. v. Ottumwa*, 112 Iowa 300, 83 N. W. 1074, 51 L. R. A. 763.

use, is property which may be assessed as abutting property where there is a strip of highway on each side, from which it is separated by a curb.<sup>39</sup>

§ 952 (787a). **Whether street railroads are subject to assessment.**—The same lack of harmony in the decisions noted in the preceding section is shown in the cases relating to the right of a city to levy special assessments on street railway tracks laid in the streets. Special assessment statutes have been regarded as in derogation of the rights of property, and hence to be strictly construed.<sup>40</sup> In conformity with this view it has been held that street surface railroads are not subject to assessment for street improvements unless the law has made them specially liable thereto.<sup>41</sup> Thus, statutes placing the burden on “abutting” property will not cover street railway tracks, since the street railroad company does not own any part of the street, nor is it abutting property.<sup>42</sup> Neither does the fact that the street railroad company is bound by law to make permanent repairs upon the portion of the street between its tracks render the property subject to these assessments.<sup>43</sup> And it has been held that the track is not “real estate” within the meaning of a charter making real estate liable to special assessment for street improvements.<sup>44</sup> Another case holds that a statute pro-

<sup>39</sup> *Des Moines City Ry. Co. v. Des Moines*, 183 Iowa 984, 159 N. W. 450, L. R. A. 1918D, 839.

<sup>40</sup> *Oshkosh &c. R. Co. v. Winnebago Co.*, 89 Wis. 435, 61 N. W. 1107.

<sup>41</sup> *People v. Gilon*, 126 N. Y. 147, 27 N. E. 282. See also *Seattle v. Seattle Elec. Co.*, 48 Wash. 599, 94 Pac. 194, 15 L. R. A. (N. S.) 486, and cases there cited in note.

<sup>42</sup> *South Park Comrs. v. Chicago &c. R. Co.*, 107 Ill. 105; *Haynes Automobile Co. v. Kokomo*, 186 Ind. 9, 114 N. E. 758; *Indianapolis &c. R. Co. v. Capitol Pav. &c. Co.*, 24 Ind. App. 114, 54 N. E. 1076;

*Koons v. Lucas*, 52 Iowa 177, 3 N. W. 84; *O'Reilly v. Kingston*, 114 N. Y. 499, 21 N. E. 1004; *Houston &c. R. Co. v. Storrie* (Tex. Civ. App.), 44 S. W. 693; *Oshkosh &c. R. Co. v. Winnebago County*, 89 Wis. 435, 61 N. W. 1107.

<sup>43</sup> *Conway v. Rochester*, 24 App. Div. 489, 49 N. Y. S. 244; *Oshkosh &c. R. Co. v. Winnebago Co.*, 89 Wis. 435, 61 N. W. 1107. See also *Farmers' T. Co. v. Ansonia*, 61 Conn. 76, 23 Atl. 705.

<sup>44</sup> *State v. District Court*, 31 Minn. 354, 17 N. W. 954. Compare also *Haynes Automobile Co.*



viding that the track and right of way of railroad companies shall be exempt from taxation, "except that the same shall be subject to special assessments for local improvements in cities and villages," is, at most, a mere general declaration that the property shall be subject to such assessment in cases provided by law, and hence the power to levy such an assessment must be found in some other statute.<sup>45</sup> Under the Illinois statute, which makes contiguous property liable to assessment, the authorities are numerous and consistent, to the effect that the street railroad track is subject to assessment. Here it is held that the property of a street railroad company is of a character to be substantially and directly benefited by the proposed paving of a street, and that in proportion as it is thus benefited it should contribute its share to the cost of the improvement in common with the property on the street.<sup>46</sup> The same rule is held to apply to an elevated railroad.<sup>47</sup> It is clear that the street railroad company will be liable to assessment where it accepts a charter under which it consents to bear its proportion of the cost of the improvement of streets traversed by it.<sup>48</sup>

**§ 953 (788). Right of way—Mode of assessing.**—Where the right of way of a railroad company is liable to an assessment

v. Kokomo, 186 Ind. 9, 114 N. E. 758. But see note in 15 L. R. A. (N. S.) 489.

<sup>45</sup> Oshkosh &c. R. Co. v. Winnebago Co., 89 Wis. 435, 61 N. W. 1107.

<sup>46</sup> Chicago v. Baer, 41 Ill. 306; Parmelee v. Chicago, 60 Ill. 267; Kuehner v. Freeport, 143 Ill. 92, 32 N. E. 372, 17 L. R. A. 774; Lightner v. Peoria, 150 Ill. 80, 37 N. E. 69; Billings v. Chicago, 167 Ill. 337, 47 N. E. 731; West Chicago &c. R. Co. v. Chicago, 178 Ill. 339, 53 N. E. 112; Cicero &c. R. Co. v. Chicago, 176 Ill. 501, 52 N. E. 866. Such is the prevailing rule where the statute is broad

enough. Shreveport v. Shreveport &c. R. Co., 104 La. 260, 29 So. 129; New Haven v. Fair Haven &c. R. Co., 38 Conn. 422, 9 Am. Rep. 399; Freeport St. R. Co. v. Freeport, 151 Ill. 451, 38 N. E. 137; Troy &c. R. Co. v. Kane, 9 Hun (N. Y.) 506. See also Des Moines City Ry. Co. v. Des Moines, 183 Iowa 984, 159 N. W. 450, L. R. A. 1918D, 839.

<sup>47</sup> Lake St. El. R. Co. v. Chicago, 183 Ill. 75, 55 N. E. 721, 47 L. R. A. 624.

<sup>48</sup> Schmidt v. Market St. &c. R. Co., 90 Cal. 37, 39, 27 Pac. 61. See also Municipal Securities Corp. v. Metropolitan St. R. Co., 196 Mo. App. 518, 196 S. W. 400.

to pay for a local improvement there seems to be no distinction between the mode of assessing it and other lands subject to the assessment for the same improvement, where the right of way bears the same relation to the street as other lands adjoining the street. But where the railway runs longitudinally along the street a special rule usually applies. The different modes of assessment which have been held valid in assessing local charges against the lands of individuals and lands not occupied as a right of way by a railway company seem to be equally applicable to lands occupied as a railway right of way. Thus, where the mode of assessment to pay for the improvement of a street was by assessments levied in proportion to the front feet abutting on the improvement, it was held that a railway right of way abutting on the improvement was subject to assessment as abutting property, the same as other lands or lots.<sup>49</sup> Where a railroad track ran longitudinally through a street, a statute making the company liable to local assessment for improving the street for the proportional amount of the street occupied by the track was held to be valid.<sup>50</sup>

**§ 954 (788a). Assessment for drainage purposes.**—It is certainly within the power of the legislature, in proper cases, to require a railroad company, whose right of way is benefited by a system of drainage, to bear its proportion of the expense of

<sup>49</sup> *Chicago v. Baer*, 41 Ill. 306; *Illinois Cent. Co. v. Decatur*, 126 Ill. 92, 18 N. E. 315, 1 L. R. A. 613, and note; *Chicago & Co. v. Joliet*, 153 Ill. 655, 39 N. E. 1077; *Lake Erie & Co. v. Walters*, 9 Ind. App. 684, 37 N. E. 295; *Burlington & Co. v. Spearman*, 12 Iowa 112; *Northern & Co. v. Connelly*, 10 Ohio St. 159, 36 Am. Dec. 82, and note. See also *Pittsburgh & R. Co. v. Taber*, 168 Ind. 419, 77 N. E. 741. But it seems to us that there is reason to doubt the soundness of the doctrine of some of the cases cited.

*In Peru & Co. v. Hanna*, 68 Ind. 562, it was said by the court: "We are of the opinion that the track of a railroad company, when it borders on a street, is properly assessable for its due proportion of the cost of the improvement of such street under an ordinance of the city." Much depends upon the particular statute under which the assessment is levied, and it is unsafe to accept as indicative of a general rule cases decided upon particular statutes.

<sup>50</sup> *Lake Shore & Co. v. Dunkirk*, 20 N. Y. S. 596.

this work.<sup>51</sup> The method of assessment of railroad property in cases of this character has been the subject of a special statute in Illinois, which provides that, when a railroad will be benefited, the commissioners may assess the road in proportion to the benefits received, "which shall be determined by estimating the amount of benefits to the entire district, including the benefits to . . . such railroad, and also the benefit to . . . the railroad, then the fractional figures expressing the ratio between the sum of the benefits for the whole district, and the sum found to be the benefit to the . . . railroad shall express the proportional part of the corporate taxes of the district to be paid by such . . . railroad." This proportional classification is subject to review at the instance of the railroad company in the same manner as is provided for individual landowners affected.<sup>52</sup> This statute has been upheld against the objection that it authorized unlimited expenditure and disregarded the necessary equality between expenditure and benefits.<sup>53</sup> There is authority to the effect that where the statute creating a lien upon a railroad for drainage assessments does not authorize a sale of the body of the road to satisfy the lien, an order of the court directing such sale is void.<sup>54</sup>

**§ 955 (788b). Bridges over natural watercourses utilized for drainage purposes.**—The adequacy of a bridge over a stream, and the opening under it for the passage of the water at the time of its construction, does not determine for all time the obligation of the railroad company. The law goes further, and charges the company with the duty to maintain an opening under the bridge that will be adequate and effectual for increases in the volume of the water resulting from reasonable and lawful

<sup>51</sup> *Illinois Central R. Co. v. Drainage Commissioners*, 129 Ill. 417, 21 N. E. 925; *Drainage Dist. v. Chicago &c. R. Co.*, 96 Nebr. 1, 146 N. W. 1055. See also *State v. Passaic*, 54 N. J. L. 340, 23 Atl. 945.

<sup>52</sup> Act of Illinois June 27, 1885, § 40.

<sup>53</sup> *Illinois Central R. Co. v. Drainage Comrs.*, 129 Ill. 417, 21 N. E. 925.

<sup>54</sup> *Louisville &c. R. Co. v. State*, 122 Ind. 443, 24 N. E. 351.

drainage regulations.<sup>55</sup> Conformably to this doctrine the Supreme Court of the United States has held that the charging upon a railroad company of the entire cost of removal and rebuilding a railroad bridge and culvert, made necessary by the proposed widening and deepening of the channel of a creek by drainage commissioners acting under a state law authorizing such action, does not violate the due process or equal protection clauses of the federal constitution.<sup>56</sup>

**§ 956 (789). Lien of the assessment—Personal liability.**—The statutes conferring upon municipalities the power to levy local assessments to pay for local improvements usually, if not always, provide that the amount of the assessment shall be a lien upon the lots or lands against which the assessment is levied. These liens are purely statutory, and their existence, force and extent depend upon the terms of the statute creating them.<sup>57</sup> Such liens are ordinarily superior to all liens except general taxes, and the authority of the legislature to make them such is firmly established. The assessments being made on the theory that the property is benefited and enhanced in value in a sum equal to the amount of the assessment, no injury can result to other lienholders, such as mortgagees, mechanic lien holders, and the like. In addition to the lien given against the property benefited, some of the statutes make the property owner personally liable for the assessment. This personal liability, however, cannot exist in any event, in ordinary cases, unless there is a valid statute creating it.<sup>58</sup> There is very grave

<sup>55</sup> *Chicago &c. R. Co. v. Illinois*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. ed. 596, affirming 212 Ill. 103, 72 N. E. 219.

<sup>56</sup> *Chicago &c. R. Co. v. People*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. ed. 596, affirming 212 Ill. 103, 72 N. E. 219. See as to whether a municipality has power to assume part of burden of fitting a bridge or street so that railroad can use it, *Minneapolis &c. R. Co.*

*v. Minneapolis*, 124 Minn. 351, 145 N. W. 609, 50 L. R. A. (N. S.) 143 and note.

<sup>57</sup> *State v. Aetna Life Ins. Co.*, 117 Ind. 251, 20 N. E. 144; *Kiphart v. Pittsburgh &c. Co.*, 7 Ind. App. 122, 34 N. E. 375; *Gause v. Bulard*, 16 La. Ann. 197; *Philadelphia v. Greble*, 38 Pa. St. 339.

<sup>58</sup> *Ivanhoe v. Enterprise*, 29 Ore. 245, 45 Pac. 771, 35 L. R. A. 58, 61 (citing *Elliott Roads and Streets*

doubt as to the constitutionality of such a statute.<sup>59</sup> Imposing such a liability on the owner would in many cases be a great hardship, for it is easy to conceive of cases where the assessment might be so heavy that the property would not sell for enough to pay it. The weight of authority, if numerical superiority controls, seems to be in favor of the constitutionality of such statutes,<sup>60</sup> but few of the cases apparently to this effect really decide the question and there is very great conflict.<sup>61</sup> The

(2nd ed.), § 567); *Green v. Ward*, 82 Va. 324; *Wolf v. Philadelphia*, 105 Pa. St. 25; *McCrowell v. Bristol*, 89 Va. 652, 16 S. E. 867, 20 L. R. A. 653, and note. See also 2 *Elliott Roads & Sts.* (3rd ed.), § 706. But where, as in case of railroad companies, the property can not be sold piecemeal without injury to the public there may be reason for rendering a personal judgment or the company might otherwise escape.

<sup>59</sup> In our opinion there can, upon principle, be no personal liability since the whole right to levy a local assessment rests upon the ground that the property is benefited to the extent of the assessment. See, for discussion of the subject, and authorities on both sides, *Elliott Roads and Streets* (3rd ed.), § 707; note to *Brookings v. Natwick*, 22 S. Dak. 322, in 18 L. R. A. (N. S.) 1259.

<sup>60</sup> *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; *Muscatine v. Chicago &c. Co.*, 79 Iowa 645, 44 N. W. 909; *Dewey v. Des Moines*, 101 Iowa 416, 70 N. W. 605; *New Orleans v. Wire*, 20 La. Ann. 500; *Franklin v. Hancock*, 204 Pa. 110, 53 Atl. 644; *Lake Shore &c. Co. v. Dunkirk*, 65 Hun (N. Y.) 494, 20 N. Y. S. 596; *City of*

*Rochester v. Rochester R. Co.*, 109 App. Div. 638, 96 N. Y. S. 152. See also *Pittsburgh &c. R. Co. v. Hays*, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597; *Hazard v. Heacock*, 39 Ind. 172; *Pittsburgh &c. R. Co. v. Taber*, 168 Ind. 419, 77 N. E. 741.

<sup>61</sup> *Taylor v. Palmer*, 31 Cal. 240; *Virginia v. Hall*, 96 Ill. 278; *Hoover v. People*, 171 Ill. 182, 49 N. E. 367; *Burlington v. Quick*, 47 Iowa 222; *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Higgins v. Ausmuss*, 77 Mo. 351; *Seattle v. Yesler*, 1 Wash. Ter. 571; *Sweaney v. Kansas City &c. Co.*, 54 Mo. App. 265; *City of Brookings v. Natwick*, 22 S. Dak. 322, 117 N. W. 376, 18 L. R. A. (N. S.) 1259, and other cases there cited in note; *Asberry v. Roanoke*, 91 Va. 562, 22 S. E. 360, 42 L. R. A. 636. In *Neenan v. Smith*, 50 Mo. 525, 528, it is said: "All taxation is supposed to be for the benefit of the person taxed. That for raising a general revenue is imposed primarily for his protection as a member of society, both in his person and his property in general and hence the amount assessed is against him to be charged against his property, and may be collected of him person-

statutes creating a lien for local assessments being remedial in their nature, and intended to secure the person constructing the improvement for his outlay, should be liberally construed to accomplish that purpose.<sup>62</sup> A statute which provides for the recovery of a reasonable attorney's fee in actions to foreclose the lien of an assessment for a local improvement is constitutional.<sup>63</sup>

**§ 957 (789a). Property secondarily liable—Back-lying property.**—In some states the statute makes abutting property primarily liable for a certain distance back of the front property

ally. But on the other hand, local taxes for local improvements are merely assessments upon the property benefited by such improvements, and to pay for the benefits which they are supposed to confer; the lots are increased in value, or better adapted to the uses of town lots, by the improvement. Upon no other ground will such partial taxation for a moment stand. Other property held by the owner is affected by this improvement precisely and only as is the property of all other members of the community, and there is no reason why it should be made to contribute, that does not equally apply to that of all others. The sole object, then, of a local tax being to benefit local property, it should be a charge upon that property only, and not a general one upon the owner. The latter, indeed, is not what is understood by local or special assessment, but the very term would confine it to the property in the locality; for if the owner be personally liable, it is not only a local assessment but also a general one as against the owner. The reasonableness of this

restriction will appear when we reflect that there is no call for a general execution until the property charged is exhausted. If that is all sold to pay the assessment, leaving a balance to be collected otherwise, we should have the legal anomaly—the monstrous injustice—of not only wholly absorbing the property supposed to be benefited and rendered more valuable by the improvement, but also of entailing upon the owner the loss of his other property. I greatly doubt whether the legislature has the power to authorize a general charge upon the owner of local property which may be assessed for its special benefit, unless the owners of all taxable property within the municipality are equally charged. As to all property not to be so specially benefited, he stands upon the same footing with others; he has precisely the same interests, and should be subject to no greater burdens."

<sup>62</sup> Chaney v. State, 118 Ind. 494, 21 N. E. 45.

<sup>63</sup> Lake Erie &c. R. Co. v. Walters, 13 Ind. App. 275, 41 N. E. 465; Brown v. Central Bermudez Co.,

line, and further provides that, if the land is subdivided or plat-  
ted, and that primarily liable is insufficient to pay the cost of  
the improvement, other parcels of the back-lying property back  
to a specified distance shall be liable in their order. Under such  
a statute it has been held, in a case where the back-lying prop-  
erty was the right of way of a railroad company, that the lien  
extended to all of the property; all persons owning property  
within the district, both abutting owners and owners of the  
back-lying property could be made parties to a suit to collect  
the assessment and the whole matter determined; and that the  
complaint must show, as against the owners of the back-lying  
property as well as the abutters, that all jurisdictional steps  
were taken.<sup>64</sup> But it has also been held under the same statute

162 Ind. 452, 69 N. E. 150. See  
also *Cleveland &c. R. Co. v. Por-  
ter*, 210 U. S. 177, 28 Sup. Ct. 647,  
52 L. ed. 1012.

<sup>64</sup> *Cleveland &c. R. Co. v. Ed-  
ward C. Jones Co.*, 20 Ind. App.  
87, 90, 91, 50 N. E. 319. In the  
course of the opinion it is said:  
"In the case at bar the abutting  
owners and those owning lots  
within the limit of one hundred and  
fifty feet were joined as defend-  
ants, and we think this is permis-  
sible under the statute. The stat-  
ute intends that if the abutting  
property is insufficient to pay the  
assessment other property back  
one hundred and fifty feet shall  
then be liable. We see no reason  
for not determining the whole  
question in one suit. The engineer,  
it is true, has no power to assess,  
in the first instance, property sec-  
ondarily liable; nor does the stat-  
ute provide for a separate assess-  
ment upon such property by the  
engineer after the abutting prop-  
erty has been exhausted. But from  
the language of the whole statute

it must be held that it was the  
intention of the act to carry the  
balance of such an assessment to  
such other property as lies within  
the limit, and that without any  
separate assessment being made on  
such property. The act itself fixes  
a lien for the unpaid balance upon  
property secondarily liable. If we  
are right in this view of the stat-  
ute, it necessarily follows that, in  
an action seeking to fix a sec-  
ondary liability upon such prop-  
erty, it must be made to appear  
that the municipality took the stat-  
utory steps necessary to fix the lien.  
The waiver signed by the abutting  
property owners has no effect in  
any way in determining the rights  
and liabilities of appellants. With-  
out holding to what extent such a  
waiver would be conclusive against  
the abutting property owners who  
signed it, it is evident that such  
waiver can in no way affect the  
rights of persons whose property  
is only secondarily liable. Appel-  
lants waived no defects, and the  
statute empowers no one to waive

that a suit to foreclose the assessment on the abutting property does not estop the plaintiff from afterwards foreclosing the lien on the back-lying property for the balance where the abutting property fails to sell for enough to pay the assessment.<sup>65</sup> It has also been held, under the Indiana statute, that an assessment for a gross sum against two distinct tracts described by metes and bounds is invalid, and that a condition in a deed of land for a street that the grantor and remaining portion of the lot should not be liable for any street improvement assessment is *ultra vires* and void.<sup>66</sup>

**§ 958 (790). Assessment of right of way—Enforcing assessment.**—While it is probably true that there may be a lien on the right of way of a railroad for a local assessment, where such assessment is authorized by statute, the manner of enforcing such assessment is not clearly settled. The right of way of a railway company is a part of the company's property, without which it could not perform the duties it owes to the public. To subject a portion of the right of way to a sale to enforce a local improvement would greatly embarrass, if not entirely destroy, the ability of the company to perform its public functions.<sup>67</sup> The rights of the public are regarded as superior to the rights of any individual, or group of individuals. Local

such defects for them. They can rightfully insist that appellee shall show that such steps were taken as result in a valid lien."

<sup>65</sup> *Cleveland &c. R. Co. v. Porter*, 38 Ind. App. 226, 74 N. E. 260, 76 N. E. 179; *Dueres v. Burlington Sav. Bank*, 40 Ind. App. 678, 82 N. E. 1020; *Voris v. Pittsburgh Plate Glass Co.*, 163 Ind. 599, 70 N. E. 249. See also 2 *Elliott Roads & Sts.* (3rd ed.), § 690; *Voris v. Pittsburgh &c. Co.*, 163 Ind. 559, 70 N. E. 249. It is also held in the first case cited that an attorney's fee may also be recovered in such suit under the statute.

<sup>66</sup> *Pittsburgh &c. R. Co. v. Oglesby*, 165 Ind. 542, 76 N. E. 165.

<sup>67</sup> *Decatur v. Southern R. Co.*, 183 Ala. 531, 62 So. 855, 48 L. R. A. (N. S.) 231, 232 (quoting text); *Chicago &c. R. Co. v. Milwaukee*, 89 Wis. 506, 62 N. W. 417, 28 L. R. A. 249; *Detroit &c. R. Co. v. Grand Rapids*, 106 Mich. 13, 63 N. W. 1007, 28 L. R. A. 793, 58 Am. St. 466. As we have elsewhere shown the rule is that a railroad is to be treated as a unity, and this rule would forbid the sale of a part, as a few hundred feet, or the like, to pay a local assessment.



assessments are usually levied on a small portion of a railway right of way, varying from a few feet in length to miles in length. To permit such portion to be sold would prevent the operation of the road, and, on grounds of public policy, it is held that the ordinary remedy of enforcing the collection of a local assessment by a sale of the property benefited does not apply to the enforcement of an assessment against the right of way of a railway company. While there is a conflict of authority on this subject, the decided weight is that the right of way, if sold to pay the assessment, must be sold as a whole, and not in broken fragments.<sup>68</sup> "The public have a right to have a

<sup>68</sup> *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *Dano v. Mississippi &c. R. Co.*, 27 Ark. 564; *Detroit &c. R. Co. v. Grand Rapids*, 116 Mich. 13, 28 L. R. A. 793, 58 Am. St. 466; *Cox v. Western Pacific R. Co.*, 44 Cal. 18; *Cox v. Western Pac. R. Co.*, 47 Cal. 87; *Southern Cal. R. Co. v. Workman*, 146 Cal. 80, 79 Pac. 586, 82 Pac. 79; *Macon &c. Co. v. Parker*, 9 Ga. 377; *Indianapolis &c. Co. v. State*, 105 Ind. 37, 4 N. E. 316; *Louisville &c. Co. v. State*, 122 Ind. 443, 24 N. E. 350; *Midland R. Co. v. Wilcox*, 122 Ind. 84, 23 N. E. 506; *Lake Shore &c. R. Co. v. Grand Rapids*, 102 Mich. 374, 60 N. W. 676, 29 L. R. A. 195; *Knapp v. St. Louis &c. R. Co.*, 74 Mo. 374; *Cranston v. Union Trust Co.*, 75 Mo. 29; *Ammant v. President &c.*, 13 S. & R. (Pa.) 210; *Dunn v. North &c. Co.*, 24 Mo. 493. "We fully agree with appellant's counsel that a continuous line of railroad is to be treated as an entirety, and we adjudge that as such it must be sold, for it would be unjust to lien holders, as well as to the railroad company, to sell a bridge, a culvert or a few

rods, or even a mile of a railroad." *Farmers' &c. Co. v. Canada &c. R. Co.*, 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740, and note. "For the sake of the public whatever is essential to the corporate functions shall be retained by the corporation. The only remedy which the law allows to creditors against property so held is sequestration, and that remedy is consistent with corporate existence, whilst a power to alien, or liability to levy and sale on execution, would hang the existence of the corporation on the caprices of the managers or on the mercy of its creditors." *Plymouth R. Co. v. Colwell*, 39 Pa. St. 337, 80 Am. Dec. 526. See also *Connor v. Tennessee Cent. R. Co.*, 109 Fed. 931, 54 L. R. A. 687 (citing text). But in Illinois it was held that the portion of the right of way of a railway company lying within a drainage district might be sold to pay the assessment for constructing the drain. In *Wabash &c. Co. v. East Lake Fork District*, 134 Ill. 384, 10 L. R. A. 285, it is said: "Again, it is urged that the decree is erroneous in directing a sale of

railway remain an entirety, and it would be destructive to public interest to permit it to be broken up into disjointed and practically useless fragments."<sup>69</sup> Even if it be conceded that a personal judgment for the amount of the assessment can be rendered,<sup>70</sup> still it does not follow that a railroad can be sold

a portion of the railroad for the satisfaction of the lien. This proposition was presented and considered in *Illinois Cent. R. Co. v. Commissioners of &c.*, 129 Ill. 417, 25 N. E. 781, and it was there held that an order for the sale of the track and right of way of the railroad company within the district for the payment of the assessment was proper. We are still inclined to adhere to the conclusion to which we arrived in that case." See also *Little v. Chicago*, 46 Ill. App. 534; *Kansas City &c. R. Co. v. Waterworks Imp. Dist.*, 68 Ark. 376, 59 S. W. 248, to same effect. And see generally *Georgia R. &c. Co. v. Decatur*, 137 Ga. 537, 73 S. E. 830, 40 L. R. A. (N. S.) 934; *Northern Pac. R. Co. v. Seattle*, 46 Wash. 674, 91 Pac. 244, 12 L. R. A. (N. S.) 121.

<sup>69</sup> *Farmers' &c. Co. v. Canada &c. Co.*, 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740, and note. See also the following authorities, which declare and enforce the same doctrine: *Indiana &c. Co. v. Allen*, 113 Ind. 581, 15 N. E. 446; *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. ed. 950; *East Alabama R. Co. v. Doe*, 114 U. S. 340, 5 Sup. Ct. 869, 29 L. ed. 136; *Southern Cal. R. Co. v. Workman*, 146 Cal. 80, 79 Pac. 586; *Richardson v. Sibley*, 11 Allen (Mass.) 65, 87 Am. Dec. 700; *Detroit &c. R. Co. v. Grand*

*Rapids*, 106 Mich. 13, 63 N. W. 1007, 28 L. R. A. 793, 58 Am. St. 466; *Sweaney v. Kansas City R. Co.*, 54 Mo. App. 266; *Black v. Delaware &c. Co.*, 22 N. J. Eq. 130; *Stewart's Appeal*, 56 Pa. St. 413; *Foster v. Fowler*, 60 Pa. St. 27; *Chicago &c. R. Co. v. Milwaukee*, 89 Wis. 506, 62 N. W. 417, 419, 28 L. R. A. 249. The text is quoted with approval in *Dobbins v. Colorado &c. R. Co.*, 19 Colo. App. 257, 75 Pac. 156, 157, 58 Cent. L. J. 330, 331.

<sup>70</sup> *Louisville &c. v. State*, 122 Ind. 443, 24 N. E. 350; *Louisville &c. Co. v. State*, 8 Ind. App. 377, 35 N. E. 916; *Lake Erie &c. R. Co. v. Bowker*, 9 Ind. App. 428, 36 N. E. 864; *Lake Shore &c. v. Dunkirk*, 65 Hun 494, 20 N. Y. S. 596. "The proceeding to enforce a lien for an assessment on account of street improvements is in rem, and ordinarily no personal judgment may be rendered against the owner in such proceedings. The only reason why a personal judgment may become a proper and available remedy in certain cases of this character, where the proceeding is against a railway company to enforce a lien upon its railroad property and franchises, is that it would be contrary to public policy to decree the sale of the specific property to which the lien has attached, and as the lessor might otherwise

in fragments to satisfy the judgment.<sup>71</sup>

§ 959 (791). **Procedure.**—The matter of procedure is so much a matter of statutory regulation that we shall not attempt to give the subject much consideration. It may be said that direct proof of the assessment must be made and a county tax list is incompetent for that purpose.<sup>72</sup> And where the statute so provides an attorney's fee may be recovered.<sup>73</sup> The lien, it has been held, may be enforced against the property-owner whether the work was completed according to the original plans and specifications or not, if it appear that the contractor performed his work as far as it was in his power to do, or where the municipality waived a strict compliance with the ordinance directing the improvement.<sup>74</sup> Where the statute prescribes what steps shall be taken in order to the existence of a valid assessment there must be a substantial compliance with its provisions. The general rule is that where the statute specifically provides a remedy for the enforcement of the assessment, that remedy must be pursued, but if a right be given and no remedy prescribed the courts will usually provide the appropriate remedy.<sup>75</sup>

be left without any remedy whatever, equity will, in a proper case, award such lienor the right of collecting the amount due him by virtue of the lien, in the way of such personal judgment." *Lake Erie &c. Co. v. Walters*, 9 Ind. 684, 37 N. E. 295. And to same effect, see *Pittsburgh &c. R. Co. v. Fish*, 158 Ind. 525, 63 N. E. 454.

<sup>71</sup> *Decatur v. Southern R. Co.*, 183 Ala. 531, 62 So. 855, 48 L. R. A. (N. S.) 231, 232 (quoting text).

<sup>72</sup> *Muscataine v. Chicago &c. Co.*, 88 Iowa 291, 55 N. W. 100.

<sup>73</sup> *Lake Erie &c. R. Co. v. Walters*, 13 Ind. App. 275, 41 N. E. 465; *Cleveland &c. R. Co. v. Porter*, 38 Ind. App. 226, 76 N. E. 179; *Pittsburgh &c. R. Co. v. Taber*, 168 Ind. 419, 77 N. E. 741.

<sup>74</sup> *Lake Erie &c. R. Co. v. Walters*, 13 Ind. App. 275, 41 N. E. 465. See also *Elliott Roads and Streets* (3d ed.), §§ 728, 752, et seq.

<sup>75</sup> *Dobbins v. Colorado &c. R. Co.*, 19 Colo. App. 257, 75 Pac. 156, 157 (quoting text). As to the necessity for notice and the kind of notice that will suffice, see note in 28 L. R. A. (N. S.) 1201, et seq., 2 *Elliott Roads & Sts.* (3rd ed.), §§ 699-702, and the following more recent cases: *Pierce v. Huntsville*, 185 Ala. 490, 64 So. 301; *Durst v. Des Moines*, 164 Iowa 82, 145 N. W. 528; *Embree v. Kansas City &c. Dist.*, 257 Mo. 593, 166 S. W. 282; *Texas Bitulithic Co. v. Abilene St. R. Co.* (Tex. Civ. App.), 166 S. W. 433.

## • CHAPTER XXXIII

### LAND GRANTS

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§ 965 (792). The ground upon which public aid to railroads rests.—The public nature of railroads authorizes the use of public money or property in aid of their construction and maintenance. Even in jurisdictions where the legislature has no power to appropriate money or property to private individuals aid may be given or granted to railroad companies because they are not strictly private corporations. Burdens may be placed upon them because they are "affected with a public interest," and for the same reason benefits may be bestowed upon them that cannot be rightfully bestowed on strictly private corpo-

rations. The construction and maintenance of railroads has been generally considered a matter of public concern, and the machinery of government, local, state, and national, has been liberally employed in aiding to build new lines of road, not only between centers of trade, but far out into unsettled portions of the country where the operation of a railroad can prove a profitable business only after settlers have developed the resources of the country. It will be found, upon examination of the cases decided by the federal courts hereafter referred to, that the policy of the government in granting land to railroad companies exerts an important influence upon the construction of such grants, for the construction given them is a very liberal one, the courts assuming that by making such grants Congress intended to encourage the building of railroads.

§ 966 (793). **Land grants.**—The term “land grants,” when used in the branch of the law relating to railroads, has a peculiar meaning. It does not, as ordinarily used, mean a grant by an individual, but means a grant by the nation or by a state. Aid has been given to railroads in many instances by a direct grant of land by the federal government, and in other cases the grant is made to a state for the benefit of the railroad company. Where the grant is made to the state for the benefit of a company the position of the state is that of a trustee for the company.<sup>1</sup>

§ 967 (794). **Construction of land grants.**—A congressional grant of land is a peculiar one, for there is both a statute and

<sup>1</sup> Rice v. Minnesota &c. R. Co., 1 Black (U. S.) 358, 17 L. ed. 147; Kansas City &c. R. Co. v. Attorney-General, 118 U. S. 682, 7 Sup. Ct. 66, 30 L. ed. 281; Leavenworth &c. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Litchfield v. Webster County, 101 U. S. 773, 25 L. ed. 925; Wolsey v. Chapman, 101 U. S. 755, 25 L. ed. 915; Van Wyck v. Knevals, 106 U. S. 360, 1 Sup. Ct. 336, 27 L. ed. 201; Han-

nibal &c. R. Co. v. Smith, 9 Wall. (U. S.) 95, 19 L. ed. 599; Schulenberg v. Harriman, 21 Wall. (U. S.) 44, 22 L. ed. 551; Grinnell v. Chicago &c. R. Co., 103 U. S. 739, 26 L. ed. 456; Railroad Land Co. v. Courtright, 21 Wall. (U. S.) 310, 22 L. ed. 582; Miller v. Swann, 89 Ala. 631, 7 So. 771. The term “land grants,” as we here use it, means grants of lands by the federal government or by a state.

a conveyance, so that the rules for construing conveyances made by individuals do not fully apply to land grants.<sup>2</sup> A land grant has the effect of a legislative enactment, and the intention of the legislature is to be sought and enforced.<sup>3</sup> The statute making the grant abrogates common-law rules so far as they conflict with its provisions.<sup>4</sup> Statutes granting lands to aid in building railroads are liberally construed in favor of the grantees, to enable them to carry out the purposes of the grant. Thus a grant to a railroad "of every alternate section of public land designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad on the line thereof," was held not to be limited to lands situated on lines at right angles to the general line of the road, where, in consequence of turns or changes of direction in the road, such a rule of selection would cause an overlapping on one side, and leave a vacancy on the other.<sup>5</sup> But the grant to the Illinois Central

<sup>2</sup> *Missouri &c. R. Co. v. Kansas Pacific R. Co.*, 97 U. S. 491, 24 L. ed. 1095; *Hall v. Russell*, 101 U. S. 503, 25 L. ed. 829.

<sup>3</sup> *Winona &c. R. Co. v. Barney*, 113 U. S. 618, 5 Sup. Ct. 606, 28 L. ed. 1109; *United States v. Denver &c. R. Co.*, 150 U. S. 1, 14 Sup. Ct. 11, 37 L. ed. 975; *Bradley v. New York &c. R. Co.*, 21 Conn. 294. See *Brewster v. Kansas City &c. R. Co.*, 25 Fed. 243. Short, narrow tramway up mountain-side not a "railroad" within Act of Congress of March 3, 1875, granting right of way to railroads over public lands of United States. *Denver &c. R. Co. v. Bolognese*, 45 Utah 65, 143 Pac. 129.

<sup>4</sup> *Kansas &c. R. Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. ed. 1122; *St. Paul &c. R. Co. v. Greenhalgh*, 26 Fed. 563.

<sup>5</sup> *United States v. Union Pac. R. Co.*, 2 Denver Leg. News, 37 Fed.

551, 83. But it was held that the acts of congress granting to the state of Alabama, in aid of the construction of railroads in that state, every alternate section of land designated by odd numbers, and within six miles of either side of the projected line of said roads, does not embrace, by implication, land within six miles of that portion of the roads constructed through the state of Georgia. *Swann v. Jenkins*, 82 Ala. 478, 2 So. 136. The Joint Resolution of Congress of May 31, 1870, giving the Northern Pacific Railroad Company, in the event of there not being within the limits prescribed by its charter the amount of lands per mile which had been granted to it, the right to make up the deficiency from sections designated by odd numbers within ten miles "on each side of the said road beyond the limits prescribed in said

Railroad Company of "lands, waters and materials" necessary for the construction, alteration and operation of its road, has been held not to include submerged lands along the shore of Lake Michigan.<sup>6</sup> As we have said, land grants are usually construed to pass the land at once, but to convey it upon condition subsequent, although, of course, a grant may be upon condition precedent.<sup>7</sup> Whether the grant is upon condition precedent or upon condition subsequent must, it is obvious, be determined from the language of the statute making the grant.<sup>8</sup> In other

charter," was held to give the company an additional ten-mile indemnity limit, and not to restrict it to a loss of land occurring subsequent to the grant, nor does it restrict it to the state or territory where such deficiency occurs. *Northern Pac. R. Co. v. United States*, 36 Fed. 282. See as to grant to Oregon & California R. Co., and the question of forfeiture and rights of purchasers under acts of Aug. 20, 1912, and June 9, 1916. *Oregon & C. R. Co. v. United States*, 238 U. S. 393, 59 L. ed. 1360, 35 Sup. Ct. 908; *Hammond v. Oregon & C. R. Co. (Oreg.)*, 193 Pac. 457; *Booth-Kelly Lumber Co. v. Oregon & C. R. Co. (Oreg.)*, 193 Pac. 463.

<sup>6</sup> *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 20 Sup. Ct. 509, 44 L. ed. 622.

<sup>7</sup> *Chamberlain v. St. Paul & C. R. Co.*, 92 U. S. 299, 23 L. ed. 715; *Farnsworth v. Minnesota & C. R. Co.*, 92 U. S. 49, 23 L. ed. 530; *Cedar Rapids & C. R. Co. v. Herring*, 110 U. S. 27, 3 Sup. Ct. 485, 28 L. ed. 56; *New Orleans & C. R. Co. v. United States*, 124 U. S. 124, 8 Sup. Ct. 417, 31 L. ed. 383; *United States v. Southern Pacific R. Co.*, 39 Fed. 132; *Shepard v. Northwestern Life Ins. Co.*, 40 Fed. 341;

*Vicksburg & C. R. Co. v. Sledge*, 41 La. Ann. 896, 6 So. 725. See *Buttz v. Northern Pac. R. Co.*, 119 U. S. 55, 7 Sup. Ct. 100, 30 L. ed. 330; *United States v. Southern Pac. R. Co.*, 62 Fed. 531; *St. Paul & C. R. Co. v. Northern Pacific R. Co.*, 139 U. S. 1, 35 L. ed. 77. And there may be covenants, as under the provisos in the Railway Land Grant Acts of 1869 and 1870, which are enforceable and not merely conditions subsequent the breach of which is cause for forfeiture. *Oregon & C. R. Co. v. United States*, 238 U. S. 393, 35 Sup. Ct. 908, 59 L. ed. 1360. See also *Baker v. Berg*, 138 Minn. 109, 164 N. W. 588.

<sup>8</sup> *United States v. Southern Pacific R. Co.*, 62 Fed. 531; *Rogers v. Port Huron & C. R. Co.*, 45 Mich. 460, 10 Am. & Eng. R. Cas. 635; *State v. Rusk*, 55 Wis. 465, 10 Am. & Eng. R. Cas. 642. The grant of right of way to Northern Pacific R. R. by act of Congress of July 2, 1864, was of a limited fee on implied condition of reverter if the grantee or its successor ceased to use or retain the land for the purpose for which it was granted. *Crandall v. Goss*, 30 Idaho 661, 167 Pac. 1025.

words, the grant is usually regarded as conveying a present title but upon condition subsequent. It is upon this principle that it is held that possession under the grant for the statutory period will give title by limitation.<sup>9</sup> The rule is that where a railway company fails to comply with the provisions of the act of Congress granting the right of way to railroads through the public lands of the United States, it has no right to run its road through the land of a homesteader who has complied with the terms of the homestead law, although he has not at the time received his patent, as, in such case, his claim is superior to that of the company.<sup>10</sup>

**§ 968 (795). Construction of land grants.—Illustrative cases.**—Under acts granting a right of way over all government lands along certain routes, the railroad has been held to acquire a right of way over sections numbered sixteen and thirty-six, although such sections have been, before the grants were made, designated generally as school sections, but have not been definitely disposed of.<sup>11</sup> Grants to railroads by Congress cannot be construed to include routes not contemplated by the charters of the companies at the time of the grant.<sup>12</sup> Where the act of Congress authorized the Northern Pacific Railroad Company to construct a road from Lake Superior westerly by the most eligible route within the United States north of 45 degrees of latitude, to Puget's Sound, with a branch via the valley of the Columbia river to Portland, Oregon, it was held that the company, upon finding a more eligible route, could follow down the

<sup>9</sup> *Wheeler v. Chicago*, 68 Fed. 526.

<sup>10</sup> *Savannah &c. R. Co. v. Davis*, 25 Fla. 917, 7 So. 29, 43 Am. & Eng. R. Cas. 542. See also *Tonopah &c. R. Co. v. Fellanbaum*, 32 Nev. 278, 107 Pac. 882, L. R. A. 1918D, 584.

<sup>11</sup> *Union Pac. R. Co. v. Douglas Co.*, 31 Fed. 540; *Coleman v. St. Paul &c. R. Co.*, 38 Minn. 260. The grant of a right of way over the

school sections of the public domain, acquired by a railroad company under an act of congress and a subsequent territorial statute, was not a grant in praesenti, but in futuro; and must be used under the statute referred to, if at all, before the sale of the land by the state. *Radke v. Winona &c. R. Co.*, 39 Minn. 262, 39 N. W. 624.

<sup>12</sup> *Jackson v. Dines*, 13 Colo. 90, 21 Pac. 918.



Columbia river to and past Portland, cross over and go north to Puget's Sound, thereby dispensing with its branch to Portland.<sup>13</sup> And where the title of the Indians and their right of occupation of certain lands in Michigan had been fully extinguished, they were held to pass under the Act of Congress of June 3, 1856, notwithstanding they were held by the United States in trust to sell them for the benefit of the Indians.<sup>14</sup> To the extent of such claims, when the grant was for lands with specific boundaries, or known by a particular name, and also to the extent of the quantity named within boundaries containing a greater area, Mexican claims are excluded from a grant to a railroad company.<sup>15</sup> And lands "claimed to be included in a Mexican grant of a specific boundary, which grant was sub judice at the time of the grant of March 3, 1871, were not public land at that date, and did not pass by the grant, though they were afterwards held not to be embraced by the Mexican grant."<sup>16</sup> But a railroad land grant embracing within its boundaries Mexican floating grants takes effect except as to the quantity of land granted in the Mexican grant; and the railroad company is entitled to patents for the odd sections of the remainder.<sup>17</sup> Where lands had been granted to the state to aid in building railroads under certain restrictions, the legislature was held, in a Michigan case, to have authority to accept a surrender of the grant and to regrant the lands to another

<sup>13</sup> *United States v. Northern Pac. R. Co.*, 41 Fed. 842. At all events the resolution of congress of May 31, 1870, recognized and approved this location. *United States v. Northern Pac. R. Co.*, 41 Fed. 842.

<sup>14</sup> *Shepard v. Northwestern Life Ins. Co.*, 40 Fed. 341.

<sup>15</sup> *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. ed. 844; *Foss v. Hinkell*, 78 Cal. 158, 20 Pac. 393.

<sup>16</sup> *United States v. Southern Pac. R. Co.*, 39 Fed. 132, construing *Southern Pac. R. Land Grants*; *Southern Pacific R. Co. v. Brown*, 68 Fed. 333. And the same is true

as to a floating Mexican grant, to the extent of the lands embraced by it. *United States v. McLaughlin*, 30 Fed. 147, construing the *Central Pacific R. Land Grant* with reference to its fraudulent Mosqueslamous grant; *United States v. McLaughlin*, 127 U. S. 428, 8 Sup. Ct. 1177, 32 L. ed. 213; *Carr v. Quigley*, 79 Cal. 130, 21 Pac. 607, construing the *Western Pac. R. Land Grant* with reference to a valid Mexican grant.

<sup>17</sup> *State v. McLaughlin*, 127 U. S. 428, 8 Sup. Ct. 1177, 32 L. ed. 213; *United States v. Curtner*, 38 Fed. 1.

company; and a transfer of the lands, which was in form a sale to another company of the lands granted, upon condition that it would complete the first company's road, made by authority of the legislature, was construed to be such a surrender and regrant.<sup>18</sup> But where there is no authority to execute a certificate of surrender, the certificate is ineffective, and the filing of it in the general land office does not transfer title to the United States.<sup>19</sup> The courts will not presume that the officers of the land department erred in carrying out the provisions of such an act, but will uphold their acts done in pursuance of the construction which they have given it, unless a very clear case of error is presented; especially where the actions of the officers have been acquiesced in until the lands have in large part been sold by the company.<sup>20</sup> The ruling in the cases decided by the Supreme Court of the United States is that where the grant is to be satisfied out of sections along the line of the road the implication, in the absence of a specific designation or of some provision to the contrary, is that the grant conveys the land in sections of the character specified nearest the line of the road, but, of course, does not convey lands previously disposed of.<sup>21</sup> Where there is a conflict between two companies, both claiming, under the same grant, they take in undivided moieties.<sup>22</sup> Where the grant expressly reserves from its

<sup>18</sup> Jackson &c. R. Co. v. Davison, 65 Mich. 416, 32 N. W. 726.

<sup>19</sup> Lake Superior &c. R. Co. v. Cunningham, 155 U. S. 354, 15 Sup. Ct. 103, 39 L. ed. 183. In Lake Superior &c. R. Co. v. Finan, 155 U. S. 385, 15 Sup. Ct. 115, 39 L. ed. 194, it was held that an entry upon land granted to a railroad company gave no title to person entering, and the case was distinguished from the first of the cases cited in this note.

<sup>20</sup> United States v. Union Pac. R. Co., 37 Fed. 551; United States v. Missouri &c. R. Co., 37 Fed. 68. A patent to the S. P. R. Co., for

land which, at the time of its grants, was within the exterior limits of a Mexican or Spanish grant then sub judice, is void from the beginning. Foss v. Hinkell, 78 Cal. 158.

<sup>21</sup> Wood v. Burlington &c. R. Co., 104 U. S. 329, 26 L. ed. 772; Ryan v. Central &c. R. Co., 99 U. S. 382, 25 L. ed. 305.

<sup>22</sup> St. Paul &c. R. Co. v. Winona &c. R. Co., 112 U. S. 720, 5 Sup. Ct. 334, 28 L. ed. 872. See generally Platt v. Union Pacific R. Co., 99 U. S. 48, 25 L. ed. 424; Wood v. Burlington &c. R. Co., 104 U. S. 329, 26 L. ed. 772; St. Louis &c. R.

operation all lands to which the right of preemption or homestead settlement is attached when the line is fixed, the land commissioner is without power on his own motion, prior to the location of the line, to withdraw any of such lands from preemption or homestead settlement.<sup>23</sup>

§ 969 (796). **Effect of grant.**—Where a grant of land to a railroad company becomes effective it relates back to the time of the enactment of the statute.<sup>24</sup> The general rule as to the time such grants become effective is that they take effect when the road is located and the sections thereby identified;<sup>25</sup> that is, they are usually grants in praesenti, which, when maps of definite location are filed and approved, take effect by relation as of the date of the act.<sup>26</sup> It is generally held that Congress, by a grant of land to a railroad to aid in its construction, confers a present title to the designated sections along its route, with such restrictions upon their use and disposal as to secure them for the purposes of the grant, subject to be defeated,

*Co. v. McGee*, 115 U. S. 469, 6 Sup. Ct. 123, 29 L. ed. 446; *Bullard v. Des Moines &c. R. Co.*, 122 U. S. 167, 7 Sup. Ct. 1149, 30 L. ed. 1123; *United States v. Union Pacific R. Co.*, 37 Fed. 551; *Farmers' &c. Co. v. Chicago &c. R. Co.*, 39 Fed. 143; *Southern Pacific R. Co. v. Esquibel*, 4 New Mex. 337, 20 Pac. 109; *Verdier v. Port Royal &c. R. Co.*, 15 S. Car. 476; *Sams v. Port Royal &c. R. Co.*, 15 S. Car. 484; *Eldred v. Sexton*, 30 Wis. 193; *Post*, § 981.

<sup>23</sup> *Missouri, K. & T. R. Co. v. Watson (Kans.)*, 87 Pac. 687; *Winona &c. Co. v. Barney*, 113 U. S. 618, 5 Sup. Ct. 606, 28 L. ed. 1109; *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. 336, 27 L. ed. 201; *Railroad Co. v. Baldwin*, 103 U. S. 426, 26 L. ed. 578.

<sup>24</sup> *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44, 22 L. ed. 551;

*Broder v. Natoma Water Works Co.*, 101 U. S. 274, 25 L. ed. 790; *St. Paul &c. Co. v. Winona &c. Co.*, 112 U. S. 720, 5 Sup. Ct. 334, 28 L. ed. 872.

<sup>25</sup> *St. Paul &c. R. Co. v. Northern Pacific R. Co.*, 139 U. S. 1, 11 Sup. Ct. 389, 35 L. ed. 77; *United States v. Southern Pacific R. Co.*, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. ed. 1091; *Northern Pacific R. Co. v. Musser &c. Co.*, 68 Fed. 993.

<sup>26</sup> *Southern Pac. R. Co. v. Lipman*, 148 Cal. 445, 83 Pac. 445; *Walbridge v. Board*, 74 Kans. 341, 86 Pac. 473; *Wiese v. Union Pac. R. Co.*, 77 Nebr. 40, 108 N. W. 175; *United States v. Southern Pac. R. Co.*, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. ed. 1091. See also *Taggart v. Great No. Ry. Co.*, 211 Fed. 288. "The grant made by the United States by Act July 25, 1866, c. 242,

however, on non-compliance with the terms of the grant.<sup>27</sup> In other words, the grant is regarded as immediately conveying title, but conveying it upon condition subsequent. It is upon

14 Stat. 239, to aid in the construction of a railroad and telegraph line, from the Central Pacific Railroad Company in California to Portland in Oregon, of 'every alternate section of public land, not mineral,' within 20 miles on each side of said railroad line, with a provision for selection of lands in lieu of any of those within such primary limits, which should be found to have been occupied by homestead or pre-emption settlers or in any manner disposed of within 10 miles beyond such limits, was a grant in praesenti, and did not embrace land which was at the time of the passage of the act subject to a live homestead entry, although such entry was relinquished prior to the filing of the map of definite location and survey of any part of its road by the railroad company; such land not having been 'public land,' within the meaning of the grant." *United States v. Oregon &c. R. Co.*, 143 Fed. 765. The Act Cong. July 26, 1866, granting to the Union Pacific Railroad Company a right of way through the Osage ceded lands, was an absolute grant in praesenti vesting title from the date of the act, and persons subsequently purchasing any of the land did so with notice of the railroad company's rights. *Missouri &c. R. Co. v. Watson (Kans.)*, 87 Pac. 687. The grant to the Northern Pacific Ry. Co. took effect as upon the date on which it filed its map of definite

location and it had no vested interest before that time. *Sander v. Bull*, 76 Wash. 1, 135 Pac. 489.

<sup>27</sup> *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. ed. 687, 41 Am. & Eng. R. Cas. 669; *California &c. Land Co. v. Munz*, 29 Fed. 837; *Southern Pac. R. Co. v. Orton*, 32 Fed. 457; *United States v. Curtner*, 38 Fed. 1; *United States v. Northern Pac. R. Co.*, 41 Fed. 842; *Washington &c. R. Co. v. Northern Pac. R. Co.*, 2 Idaho 513, 21 Pac. 658; *Jackson &c. R. Co. v. Davison*, 65 Mich. 416, 32 N. W. 726; *Coleman v. St. Paul &c. R. Co.*, 38 Minn. 260, 36 N. W. 638; *United States v. Northern Pac. R. Co.*, 6 Mont. 351, 12 Pac. 769. Among the many cases holding the grant to be in praesenti may be cited in addition to those already cited the following: *Summers v. Dickinson*, 9 Cal. 554; *Fremont v. United States*, 17 How. (U. S.) 542, 15 L. ed. 241; *Hall v. Russell*, 101 U. S. 503, 25 L. ed. 829; *Southern Pac. R. Co. v. Lipman*, 148 Cal. 445, 83 Pac. 445; *Lee v. Summers*, 2 Ore. 260; *Blakesly v. Caywood*, 4 Ore. 279. The words "shall be and are hereby granted," are held to always import a grant in praesenti. *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985, 30 L. ed. 1039; *Martin v. Marks*, 97 U. S. 345, 24 L. ed. 940; *Hannibal &c. R. Co. v. Smith*, 9 Wall. (U. S.) 95, 19 L. ed. 599; *Winona &c. R. Co. v. Barney*, 113 U. S. 618, 5 Sup. Ct. 606, 28 L. ed.

this principle that it has been held that no one but the grantor can take advantage of a breach of the condition.<sup>28</sup> Under the various acts by which such grants have been made, the title has been held in most instances to vest in the railroad when a map of the proposed route has been duly filed;<sup>29</sup> but the filing of the map does not preclude a change of route where the rights of third persons have not intervened.<sup>30</sup> No notice of the filing of such a map or of the withdrawal from entry of the lands granted need be given by the United States officers in order to vest the title in the railroad company, unless the act specially requires it.<sup>31</sup> The secretary of the interior has no authority to suspend or modify a statute withdrawing lands from preemption, and any orders he may make as to lands within the limits of the grant will not affect the rights of the railroad company.<sup>32</sup> The rule is that all claims which subsequently attach, either by homestead or preemption, or claims of right

1109. That it can not be alienated by the company for other purposes, see *H. A. & L. D. Holland Co. v. Northern Pac. R. Co.*, 215 Fed. 970.

<sup>28</sup> *Wheeler v. Chicago*, 68 Fed. 526.

<sup>29</sup> *United States v. McLaughlin*, 30 Fed. 147; *Southern Pac. R. Co. v. Poole*, 32 Fed. 451; *Southern Pac. R. Co. v. Orton*, 32 Fed. 457; *United States v. Curtner*, 38 Fed. 1; *Sioux City &c. Co. v. Griffey*, 72 Iowa 505, 34 N. W. 304; *Walbridge v. Board*, 76 Kans. 341, 86 Pac. 473; *Coleman v. St. Paul &c. R. Co.*, 38 Minn. 260, 36 N. W. 638. That the title does not vest until the profile is approved by the secretary of the interior, see *Phoenix &c. R. Co. v. Arizona Eastern R. Co.*, 9 Ariz. 434, 84 Pac. 1097. But in some cases the right of the railroad company to lands is suspended until a certain portion of the road is built and the lands are

selected. The sale by the railroad of any specific parcels of lands not exceeding the quantity earned, and lying within the limits specified in the grant, would, to that extent, be an effectual selection. *Jackson &c. R. Co. v. Davison*, 65 Mich. 416, 32 N. W. 726; *Shepard v. Northwestern Life Ins. Co.*, 40 Fed. 341. <sup>30</sup> *Washington &c. R. Co. v. Coeur D'Alene &c. Co.*, 60 Fed. 981.

<sup>31</sup> The neglect of the secretary of the interior to file a map furnished by a railroad company showing the route of its road can not impair the company's rights. *United States v. Northern Pac. R. Co.*, 41 Fed. 842.

<sup>32</sup> *Northern Pac. R. Co. v. Orton*, 32 Fed. 457. See also, *Howard v. Perrin*, 200 U. S. 71, 26 Sup. Ct. 195, 50 L. ed. 374; *Sjoli v. Dreschel*, 199 U. S. 564, 26 Sup. Ct. 154, 50 L. ed. 311.

of way by other roads under grants subsequently made by the government, are ineffective as against a railroad company holding an effective grant.<sup>33</sup> It is not necessary that a patent should be issued to the company,<sup>34</sup> since the effect of a patent to lands granted by such an act is not to vest title to them, but to afford record evidence thereof.<sup>35</sup> By operation of the act itself, the conditions having been fully complied with as to a portion of the road, the railroad company's title to lands given along that portion becomes perfect and indefeasible.<sup>36</sup> The general rule is that, until a survey and definite location of the road have been made, and a map of the proposed route has been filed, the railroad acquires no rights adverse to those of others taking claims under general laws.<sup>37</sup>

<sup>33</sup> *Southern Pac. R. Co. v. Orton*, 32 Fed. 457; *United States v. Curtner*, 38 Fed. 1; *United States v. Northern Pac. R. Co.*, 41 Fed. 842; *Washington &c. R. Co. v. Northern Pac. R. Co.*, 2 Idaho 513, 21 Pac. 658. See also *Wiese v. Union Pac. R. Co.*, 77 Nebr. 40, 108 N. W. 175.

<sup>34</sup> *Whitehead v. Plummer*, 76 Iowa 181, 40 N. W. 709; *Minnesota &c. Co. v. Davis*, 40 Minn. 455, 42 N. W. 299. The failure to pay the expense of surveying as required by the act of congress only prevents the issue of the patent. It does not prevent the title attaching under the congressional grant. *Francoeur v. Newhouse*, 40 Fed. 618; 40 Am. & Eng. R. Cas. 439.

<sup>35</sup> *Pengra v. Munz*, 29 Fed. 830; *California &c. Co. v. Munz*, 29 Fed. 837. The title which vests under the congressional grant of lands to the Central Pacific Railroad Company, and the performance of the prescribed conditions, is a legal title, and an action of ejectment may be maintained upon it before

the patent issues. *Francoeur v. Newhouse*, 40 Fed. 618; 40 Am. & Eng. R. Cas. 439.

<sup>36</sup> *United States v. Northern Pacific R. Co.*, 41 Fed. 842. Under an act of congress granting the odd-numbered sections for a prescribed width on each side of a railroad, with a right of selection, when the line of road should be definitely fixed, to make up any deficiencies the title to specific lands between the two limits does not vest until selection and approval. *Musser v. McRae*, 38 Minn. 409, 38 N. W. 103; *Elling v. Thexton*, 7 Mont. 330, 16 Pac. 931.

<sup>37</sup> *Sioux City &c. Co. v. Griffey*, 72 Iowa 505, 34 N. W. 304; *Weeks v. Bridgman*, 41 Minn. 352, 43 N. W. 81; *Larsen v. Oregon R. &c. Co.*, 19 Ore. 240, 23 Pac. 974, 44 Am. & Eng. R. Cas. 92. See *Southern Pac. R. Co. v. Orton*, 32 Fed. 457, in which it is held that where lands had been set apart by act of congress to aid in the construction of a railroad, and unconditionally withdrawn from pre-emption, no

§ 970 (797). **Effect of grant—Illustrative cases.**—It has been held that where the condition of the grant is that two roads shall be built, the grant is not fully effective, unless the two roads are built, and that it is not satisfied by the building of one.<sup>38</sup> If the state holds lands as a trustee for a railroad company, Congress can, at any time before the execution of the trust, annul the power of the state by repealing the statute.<sup>39</sup> The state may impose conditions<sup>40</sup> upon its own grant, but if it does not impose conditions the grantee company will take all the title the state could convey.<sup>41</sup> A patent from the state conveys whatever title was vested in the state by the Act of Congress, but it does not prove that the state had title,<sup>42</sup> and we suppose the same rule must apply to a land grant by the state. The effect of a grant of a right of way over the public lands is to confer upon the railroad company a right to construct and operate a railroad upon lands not previously pre-empted or in some other mode disposed of by the government.<sup>43</sup> Where the grant provided that the company should take on

pre-emption right could be acquired in them even if the grantee at the time of an attempted pre-emption was not authorized to take title. After settlement on public lands and properly filing of the homestead claim, it ceases to be public land through which a railroad can acquire the right of way by complying with the act of congress of March 3, 1875. *Larsen v. Oregon R. &c. Co.*, 19 Ore. 240, 23 Pac. 974, 44 Am. & Eng. R. Cas. 92. But actual construction of the road has been held a definite location although no profile map has been filed. *Jamestown &c. R. Co. v. Jones*, 177 U. S. 125, 20 Sup. Ct. 568, 44 L. ed. 698; *Johnson v. Spokane International R. Co.*, 25 Idaho 389, 137 Pac. 894. See also *Northern Pac. R. Co. v. Barlow*, 26 N. Dak. 159, 143 N. W. 903; *Van Dyke*

*v. Arizona Eastern R. Co.*, 248 U. S. 49, 39 Sup. Ct. 29, 63 L. ed. 119.

<sup>38</sup> *Brewster v. Kansas City &c. R. Co.*, 25 Fed. 243.

<sup>39</sup> *Rice v. Minnesota &c. R. Co.*, 1 Black (U. S.) 358. But see *Nash v. Sullivan*, 29 Minn. 206, 12 N. W. 698, 10 Am. & Eng. R. Cas. 552.

<sup>40</sup> *Rogers v. Port Huron &c. R. Co.*, 45 Mich. 460, 10 Am. & Eng. R. Cas. 635; *State v. Rusk*, 55 Wis. 465, 13 N. W. 452, 10 Am. & Eng. R. Cas. 642.

<sup>41</sup> *Railroad Land Co. v. Court-right*, 21 Wall. (U. S.) 310, 22 L. ed. 582; *Miller v. Iowa &c. Co.*, 56 Iowa 374, 9 N. W. 316, 3 Am. & Eng. R. Cas. 27.

<sup>42</sup> *Musser v. McRae*, 38 Minn. 409, 38 N. W. 103.

<sup>43</sup> *St. Joseph &c. R. Co. v. Baldwin*, 103 U. S. 426, 26 L. ed. 578, 2 Am. & Eng. R. Cas. 510; *Mis-*

the line of the road, and in equal quantities on each side thereof, it was held that the company could not take more land on the one side of the road than on the other.<sup>44</sup> Where lands are granted by a joint resolution of Congress, and its effect made contingent upon the favorable action of the President thereon, the resolution becomes effective as a land grant upon the issuing of an order declaring the executive judgment and setting apart the land.<sup>45</sup>

**§ 971 (798). Reserved lands.**—A grant of lands by the federal Congress does not operate upon lands theretofore reserved.<sup>46</sup> Lands withdrawn from sale are reserved.<sup>47</sup> It follows from

souri &c. R. Co. v. Kansas &c. R. Co., 97 U. S. 491, 24 L. ed. 1095; Tuttle v. Chicago &c. R. Co., 61 Minn. 190, 63 N. W. 618. See Oregon &c. R. Co. v. United States, 67 Fed. 650; Flint &c. R. Co. v. Gordon, 41 Mich. 420, 2 N. W. 648; Simonson v. Thompson, 25 Minn. 450; Wilkinson v. Northern Pacific R. Co., 5 Mont. 538, 6 Pac. 349, 10 Am. & Eng. R. Cas. 320; Rider v. Burlington &c. R. Co., 14 Nebr. 120, 15 N. W. 371, 10 Am. & Eng. R. Cas. 688.

<sup>44</sup> United States v. Burlington &c. R. Co., 98 U. S. 334, 25 L. ed. 198. See Neer v. Williams, 27 Kans. 1, 10 Am. & Eng. R. Cas. 561; Brown v. Carson, 16 Ore. 388, 19 Pac. 66, 21 Pac. 47. As to the right of way acquired over public domain under acts of Congress authorizing the same, see Union Pac. R. Co. v. Snow, 231 U. S. 204, 34 Sup. Ct. 104; Taggart v. Great No. R. Co., 208 Fed. 455; United States v. Chicago &c. R. Co., 207 Fed. 164.

<sup>45</sup> Republican &c. Co. v. Kansas Pacific R. Co., 12 Kans. 409.

<sup>46</sup> Kansas &c. R. Co. v. Atchison &c. R. Co., 112 U. S. 414, 5 Sup. Ct. 208, 28 L. ed. 794; United States v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. 1177, 32 L. ed. 213; Wisconsin &c. R. Co. v. Price County, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. ed. 687; United States v. Missouri &c. R. Co., 141 U. S. 358, 12 Sup. Ct. 13, 35 L. ed. 766; Northern Pacific R. Co. v. Musser &c. Co., 68 Fed. 993. See United States v. Northern Pacific R. Co., 152 U. S. 284, 14 Sup. Ct. 598, 38 L. ed. 443; McIntyre v. Roeschlaub, 37 Fed. 556; Oregon &c. R. Co. v. United States, 67 Fed. 650. See also Oregon &c. R. Co. v. United States, 190 U. S. 186, 23 Sup. Ct. 673, 47 L. ed. 1012; Little Rock &c. R. Co. v. Greer, 77 Ark. 387, 96 S. W. 129.

<sup>47</sup> Wisconsin &c. R. Co. v. Forsythe, 159 U. S. 46, 15 Sup. Ct. 1020, 40 L. ed. 71. See Kansas City &c. R. Co. v. Attorney-General, 118 U. S. 682, 7 Sup. Ct. 66, 30 L. ed. 281; Johnson v. Towsley, 13 Wall. (U. S.) 72, 20 L. ed. 485; Shepley v. Cowan, 91 U. S. 330, 23



these settled rules that where lands are reserved they do not vest in a railroad company receiving a grant. Until the road is located or the route determined, the grant is "in the nature of a float"; "the title does not attach to any specific sections" until they are capable of identification, but "when once identified the title attaches to them as of the date of the grant."<sup>48</sup> Where there is a grant to a railroad company of land the effect of the grant to the extent and purposes thereof is to withdraw the land granted from the operation of a prior act of reservation. When the land is so withdrawn the effect of the withdrawal, so far as concerns the property and rights withdrawn, is to re-establish the dominion of the state or territory.<sup>49</sup> So, lands valuable chiefly for granite quarries have been held to be "mineral lands" within the reservation or exception of mineral lands in the grant to the Northern Pacific Railroad Company.<sup>50</sup>

L. ed. 424; *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. ed. 844; *United States v. Missouri & Co.*, 141 U. S. 358, 12 Sup. Ct. 13, 35 L. ed. 766; *Oakes v. Myers* 68 Fed. 807.

<sup>48</sup> *St. Paul & Co. v. Northern Pacific R. Co.*, 139 U. S. 1, 11 Sup. Ct. 389, 35 L. ed. 77; *United States v. Southern Pacific R. Co.*, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. ed. 1091; *Schulenberg v. Harri-man*, 21 Wall. (U. S.) 44, 22 L. ed. 551; *Leavenworth & Co. v. United States*, 92 U. S. 733, 23 L. ed. 634; *Railroad Co. v. Baldwin*, 103 U. S. 426, 26 L. ed. 578; *Wolcott v. Des Moines Co.*, 5 Wall. (U. S.) 681, 18 L. ed. 689; *Dubuque & Co. v. Litchfield*, 23 How. (U. S.) 66, 16 L. ed. 500; *Northern Pacific R. Co. v. Musser & Co.* 68 Fed. 993; *Southern & Co. v. Groeck*, 68 Fed. 609.

<sup>49</sup> *Maricopa & Co. v. Arizona Ter.*, 156 U. S. 347, 15 Sup.

Ct. 391, 39 L. ed. 447, citing *Utah & Co. v. Fisher*, 116 U. S. 28, 6 Sup. Ct. 246, 29 L. ed. 542; *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237. See generally *Wolcott v. Des Moines Co.*, 5 Wall. (U. S.) 681, 18 L. ed. 689; *Riley v. Welles*, 154 U. S. 578, 14 Sup. Ct. 1166. See *Hamblin v. Western Land Co.*, 147 U. S. 531, 13 Sup. Ct. 353, 37 L. ed. 267. After the contract between the United States and the state segregating lands under the act of August 1894, as amended June 11, 1896, such lands were reserved from sale by the United States and were not public lands within the act of Congress of March 3, 1875, granting right of way nor subject to location thereunder. *Oregon Short Line R. Co. v. Williams*, 30 Idaho 715, 168 Pac. 14.

<sup>50</sup> *Northern Pac. R. Co. v. Soderberg*, 188 U. S. 526, 23 Sup. Ct. 365, 47 L. ed. 575. See also *Burke v. Southern Pac. R. Co.*, 234 U. S.

§ 972 (798a). **Withdrawal—When land becomes part of public domain.**—In a recent case the question arose as to whether land which was within the lines designated by the accepted map of the general route of the Lake Superior and Mississippi Railroad Company, and after the withdrawal by the land department of the lands covered by such map for the benefit of such company, was public land within a subsequent grant of “public land” to the Northern Pacific Railroad Company, and as to whether such grant attached to it when the Northern Pacific Railroad Company was definitely located thereafter. The court held that such land was not “public land” within the meaning of such later grant, and did not pass under it when it was subsequently ascertained that the land was without the line of the definite location of the Lake Superior and Mississippi Railroad, and was within the place limits of the Northern Pacific Railroad, as defined by its map of definite location, but, when freed from the earlier grant, became a part of the public domain, subject only to be disposed of under the general land laws.<sup>51</sup> It was also held, in the same case, that an order of the land department to suspend from preemption, settlement

669, 34 Sup. Ct. 907, 58 L. ed. 1527. Lands within the twenty-mile limit of the grant to the Texas Pacific Railroad Company are also held excepted from the grant to the Southern Pacific Railroad Company and can not be selected by it as indemnity lands. *Southern Pac. R. Co. v. United States*, 189 U. S. 447, 23 Sup. Ct. 567, 47 L. ed. 896.

<sup>51</sup> *Northern Lumber Co. v. O'Brien*, 204 U. S. 190, 27 Sup. Ct. 249, 51 L. ed. 438. The court cited *St. Paul &c. R. Co. v. Northern Pac. R. Co.* 139 U. S. 1, 5, 11 Sup. Ct. 389, 390, 35 L. ed. 77; *Bardon v. Northern Pac. R. Co.*, 145 U. S. 535, 12 Sup. Ct. 856, 36 L. ed. 806; *Kansas &c. R. Co. v. Dunmeyer*,

113 U. S. 629, 5 Sup. Ct. 566, 28 L. ed. 1122; *United States v. Southern Pac. R. Co.*, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. ed. 1091; *Whitney v. Taylor*, 158 U. S. 85, 15 Sup. Ct. 796, 39 L. ed. 906; *Spencer v. McDougal*, 159 U. S. 65, 15 Sup. Ct. 1026, 40 L. ed. 77; *Northern Pac. R. Co. v. Musser Sauntry Land &c. Co.* 168 U. S. 604, 18 Sup. Ct. 205, 42 L. ed. 596, and *Northern Pac. R. Co. v. De Lacey*, 174 U. S. 622, 19 Sup. Ct. 791, 43 L. ed. 1111; and distinguished *United States v. Oregon &c. R. Co.*, 176 U. S. 28, 20 Sup. Ct. 261, 44 L. ed. 358, and *Wilcox v. Eastern Oregon Land Co.*, 176 U. S. 51, 20 Sup. 269, 44 L. ed. 368, saying as to these last two cases:

and sale, a "body of land about twenty miles in width" was sufficiently definite under the circumstances of the case.

§ 973 (799). **Indemnity lands.**—In order to secure to the company the quantity of land granted to it and prevent a deficiency by reason of some of the land being preempted or taken up, it is usually provided that the company may take lands from other parts of the public domain. The loss of land covered by the grant is made good to the company where the land is taken up as homesteads out of the lands designated in the statute. As appears from what has been elsewhere said, and from the authorities referred to, the government is careful to encourage and protect the settlers who preempt land, and also to preserve the rights of the railroad under the grant, so that a liberal construction is given to the statutes providing indemnity lands.<sup>52</sup> While it is well settled that what are called "place lands" pass in praesenti, there is conflict upon the ques-

"The principal point decided in those cases was that nothing in the act of 1864 prevented Congress by legislation from appropriating for the benefit of other railroad corporations lands that might be or were embraced within the general route of the Northern Pacific Railroad; and this for the reason that an accepted map of general route only gave the company filing it an inchoate right, and did not pass title to specific sections until they were identified by a definite location of the road. Besides, in neither case was there in force, at the date of the later grant, an accepted effective order of the Land Department withdrawing the lands there in dispute pursuant to an accepted map of the general route of the Northern Pacific Railroad. If there had been an order of that kind, it would still have been com-

petent for Congress to dispose of the lands within such general route, as it saw proper, at any time prior to the definite location of the road under the later grant. In conformity with prior decisions it was so adjudged in the two cases above cited. Those cases did not adjudge that a grant of 'public land,' with the usual reservations, embraced any lands which, at the time, were formally withdrawn by the Land Department from preemption, settlement, or sale, for the benefit of a prior grant."

<sup>52</sup> *Kansas &c. R. Co. v. Atchison &c. R. Co.*, 112 U. S. 414, 5 Sup. Ct. 208, 28 L. ed. 794; *Wisconsin Central R. Co. v. Price County*, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. ed. 687; *Barney v. Winona &c. R. Co.*, 117 U. S. 228, 6 Sup. Ct. 654, 29 L. ed. 858; *Southern Pacific &c. R. Co. v. Tilley*, 41 Fed. 729.

tion whether indemnity lands pass in praesenti.<sup>53</sup> "The ordinary rule with respect to indemnity lands is that no title passes until after selection."<sup>54</sup> But as between two companies claiming under grants it is not necessary, in order to give priority to the company claiming under the earlier grant, that there should have been a formal selection.<sup>55</sup>

**§ 974 (799a). Rules laid down by Supreme Court of United States.**—Upon this general subject the following rules have been laid down by the Supreme Court of the United States in a recent case: "That the railroad company will not acquire a vested interest in particular lands, within or without place limits, merely by filing a map of general route and having the same approved by the Secretary of the Interior, although, upon the definite location of its line of road, and the filing and acceptance of a map thereof in the office of the Commissioner of the General Land Office the lands within primary or place limits not theretofore reserved, sold, granted, or otherwise disposed of, and free from preemption or other claims or rights, become segregated from the public domain, and no rights in such place lands will attach in favor of a settler or occupant who becomes such after definite location; that no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior; that up to the time such approval is

<sup>53</sup> *Railroad Co. v. Barnes*, 2 N. Dak. 310, 51 N. W. 386. But in *Grandin v. La Bar*, 3 N. Dak. 447, 57 N. W. 241, a different doctrine was declared. The court in the latter case discussed the decisions in *Railroad Co. v. Wiggs*, 43 Fed. 333; *St. Paul & C. R. Co. v. Northern Pacific R. Co.*, 139 U. S. 1, 11 Sup. Ct. 389, 35 L. ed. 77, and held that they did not decide that indemnity lands passed in praesenti. In the case of *Railroad Co. v. Barnes*, 2 N. Dak. 310, 51 N. W. 386, C. J. Corliss, in a very vigor-

ous opinion, dissented, and we think his opinion expresses the law.

<sup>54</sup> *United States v. Colton Marble & C. Co.* 146 U. S. 615, 13 Sup. Ct. 163, 36 L. ed. 1104; *United States v. Southern Pac. R. Co.*, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. ed. 1091.

<sup>55</sup> *St. Paul & C. R. Co. v. Northern Pacific R. Co.*, 139 U. S. 1, 11 Sup. Ct. 389, 35 L. ed. 77. See *Smith v. Northern Pacific R. Co.*, 58 Fed. 513.

given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States, or to be settled upon and occupied under the preemption and homestead laws of the United States; and that the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road."<sup>56</sup>

**§ 975 (800). Priority of rights.**—If there are two conflicting grants the first in point of time usually has priority.<sup>57</sup> If the company having the priority of right locates its road, files the proper map, and the map is approved by the Secretary of the Interior, its rights are vested subject to be divested if conditions subsequent are not performed. If a forfeiture is declared be-

<sup>56</sup> *Sjoli v. Dreschel*, 199 U. S. 564, 26 Sup. Ct. 154, 155, 50 L. ed. 311, citing *Hewitt v. Schultz*, 180 U. S. 139, 21 Sup. Ct. 309, 45 L. ed. 463; *Nelson v. Northern P. R. Co.*, 188 U. S. 109, 23 Sup. Ct. 302, 47 L. ed. 406; *United States v. Northern P. R. Co.*, 152 U. S. 284, 296, 14 Sup. Ct. 598, 38 L. ed. 443, 448; *Northern P. R. Co. v. Sanders*, 166 U. S. 620, 634, 635, 17 Sup. Ct. 671, 41 L. ed. 1139, 1144; *Menotti v. Dillon*, 167 U. S. 703, 17 Sup. Ct. 945, 42 L. ed. 333; *United States v. Oregon &c. R. Co.*, 176 U. S. 28, 20 Sup. Ct. 261, 42, 44 L. ed. 358, 364; *St. Paul &c. R. Co. v. Northern P. R. Co.*, 139 U. S. 1, 5, 11 Sup. Ct. 389, 35 L. ed. 77, 79; *St. Paul &c. R. Co. v. Winona &c. R. Co.*, 112 U. S. 720, 726, 5 Sup. Ct. 334, 28 L. ed. 872, 874; *Missouri &c. R. Co. v. Kansas P. R. Co.*, 97 U. S. 491, 501, 24 L. ed. 1095, 1098, *Cedar Rapids &c. R. Co. v. Herring*, 110

U. S. 27, 3 Sup. Ct. 485, 28 L. ed. 56; *Grinnell v. Chicago &c. R. Co.*, 103 U. S. 739, 26 L. ed. 456; *Kansas P. R. Co. v. Atchison &c. R. Co.*, 112 U. S. 414, 5 Sup. Ct. 208, 28 L. ed. 794; *Wilcox v. Eastern Oregon Land Co.*, 176 U. S. 51, 20 Sup. Ct. 269, 44 L. ed. 368. See also *Oregon &c. R. Co. v. United States*, 190 U. S. 186, 23 Sup. Ct. 673, 47 L. ed. 1012; *Doughty v. Minneapolis &c. R. Co.*, 15 N. Dak. 290, 107 N. W. 971. Compare *Baker v. Berg*, 138 Minn. 109, 164 N. W. 588.

<sup>57</sup> *United States v. Southern Pacific R. Co.*, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. ed. 1091. But compare *Southern Pac. R. Co. v. Boyard (Cal.)*, 87 Pac. 203. See as to priority between railroad grant and homestead entry, *Taggart v. Great No. Ry. Co.*, 211 Fed. 288; *St. Louis &c. R. Co. v. Budd*, 112 Ark. 105, 165 S. W. 265.

cause of a breach of conditions the land reverts to the United States, and does not pass to the company having a grant junior to the company which secured the prior right.<sup>58</sup> In a case where rival claimants for the same right of way filed profiles covering the same right of way at about the same time, it was held the duty of the Secretary of the Interior to determine from the facts which company had the superior right to have its profile approved.<sup>59</sup>

**§ 976 (801). Breach of condition—Forfeiture.**—The railroad company may, of course, lose the benefit of a grant by failure to perform the conditions imposed upon it, but in order to constitute a forfeiture action must be taken by the government.<sup>60</sup> It is held that when a grant has once vested it can only be defeated by breach of conditions, and divestiture of title thereupon by proper proceedings on behalf of the United States,<sup>61</sup>

<sup>58</sup> *United States v. Southern Pacific R. Co.*, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. ed. 1091; *United States v. Northern Pacific R. Co.*, 152 U. S. 284, 14 Sup. Ct. 598, 38 L. ed. 443, 57 Am. & Eng. R. Cas. 362; *Sioux City &c. R. Co. v. Countryman*, 159 U. S. 377, 16 Sup. Ct. 28, 40 L. ed. 187. See *Chicago &c. R. Co. v. United States*, 159 U. S. 372, 16 Sup. Ct. 26, 40 L. ed. 185; *Sioux City &c. R. Co. v. United States*, 159 U. S. 349, 16 Sup. Ct. 17, 40 L. ed. 177.

<sup>59</sup> *Phoenix &c. R. Co. v. Arizona Eastern R. Co.*, 9 Ariz. 434, 84 Pac. 1097.

<sup>60</sup> *Bybee v. Oregon &c. R. Co.*, 139 U. S. 663, 11 Sup. Ct. 641, 35 L. ed. 305; *Union Pac. R. Co. v. Snow*, 231 U. S. 204, 34 Sup. Ct. 104, 58 L. ed. 184. See also *Utah &c. R. Co. v. Utah &c. R. Co.*, 110 Fed. 879.

<sup>61</sup> *United States v. Curtner*, 38 Fed. 1. If the company conveys

any of the lands before constructing its road, and the grant is subsequently revoked for a failure to comply with the conditions subsequent upon which it was made, the title of the company's grantees will fail. *Shepard v. Northern Life Ins. Co.*, 40 Fed. 341; *Southern Pac. R. Co. v. Esquibel*, 4 N. Mex. 337, 20 Pac. 109. It has been held that sales made in excess of the amount earned by a railroad company which is entitled, by the terms of the grant, to a certain quantity of land upon the completion of a stated number of miles of its road, are absolutely void, even though the road afterwards earns the lands sold. *Jackson &c. R. Co. v. Davison*, 65 Mich. 416, 32 N. W. 726; *Swann v. Miller*, 82 Ala. 530, 1 So. 65. See *Lake Superior &c. Co. v. Cunningham*, 44 Fed. 587; *Grinnell v. Chicago &c. R. Co.*, 103 U. S. 739, 26 L. ed. 456. In *Bybee v. Oregon &c. R. Co.*, 139 U. S. 663,

but, while a judicial proceeding is the usual and appropriate one, it has been held that a forfeiture may be declared by Congress. A third person will not be heard to question the title of the corporation on the ground that it had no authority to take the land, for this is a question between the government and the corporation.<sup>62</sup> Where a statute assumes to convey the title to lands adjoining the right of way of a railroad, its effect in passing the title to particular tracts cannot be questioned by a third person.<sup>63</sup> In Louisiana it was held that the United States government is the only claimant that can dispute the validity of rights to such lands acquired with the sanction and authority of the state legislature, and that parties who have acquired title through a sale under a mortgage authorized by the legislature have the legal title to the lands, as against a party claiming no title except by possession, and who went on the land, expecting it to be thrown open to public sale and

11 Sup. Ct. 641, 35 L. ed. 305; *Sioux City &c. R. Co. v. Countryman*, 159 U. S. 377, 16 Sup. Ct. 28, 40 L. ed. 187; *St. Paul &c. R. Co. v. St. Paul &c. R. Co.*, 68 Fed. 2, the court distinguished the cases of *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536; *Farnham v. Benedict*, 107 N. Y. 159, 13 N. E. 784; *Brooklyn &c. Co. v. Brooklyn*, 78 N. Y. 524, holding that the legislative act did not avoid the grant by forfeiture upon the non-performance of the conditions, but because the corporate existence had expired.

<sup>62</sup> *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44, 22 L. ed. 551; *United States v. De Repentigny*, 5 Wall. (U. S.) 211, 268, 18 L. ed. 627; *Southern Pac. R. Co. v. Orton*, 32 Fed. 457; *Kennett v. Plummer*, 28 Mo. 142; *Cowell v. Springs Co.*, 100 U. S. 55, 25 L. ed. 547;

*American &c. Christian Union v. Yount*, 101 U. S. 352, 361, 25 L. ed. 888. See *Cole &c. Mining Co. v. Virginia &c. Co.*, 1 Sawy. (U. S.) 478; *Rutland &c. Railroad Co. v. Proctor*, 29 Vt. 93; *Bissell v. Michigan &c. R. Co.*, 22 N. Y. 258; *Natoma &c. Mining Co. v. Clarkin*, 14 Cal. 544; *Missouri &c. R. Co. v. Watson*, 74 Kans. 494, 87 Pac. 687; *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. 336, 27 L. ed. 201; *United States v. Loughrey*, 71 Fed. 921; *Chicago &c. R. Co. v. Grinnell*, 51 Iowa 476, 1 N. W. 712; *Chicago &c. R. Co. v. Lewis*, 53 Iowa 101, 4 N. W. 842; *Johnson v. Thornton*, 54 Iowa 144, 6 N. W. 65; *Northern Pacific R. Co. v. Majors*, 5 Mont. 111, 2 Pac. 322.

<sup>63</sup> *Minnesota Land &c. Co. v. Davis*, 40 Minn. 455, 42 N. W. 299. See *Vicksburg &c. R. Co. v. Sledge*, 41 La. Ann. 896, 6 So. 725.

entry.<sup>64</sup> All the cases agree, however, that the state has no power to sanction any disposition of the lands which will tend to defeat or to render impossible the performance of conditions upon which the grant was made by Congress.<sup>65</sup>

**§ 977 (802). Legislative declaration of forfeiture.**—It is held by the Supreme Court of the United States that, where the statute containing the grant provides for a forfeiture within a specified time, the legislature may effectively declare a forfeiture, and that it is not necessary to obtain a declaration of forfeiture by judicial proceedings.<sup>66</sup> It is said that where the declaration is made by Congress it must be "direct, positive, and free from all doubt and ambiguity."<sup>67</sup> It is, of course, competent for the legislature to avert a forfeiture by dispensing with performance of the conditions.<sup>68</sup>

**§ 978 (803). Cancellation of grants and entries.**—The cancellation of a homestead entry after a subsequent grant to a railroad and the definite location of its line of road does not inure to the benefit of the railroad company, but the land reverts to the government, and becomes a part of the domain, subject to appropriation by the first legal applicant.<sup>69</sup> The voluntary

<sup>64</sup> *Vicksburg &c. R. Co. v. Sledge*, 41 La. Ann. 896, 6 So. 725.

<sup>65</sup> *Miller v. Swann*, 89 Ala. 631, 7 So. 771; *Vicksburg &c. R. Co. v. Sledge*, 41 La. Ann. 896, 6 So. 725; *Jackson &c. R. Co. v. Davison*, 65 Mich. 416, 32 N. E. 726.

<sup>66</sup> *Farnsworth v. Minnesota &c. R. Co.*, 92 U. S. 49, 23 L. ed. 530; *Bybee v. Oregon &c. R. Co.*, 139 U. S. 663, 11 Sup. Ct. 641, 35 L. ed. 305; *United States v. De Repentigny*, 5 Wall. (U. S.) 211, 267, 18 L. ed. 627; *McMicken v. United States*, 97 U. S. 204, 24 L. ed. 947; *Atlantic &c. R. Co. v. Mingus*, 7 N. Mex. 360, 34 Pac. 592.

<sup>67</sup> *St. Louis &c. R. Co. v. McGee*, 115 U. S. 469, 473, 6 Sup. Ct. 123, 29 L. ed. 446.

<sup>68</sup> *United States v. Denver &c. R. Co.*, 150 U. S. 1, 14 Sup. Ct. 11, 37 L. ed. 975.

<sup>69</sup> *Hastings & Des Moines R. Co. v. Whitney*, 132 U. S. 357, 363, 10 Sup. Ct. 112, 33 L. ed. 363, 40 Am. & Eng. R. Cas. 426. A homestead entry made before the definite location of a railroad, but voluntarily abandoned before location, although the filing was not canceled until after the location, will not except the land from the grant to the company, under an act of congress donating lands to aid in the construction of railroads. *Young v. Goss*, 42 Kans. 502, 22 Pac. 572, 40 Am. & Eng. R. Cas. 435.



filing of an amended preemption claim operates as a cancellation of a previous claim or entry, although there is no formal record of cancellation.<sup>70</sup> The federal courts will entertain a suit by the United States to cancel patents erroneously issued by its officers in derogation of rights previously acquired by homestead of preemption, or otherwise under existing laws.<sup>71</sup> A bona fide purchaser of lands conveyed to a railroad company by patent, but which were in fact not included in the grant, may successfully defend against a suit to cancel the patent, but not where he is not a bona fide purchaser, because the lands were already occupied under a recorded preemption claim.<sup>72</sup> Where a preemption claim was filed but canceled because the claimant had not lived on the land, the land was held to be exempted from the grant.<sup>73</sup> A company, by laches, may lose its right to have a patent canceled.<sup>74</sup>

<sup>70</sup> *Amacker v. Northern Pac. R. Co.*, 58 Fed. 850. See *Bardon v. Northern Pac. Railroad Co.*, 145 U. S. 535, 12 Sup. Ct. 856, 36 L. ed. 806; *Hastings &c. Railroad Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. ed. 363; *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. ed. 1122; *Gallagher v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. ed. 738. See *Northern Pacific R. Co. v. De Lacy*, 66 Fed. 450.

<sup>71</sup> *United States v. Missouri &c. R. Co.*, 141 U. S. 358, 12 Sup. Ct. 13, 35 L. ed. 766, reversing 37 Fed. 68. See also *Southern Pac. R. Co. v. United States*, 200 U. S. 341, 26 Sup. Ct. 296, 50 L. ed. 507.

<sup>72</sup> *United States v. Winona &c. R. Co.*, 67 Fed. 969, affirmed in *Winona &c. R. Co. v. United States*, 165 U. S. 483, 17 Sup. Ct. 381, 41 L. ed. 798; *United States v. Winona &c. R. Co.*, 165 U. S. 463, 17 Sup. Ct. 368, 41 L. ed. 789; *Gert-*

*gens v. O'Connor*, 191 U. S. 237, 24 Sup. Ct. 94, 48 L. ed. 163; *Knepper v. Sands*, 194 U. S. 476, 24 Sup. Ct. 744, 48 L. ed. 1083; *United States v. Southern Pac. R. Co.*, 117 Fed. 544. See also *United States v. Southern Pac. R. Co.*, 184 U. S. 49, 22 Sup. Ct. 285, 46 L. ed. 425; *Clark v. Herington*, 186 U. S. 206, 22 Sup. Ct. 872, 46 L. ed. 1128.

<sup>73</sup> *Whitney v. Taylor*, 158 U. S. 85, 15 Sup. Ct. 796, 39 L. ed. 906, citing *Bardon v. Northern Pac. R. Co.*, 145 U. S. 535, 12 Sup. Ct. 856, 36 L. ed. 806; *Newhall v. Sanger*, 92 U. S. 761, 23 L. ed. 769; *Hastings &c. R. Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. ed. 363. See *Wood v. Beach*, 156 U. S. 548, 15 Sup. Ct. 410, 39 L. ed. 528.

<sup>74</sup> *Curtner v. United States*, 149 U. S. 662, 13 Sup. Ct. 985, 37 L. ed. 890; *Sage v. Winona &c. R. Co.*, 58 Fed. 297; *Southern &c. R. Co. v. St. Paul &c. R. Co.*, 55 Fed. 690.

**§ 979 (803a). Condition that land shall revert to United States if not disposed of within a fixed time.**—Under a condition in the land grant to the Union Pacific Railroad that lands not sold or disposed of before the expiration of three years after the completion of the road should be subject to settlement and preemption like other lands, it has been held that lands covered by a mortgage executed by the railroad company were to be regarded as disposed of within the meaning of the condition, and hence were not subject to settlement or preemption at the expiration of three years from the completion of the road. The mortgage amounted to a hypothecation of the fee, and not merely an estate terminable at the expiration of the three years mentioned in the grant.<sup>75</sup> It is not the law that settlers can take possession of such lands after the failure of the railroad company to comply with the condition and before the government has declared a forfeiture. It is well settled that a private person cannot institute proceedings for forfeiture. The right, as we have seen,<sup>76</sup> to insist upon a forfeiture in proper proceedings therefor, belongs exclusively to the government.<sup>77</sup>

**§ 980 (804). Staking and surveying line does not conclude the company.**—A railroad company is not concluded by surveying and staking a line of road. For purposes concerning the land grant it is not concluded until a map is made and filed. It has a right to survey and stake many lines, since that course is necessary in order to enable it to finally decide upon the line on which it will construct its road.<sup>78</sup> The doctrine of the cases referred to in the note was applied to the decision of commissioners appointed to decide and report upon the construction of the road.<sup>79</sup>

<sup>75</sup> *Platt v. Union Pacific R. Co.*, 99 U. S. 48, 25 L. ed. 424.

<sup>76</sup> *Ante*, § 976.

<sup>77</sup> *Vicksburg &c. R. Co. v. Elmore*, 46 La. Ann. 1237, 15 So. 701.

<sup>78</sup> *Sioux City &c. Land Co. v. Griffey*, 143 U. S. 32, 39, 12 Sup. Ct. 362, 36 L. ed. 64; *Kansas Pac.*

*R. Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. ed. 1122; *Van Wyck v. Knevals*, 106 U. S. 360, 366, 1 Sup. Ct. 336, 27 L. ed. 201.

<sup>79</sup> *Smith v. Northern Pacific R. Co.*, 58 Fed. 513. See generally *Blum v. Houston &c. R. Co.*, 10 Tex. Civ. App. 312, 31 S. W. 526.

**§ 981 (805). Aid to two companies by same grant.**—The rule is that where two lines of road are aided by land grants made by the same act, and the lines of the roads cross or intersect the lands within the "place" limits of both, the lands do not pass to either company in preference to the other, no matter which road may be first located and built, but pass in equal undivided moieties.<sup>80</sup> Where the lands are granted to the state for the accomplishment of specific purposes those purposes cannot be defeated by the state or by any corporations which are beneficiaries under the grant, so that where the state attempts to release the land to one of the companies and the release is effective only in part, the state and the United States will hold the land not effectively released in undivided portions.<sup>81</sup>

**§ 982 (806). Grants by the government — Estoppel.**—The general rule is that a state is not bound by the unauthorized acts of its officers, and that an estoppel arising from such acts will not operate against it.<sup>82</sup> But this general rule has its limitations and exceptions.<sup>83</sup> A state, as the owner of property,

<sup>80</sup> *Southern Pac. R. Co. v. United States*, 183 U. S. 519, 22 Sup. Ct. 154, 46 L. ed. 307; *Donahue v. Lake Superior &c. R. Co.*, 155 U. S. 386, 15 Sup. Ct. 115, 39 L. ed. 194, citing *St. Paul &c. R. Co. v. Winona &c. R. Co.*, 112 U. S. 720, 5 Sup. Ct. 334, 28 L. ed. 866; *Sioux City &c. R. Co. v. Chicago &c. R. Co.*, 117 U. S. 406, 6 Sup. Ct. 790, 29 L. ed. 928.

<sup>81</sup> *Donahue v. Lake Superior &c. R. Co.*, 155 U. S. 386, 15 Sup. Ct. 115, 39 L. ed. 194; *Crane v. Reeder*, 25 Mich. 303; *Ellsworth v. Grand Rapids*, 27 Mich. 250; *Rogers v. Port Huron &c. Railroad Co.*, 45 Mich. 460, 8 N. W. 46; *Lake Shore &c. R. Co. v. People*, 46 Mich. 193, 9 N. W. 249; *Plumb v. Grand Rapids*, 81 Mich. 381, 45 N. W. 1024; *Hull et al. v. Marshall County*, 12 Iowa 142.

<sup>82</sup> *Whiteside v. United States*, 93 U. S. 247, 23 L. ed. 882; *McCaslin v. State*, 99 Ind. 428; *Brown v. Ogg*, 85 Ind. 234; *Vail v. McKernan*, 21 Ind. 421; *Ferris v. Cravens*, 65 Ind. 262; *Skelton v. Bliss*, 7 Ind. 77; *Reid v. State*, 74 Ind. 252.

<sup>83</sup> *Cahn v. Barnes*, 5 Fed. 326; *State v. Flint &c. R. Co.*, 89 Mich. 481, 51 N. W. 103; *Attorney-General v. Ruggles*, 59 Mich. 123, 26 N. W. 419; *United States v. McLaughlin*, 30 Fed. 147; *State v. Milk*, 11 Fed. 389; *Hough v. Buchanan*, 27 Fed. 328; *Pengra v. Munz*, 29 Fed. 830; *United States v. Missouri &c. R. Co.*, 37 Fed. 68; *United States v. Willamette &c. Co.*, 54 Fed. 807. See *United States v. Alabama &c. R. Co.*, 142 U. S. 615, 12 Sup. Ct. 306, 35 L. ed. 1134; *United States v. Hill*, 120 U. S. 169, 7 Sup. Ct. 510, 30 L. ed. 627.

and as a party to a contract, is not always, by any means, entitled to assert its rights as a sovereign, for, in relation to property and to contracts, there are cases in which it may be regarded substantially as a private corporation or an individual citizen.<sup>84</sup> It does not follow, because a state cannot be sued,<sup>85</sup> that it cannot be estopped, for there is an essential difference between its exemption as a sovereign from suit and its right to enforce a contract or assert a cause of action where equity and good conscience forbid. Upon sound principle it is held that, where the officers of the state assuming to act for the state and under its authority, grant lands to a railroad company to aid it in constructing its road, and there is long acquiescence and all the elements of estoppel exist, the state cannot maintain a suit to avoid the grant, although the officers exceeded their authority.<sup>86</sup> The doctrine of estoppel has been applied to the case of a county granting land to a railroad company, and the reasoning by which the court reached its conclusion would seem to support the conclusion that a state may be estopped.<sup>87</sup> In

<sup>84</sup> *Wabash &c. Canal Co. v. Beers*, 2 Black (U. S.) 448, 17 L. ed. 327; *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 3 L. ed. 162; *Terrett v. Taylor*, 9 Cranch (U. S.) 43, 3 L. ed. 650; *Davis v. Gray*, 16 Wall. (U. S.) 203, 21 L. ed. 447; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Keith v. Clark*, 97 U. S. 454, 24 L. ed. 1071; *Hartman v. Greenhow*, 102 U. S. 672, 26 L. ed. 271; *Hall v. Wisconsin*, 103 U. S. 5, 26 L. ed. 302; *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 29 L. ed. 185; *Grogan v. San Francisco*, 18 Cal. 590; *Georgia &c. Co. v. Nelms*, 78 Ga. 301; *Carr v. State*, 127 Ind. 204, 26 N. E. 778, 11 L. R. A. 370; *People v. Canal Commissioner*, 5 Denio (N. Y.) 401; *State v. Cardozo*, 8 S. Car. 71, 28 Am. Rep. 275; *Lowry v. Francis*, 2 Yerg. (Tenn.) 534.

<sup>85</sup> *Hans v. Louisiana*, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. ed. 842; *Ayers, In re*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. ed. 216; *State v. Lazarus*, 40 La. Ann. 856, 5 So. 289; *Murdock &c. Co. v. Commonwealth*, 152 Mass. 28, 24 N. E. 854, 8 L. R. A. 399, and notes; *Commonwealth v. Weller*, 82 Va. 721, 1 S. E. 102.

<sup>86</sup> *State v. Jackson &c. R. Co.*, 69 Fed. 116, citing *United States v. Alabama &c. R. Co.*, 142 U. S. 615, 12 Sup. Ct. 306, 35 L. ed. 1134; *United States v. Macdaniel*, 7 Pet. (U. S.) 1, 8 L. ed. 587; *United States v. Union Pacific R. Co.*, 37 Fed. 551; *Michigan &c. Co. v. Rust*, 68 Fed. 155.

<sup>87</sup> *Roberts v. Northern Pacific R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. ed. 873.

one of the cases, however, it is held that the United States is not estopped by a failure to promptly take measures to set aside the certification of land to the state.<sup>88</sup>

**§ 983 (807). Where state renders performance of condition impossible, grant is not defeated.**—The well-known general rule that, if the grantee, by his own act, renders the performance of a condition subsequent impossible, he cannot enforce a forfeiture of the estate for non-performance of the condition, applies to land grants. A state cannot defeat the estate of the grantee by a wrongful act of its own which disables or prevents a railroad company, the beneficiary in a grant, from performing the conditions of the grant. This doctrine was applied to a state which, by seceding from the Union, rendered it impossible for the railroad company to perform the conditions subsequent embodied in the grant of land to it.<sup>89</sup>

**§ 984 (808). Partial failure to perform conditions.**—In some of the grants provision is made that, in the event that a certain part of the road is completed within a designated time, title

<sup>88</sup> *United States v. Winona & C. R. Co.*, 67 Fed. 969, citing *Lea v. Polk & C. Copper Co.*, 21 How. (U. S.) 493, 498, 16 L. ed. 203; *Lindsey v. Miller*, 6 Pet. (U. S.) 666, 8 L. ed. 538; *United States v. Knight*, 14 Pet. (U. S.) 301, 10 L. ed. 465; *Gilson v. Chouteau*, 13 Wall. (U. S.) 92, 20 L. ed. 534; *Noyes v. Hall*, 97 U. S. 34, 24 L. ed. 909; *United States v. Thompson*, 98 U. S. 486, 25 L. ed. 194; *Fink v. O'Neil*, 106 U. S. 272; 1 Sup. Ct. 325, 27 L. ed. 196; *United States v. Nashville & C. R. Co.*, 118 U. S. 120, 6 Sup. Ct. 1006, 30 L. ed. 81; *United States v. Beebe*, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. ed. 121; *Siebert v. Rosser*, 24 Minn. 155. It is not easy to reconcile the decision in the first of the cases cited in this

note with that in *State v. Jackson & C. R. Co.*, 69 Fed. 116. We think that the rule laid down in the latter case is the correct one, and that it is probable that there may be a distinction between the two cases, but there is conflict in the statements of the opinions in those cases. The case was affirmed, however, in *Winona & C. R. Co. v. United States*, 165 U. S. 483, 17 Sup. Ct. 381, 41 L. ed. 798. But see *United States v. Winona & C. R. Co.*, 165 U. S. 463, 17 Sup. Ct. 368, 41 L. ed. 789; *United States v. Des Moines & C. R. Co.*, 84 Fed. 40. See generally *St. Paul & C. R. Co. v. Sage*, 49 Fed. 315.

<sup>89</sup> *Davis v. Gray*, 16 Wall. (U. S.) 203, 21 L. ed. 447.

to a specific quantity of land shall vest in the company, and another designated part shall vest when another or other parts of the road are completed, and under such grants it is held that, upon the completion of a part of the road entitling it to a designated quantity of land, title to that quantity will vest although the other part of the road may not be completed within the time limited.<sup>90</sup> As we have elsewhere shown, a trespasser or intruder cannot successfully raise the question whether there has or has not been either part or full performance of the condition subsequent.<sup>91</sup>

**§ 985 (809). Notice by possession — Adverse possession.** — The general rule that a party is bound to take notice of the rights of a person in possession of land has been applied to a railroad company under a land grant. It was held that where the claimant was in possession under "a preemption filing," his possession was notice to the company claiming title under a grant made by statute.<sup>92</sup> The fact that the claimant was in possession under his preemption claim was said to be "a decisive fact." But adverse possession for private use under a state statute of limitation cannot give an individual title to part of a right of way granted by Congress to a railroad company and essential to its proper performance of the duties imposed upon it.<sup>93</sup> It is the province of the courts to determine who are

<sup>90</sup> *Railroad Land Co. v. Court-right*, 21 Wall. (U. S.) 310, 22 L. ed. 582; *Courtright v. Cedar Rapids &c. R. Co.*, 35 Iowa 386. See generally *Sioux City &c. R. Co. v. Osceola Co.*, 43 Iowa 318; *Dubuque &c. R. Co. v. Des Moines &c. R. Co.*, 54 Iowa 89, 6 N. W. 157.

<sup>91</sup> *Leavenworth &c. R. Co. v. United States*, 92 U. S. 733, 23 L. ed. 634; *Grinter v. Kansas Pacific R. Co.*, 23 Kans. 642; *Hannibal &c. R. Co. v. Moore*, 45 Mo. 443. See *Cooper v. Roberts*, 18 How. (U. S.) 173, 15 L. ed. 338.

<sup>92</sup> *United States v. Winona &c.*

*R. Co.*, 67 Fed. 969, citing *Lea v. Polk &c. Copper Co.*, 21 How. (U. S.) 493, 498, 16 L. ed. 203; *Noyes v. Hall*, 97 U. S. 34, 37, 24 L. ed. 909; *Siebert v. Rosser*, 24 Minn. 155, 16 Am. & Eng. Ency. of L. 800. See also *Nelson v. Northern Pac. R. Co.*, 188 U. S. 108, 23 Sup. Ct. 302, 47 L. ed. 406. The court discriminated the case before it from *United States v. Winona &c. R. Co.*, 67 Fed. 948; *Spokane Falls &c. R. Co. v. Ziegler*, 61 Fed. 392.

<sup>93</sup> *Northern Pac. R. Co. v. Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. ed. 1044. Thus, where

purchasers without notice and to protect the rights of bona fide purchasers of public lands.<sup>94</sup>

**§ 986 (810). Injunction on the application of company.—**

There can, of course, be no doubt that, after the location of the road and the identification of the land, a company receiving a grant may maintain injunction to prevent the destruction of timber, where the destruction of timber would work irreparable injury.<sup>95</sup> The question as to the right to an injunction is not so clear where there has been no location, and, consequently, no identification of the land. But it has been held, and with reason, that the company, even before the location of the road, may maintain a suit to enjoin the destruction of timber.<sup>96</sup>

Congress had granted a railroad company a right of way 400 feet wide it was held that the company could not be divested of such right to the entire width by abandonment or estoppel. *Union Pac. R. Co. v. Theden*, 104 Kans. 289, 178 Pac. 441 (also holding that the Norris act of June 24, 1892, providing that parts of right of way abandoned should become the property of abutters is prospective and not retroactive). See also *Union Pac. R. Co. v. Laramie Stockyards*, 231 U. S. 190, 34 Sup. Ct. 101, 58 L. ed. 179. But compare *Union Pac. R. Co. v. Greeley*, 189 Fed. 1; *Northern Pac. R. Co. v. Ely*, 197 U. S. 1, 25 Sup. Ct. 302, 49 L. ed. 639.

<sup>94</sup> *Bogan v. Edinburgh &c. Co.*, 63 Fed. 192; *Cunningham v. Ashley*, 14 How. (U. S.) 377, 14 L. ed. 462; *Garland v. Wynn*, 20 How. (U. S.) 6, 15 L. ed. 801; *Lytle v. Arkansas*, 22 How. (U. S.) 193, 16 L. ed. 306; *Lindsey v. Hawes*, 2 Black (U. S.) 554, 17 L. ed. 265; *Johnson v. Towsley*, 13 Wall. (U.

S.) 72, 20 L. ed. 485; *Bernier v. Bernier*, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. ed. 152. See also *Logan v. Davis*, 233 U. S. 613, 34 Sup. Ct. 685, 58 L. ed. 1121; *Tarpey v. Madsen*, 178 U. S. 215, 20 Sup. Ct. 849, 44 L. ed. 1042. But compare *Northern Pac. R. Co. v. Colburn*, 164 U. S. 383, 17 Sup. Ct. 98, 41 L. ed. 479.

<sup>95</sup> *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. ed. 1117.

<sup>96</sup> *Northern Pacific R. Co. v. Hussey*, 61 Fed. 231, citing *Frasher v. O'Connor*, 115 U. S. 102, 5 Sup. Ct. 1141, 29 L. ed. 311; *Doe v. Wilson*, 23 How. (U. S.) 457, 16 L. ed. 584; *Dubuque &c. R. Co. v. Litchfield*, 23 How. (U. S.) 66, 16 L. ed. 500; *Ross v. McJunkin*, 14 Serjt. & R. (Pa.) 364; *Toledo &c. R. Co. v. Pennsylvania Co.*, 54 Fed. 746, 19 L. R. A. 395. An incipient location of land gives the person making the location an equitable interest in the land which he can sell. *Kingman v. Holthaus*, 59 Fed. 305, distinguishing *Lessiuer v. Price*, 12 How. (U. S.) 59, 13 L.

**§ 987 (811). Effect of reservation of right to use railroad as a highway.**—In some of the land grants Congress incorporated a provision reading as follows: "The said railroad shall be and remain a public highway for the use of the government of the United States, free from all toll or other charge for the transportation of any property or troops," and it has been held that this provision secures to the government the free use of the road, but does not entitle it to have troops or property transported free of charge.<sup>97</sup> The reasoning of the court was that reference should be had to the conditions existing at the time the act was passed, and that Congress, in adopting the act, was influenced by the mode in which railroads were then used. Cases were cited holding that persons or corporations might run cars over the tracks of the company.<sup>98</sup> It has also been held that the act of Congress requiring land-grant railroads to carry freight for the use of the army at not exceeding fifty per cent. of the tariff rates charged the general public, does not entitle the government to a reduced rate for the carriage of such freight between two points by a railroad company which received no land grant, merely because its trains run for a part of the distance over the track of a land-grant road.<sup>99</sup>

**§ 988 (811a). Right to take timber and material from adjacent lands.**—Under the Act of Congress of March 3, 1875, railroad companies which have obtained a right of way over public lands of the United States, as therein prescribed, are granted the right "to take from the public lands, adjacent to the line of said road, material, earth, stone and timber" necessary for

ed. 893; *Rector v. Ashley*, 6 Wall. (U. S.) 142, 18 L. ed. 733; *Gilson v. Chouteau*, 13 Wall. (U. S.) 92, 20 L. ed. 534; *Shepley v. Cowan*, 91 U. S. 330, 23 L. ed. 424, citing *Bush v. Marshall*, 6 How. (U. S.) 285, 12 L. ed. 440; *Landes v. Brant*, 10 How. (U. S.) 348, 13 L. ed. 449; *Levi v. Thompson*, 4 How. (U. S.) 17, 11 L. ed. 856; *Massey v. Papin*, 24 How. (U. S.) 362, 16 L. ed. 734;

*Callahan v. Davis*, 90 Mo. 78, 2 S. W. 216.

<sup>97</sup> *Lake Superior &c. R. Co. v. United States*, 93 U. S. 442, 23 L. ed. 965; *Boyle v. Philadelphia &c. R. Co.*, 54 Pa. St. 310.

<sup>98</sup> *King v. Severn R. Co.*, 2 B. & A. 646; *Queen v. Grand Junction &c. R. Co.*, 4 Q. B. 18.

<sup>99</sup> *United States v. Astoria &c. R. Co.*, 131 Fed. 1006.



its construction, also a certain amount of ground adjacent for station buildings, shops, side-tracks, and the like. The word "adjacent" has been, and should be, somewhat liberally construed in this connection, and it has been held that a railroad company has the right to cut and take timber or material from public lands adjacent to the line of the road at one point and use it on portions of its line remote from such point.<sup>1</sup> But, while a liberal construction should be given to the act in regard to taking timber and material from adjacent land, yet land many miles distant from the line of the road and not immediately accessible from it can not be said to be adjacent within the meaning of the act.<sup>2</sup>

<sup>1</sup> United States v. Denver &c. R. Co., 150 U. S. 1, 14 Sup. Ct. 11, 37 L. ed. 975; United States v. Hynde, 47 Fed. 297.

<sup>2</sup> United States v. St. Anthony R. Co., 192 U. S. 524, 24 Sup. Ct. 333, 48 L. ed. 548. See also Stone v. United States, 64 Fed. 667, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. ed. 127: And see as to action by United States in trover for cutting timber. United States v. Denver

&c. R. Co., 191 U. S. 84, 24 Sup. Ct. 33, 48 L. ed. 106. See also for case in which it was held that a bill in equity would not lie, United States v. Bitter Root Development Co., 200 U. S. 451, 26 Sup. Ct. 318, 50 L. ed. 550. And see generally as to right to cut timber on public land and the remedies, note to King-Ryder Lumber Co. v. Scott, 73 Ark. 329, in 70 L. R. A. 873.

## CHAPTER XXXIV

### PUBLIC AID

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§ 995 (812). **State aid.**—Where there is no constitutional provision prohibiting it a state may aid in the construction of a railroad although the railroad is owned by a railroad corporation.<sup>1</sup> Where a change in the constitution withdraws power

<sup>1</sup> If, as held in the cases hereafter cited, the state may authorize municipalities to grant such aid, it

necessarily follows that the state may grant it directly. See post, § 1269.

from the legislature or makes the right to grant aid depend upon a popular vote the legislature cannot grant aid after the change in the constitution where the change operates as a withdrawal of the power, or, where the constitution so requires, without submitting the matter to a vote of the people.<sup>2</sup> The statute granting the aid and the acceptance of the company constitutes the contract, and if the statute does not expressly or by fair implication provide that the stockholders of the company shall be personally liable, then no such liability exists.<sup>3</sup>

§ 996 (813). **State aid—Lien of state.**—A state, by guarantying the bonds of a railway company, or by issuing its own bonds in aid of a railway company, does not secure a lien on the property of the company or on any specific fund, unless the statute expressly and clearly provides that the state shall have a lien.<sup>4</sup> It has, however, been held that a statute may be so framed as to give the state a lien on the property, or a right to a specific fund.<sup>5</sup> The rule that a state, when it enters into a contract, is to be regarded substantially as any other contracting party, requires the conclusion that, unless a lien is provided for by the statute or contract, none exists. Where a lien exists in favor of the state, it cannot be divested except by the state, or by a valid decree.<sup>6</sup>

<sup>2</sup> *McKittrick v. Arkansas Central R. Co.*, 152 U. S. 473, 14 Sup. Ct. 661, 38 L. ed. 518, citing *Aspinwall v. Daviess County*, 22 How. (U. S.) 364, 16 L. ed. 296; *Wadsworth v. Supervisors*, 102 U. S. 534, 26 L. ed. 221; *State v. Little Rock & C. R. Co.*, 31 Ark. 701.

<sup>3</sup> *United States v. Stanford*, 69 Fed. 25, citing *United States v. Union Pac. R. Co.*, 91 U. S. 72, 23 L. ed. 224; *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496; *Union Pac. R. Co. v. United States*, 104 U. S. 662, 26 L. ed. 884; *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8

*Wall. (U. S.)* 276, 19 L. ed. 349; *Hale v. Finch*, 104 U. S. 261, 269, 26 L. ed. 732; *Carrol v. Green*, 92 U. S. 509, 23 L. ed. 738.

<sup>4</sup> *Tompkins v. Little Rock & C. R. Co.*, 125 U. S. 109, 8 Sup. Ct. 762, 31 L. ed. 615; *McKittrick v. Arkansas Central R. Co.*, 152 U. S. 473, 14 Sup. Ct. 661, 38 L. ed. 518.

<sup>5</sup> *Ketchum v. St. Louis*, 101 U. S. 306, 25 L. ed. 999; *Knevals v. Florida & C. R. Co.*, 66 Fed. 224; *Wilson v. Ward & C. Co.*, 67 Fed. 674.

<sup>6</sup> *Wilson v. Boyce*, 92 U. S. 320, 23 L. ed. 608; *Whitehead v. Vineyard*, 50 Mo. 30; *Choteau v. Allen*,

§ 997 (814). **Constitutionality of statutes authorizing municipal aid to railroads.**—The question as to the power of the legislature to authorize municipal corporations to aid railroad companies by donations or subscriptions cannot now be regarded as an open one. The question has been much debated, but the overwhelming weight of authority, in the absence of constitutional prohibition or limitation upon the subject, sustains the validity of statutes authorizing public corporations to aid in building railroads.<sup>7</sup> The prevailing doctrine has met with opposition, but it is now too thoroughly settled to be successfully assailed. It is true that money cannot be raised

70 Mo. 290, 327, 328. See *Wilson v. Beckwith*, 117 Mo. 61, 22 S. W. 639; *Hawkins v. Mitchell*, 34 Fla. 405, 16 So. 311.

<sup>7</sup> Of the great number of cases upon this subject we cite: *Railroad Co. v. Otoe County*, 16 Wall. (U. S.) 667, 21 L. ed. 375; *Olcott v. Supervisors*, 16 Wall. (U. S.) 678, 21 L. ed. 382; *Rogers v. Keokuk*, 154 U. S. 546, 14 Sup. Ct. 1162, 18 L. ed. 74; *Opelika v. Daniel*, 59 Ala. 211; *Stockton &c. Co. v. Stockton*, 41 Cal. 147; *Bridgeport v. Housatonic Co.*, 15 Conn. 475; *Douglas v. Chatham*, 41 Conn. 211; *Cotton v. County Comrs.*, 6 Fla. 610; *Winn v. Macon*, 21 Ga. 275; *Powers v. Inferior Court &c.*, 23 Ga. 65; *Quincy &c. R. Co. v. Morris*, 84 Ill. 410; *Pitzman v. Freeburg*, 92 Ill. 111; *Harney v. Indianapolis R. Co.*, 32 Ind. 244; *Leavenworth Co. v. Miller*, 7 Kans., 479, 12 Am. Rep. 425; *Courtney v. Louisville*, 12 Bush (Ky.), 419; *Augusta Bank v. Augusta*, 49 Maine 507; *Hawkins v. Carroll County*, 50 Miss. 735; *State v. Linn Co.*, 44 Mo. 504; *Reineman v. Covington &c. R. Co.*, 7 Nebr. 310; *Perry v. Keene*, 56 N. H. 514; *People v. Mitchell*, 35 N. Y. 551;

*Hill v. Commissioners*, 67 N. Car. 368; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *Sharpless v. Mayor &c.*, 21 Pa. St. 147, 59 Am. Dec. 759; *State v. Charleston*, 10 Rich. L. (S. Car.) 491; *Louisville &c. Co. v. Davidson County &c.*, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424; *Harcourt v. Good*, 39 Tex. 455; *Lamville &c. Co. v. Fairfield*, 51 Vt. 257; *Longhorne v. Robinson*, 20 Grat. (Va.) 661; *Elliott Roads and Streets* (3d ed.), 435, et seq. See also *Matter of New York Cent. &c. R. Co.*, 136 App. Div. 760, 121 N. Y. S. 524. It is even held that the legislature may authorize such aid although the railroad is located partly or wholly outside the municipality or state. *Chicago &c. R. Co. v. Otoe County*, 16 Wall. (U. S.) 667, 21 L. ed. 375; *Atlantic Trust Co. v. Darlington*, 63 Fed. 76; *Louisville &c. R. Co. v. Davidson Co.*, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424; *St. Joseph &c. R. Co. v. Buchanan Co.*, 39 Mo. 485. See *Municipal Trust Co. v. Johnson City*, 116 Fed. 459, as to evidence as to whether the municipality was dealing with a foreign or domestic company.

by taxation for the benefit of private persons or purely private corporations,<sup>8</sup> but a railroad is, as we have elsewhere shown, a public enterprise, and, theoretically, if not always practically, does promote the public welfare. Because of its public nature it is subjected to many burdens from which private corporations and individual citizens are free.<sup>9</sup> There is, therefore, reason supporting the accepted doctrine, although, as often happens, there are reasons supporting a different view. It is to be remarked that it is solely upon the ground that a railroad is a matter of public concern that the power to lay a tax upon the inhabitants of a municipality can be sustained.<sup>10</sup> So that if a corporation has, if we may use the term, a public and a private side, it is only to the public side that municipal aid can be given.<sup>11</sup>

<sup>8</sup> *Loan Association v. Topeka*, 20 Wall. (U. S.) 655, 22 L. ed. 455; *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. ed. 238, 2 Am. & Eng. Corp. Cas. 263; *Blair v. Cuming County*, 111 U. S. 363, 4 Sup. Ct. 449, 28 L. ed. 457; *Cole v. LaGrange*, 113 U. S. 1, 5 Sup. Ct. 416, 28 L. ed. 896; 7 Am. & Eng. Corp. Cas. 379; *State v. Osawkee Township*, 14 Kans. 418, 19 Am. Rep. 99; *Brewer Brick Co. v. Brewer*, 62 Maine 62, 16 Am. Rep. 395; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Coates v. Campbell*, 37 Minn. 498, 35 N. W. 366; *Weismer v. Village of Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *Fieldman v. Charleston*, 23 S. Car. 57, 55 Am. Rep. 6; *Curtis v. Whipple*, 24 Wis. 350, 1 Am. Rep. 187.

<sup>9</sup> *Northern Pacific R. Co. v. Roberts*, 42 Fed. 734. In this case the court denied the doctrine of *Whiting v. Sheboygan &c. R. Co.*, 25 Wis. 167, 3 Am. Rep. 30, and declared that it was opposed to the doctrine asserted in *Pratt v. Brown*,

3 Wis. 603; *Hasbrouck v. Milwaukee*, 13 Wis. 37, 80 Am. Dec. 718, and note; *Robbins v. Milwaukee &c. R. Co.*, 6 Wis. 636; *Soens v. Racine*, 10 Wis. 271; *Brodhead v. Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711, and note; *Roberts v. Northern Pacific R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. ed. 873.

<sup>10</sup> In the case of *Northern Pacific R. Co. v. Roberts*, 42 Fed. 734, the court treats a railroad as a public highway. The question is well considered in the case referred to, and many cases are cited, some already referred to by us, and others, among them, *Beekman v. Saratoga &c. R. Co.*, 3 Paige (N. Y.) 45, 22 Am. Dec. 679, and note; *Selma &c. R. Co. Ex parte*, 45 Ala. 696, 6 Am. Rep. 722; *Brokaw v. Board*, 73 Ind. 543; *Hallenbeck v. Hahn*, 2 Nebr. 377; *Bennington v. Park*, 50 Vt. 178.

<sup>11</sup> It has been held that although a private corporation is organized for the double purpose of building and operating a railroad and erect-

§ 998 (815). **Construction of constitutional provisions.**—It seems to us where the constitution provides that specified acts shall be done, before aid can be given, that such provisions should be regarded as mandatory, for, in our judgment, all the provisions of the constitution should be regarded as mandatory unless the context clearly shows that they were intended to be directory,<sup>12</sup> but, as will be presently shown, some of the adjudged cases do not adhere very closely to this principle. So, where specific things are enumerated, it seems to us that the enumeration should be held to exclude things not enumerated, for, as we believe, the rule that the express mention of one thing excludes others applies with even greater force to written constitutions than to any other instruments.<sup>13</sup> In accordance with what we believe to be the true rule it has been held that a provision requiring publication for a designated length of time prior to the enactment of a statute is mandatory.<sup>14</sup>

§ 999 (816). **Corporate purpose—Constitutional limitations.**—The question has arisen in some jurisdictions as to whether the grant of aid can be justly regarded as a "corporate purpose." The power to grant aid, as we have seen, is not an ordinary

ing a cotton compress, the former a public improvement, and the latter a private enterprise, a special tax which is voted by a municipal corporation in its behalf, in aid of the construction of the former alone, is valid. *McKenzie v. Woolsey*, 39 La. Ann. 944, 3 So. 128.

<sup>12</sup> *State v. Johnson*, 26 Ark. 281; *May v. Rice*, 91 Ind. 546; *Varney v. Justice*, 86 Ky. 596; *Cannon v. Mathes*, 8 Heisk. (Tenn.) 504. See also *Gulf & C. R. Co. v. Miami County*, 12 Kans. 230; *Portland R. Co. v. Standish*, 65 Maine 63; *Leavenworth R. Co. v. Platte County*, 42 Mo. 171; *Stern v. Fargo*, 18 N. Dak. 289, 122 N. W. 403, 26 L. R. A. (N. S.) 665.

<sup>13</sup> *State v. Blend*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93, and note; *Page v. Allen*, 58 Pa. St. 338, 98 Am. Dec. 272.

<sup>14</sup> The constitution of Maryland contains a provision wherein it is declared that no county shall contract any debt or obligation in the construction of a railroad, nor give or loan its credit to a corporation, unless authorized by an act of the assembly, "which shall be published for two months before the next election for members of the house of delegates in the newspapers published in said counties," and this was held to be mandatory. *Baltimore & D. R. Co. v. Pumphrey*, 74 Md. 86, 21 Atl. 559.

or incidental corporate power, and exists only by virtue of legislative enactment. But it does not follow, because the power to grant aid is not an ordinary corporate power, that granting aid is not a "corporate purpose." No constitutional provision forbidding, any public purpose not palpably foreign to the object of a municipal corporation may be regarded as "a corporate purpose," where the legislature so enacts. We should very much doubt whether a statute assuming to make that a corporate purpose which palpably and unmistakably could not be a corporate purpose would be valid, since such a rule would make the provisions of the constitution limiting the power to tax to corporate purposes practically inoperative.<sup>15</sup> But whatever may

<sup>15</sup> In the case of *Atlantic Trust Co. v. Darlington*, 63 Fed. 76, it was said: "The constitution permits the legislature to authorize municipal corporations to assess and collect taxes for corporate purposes (Sec. 8, Art. 9), and none other. A municipal corporation is not only a representative of the state, but a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the state. *United States v. Railroad Co.*, 17 Wall. (U. S.) 322, 21 L. ed. 597. The powers of a municipal corporation, dependent wholly upon the source whence they are derived, may be enlarged at any time by the legislature. *Rogers v. Burlington*, 3 Wall. (U. S.) 654, 18 L. ed. 79. The legislature then determines the purpose for which they have been created, and clothes them with the means of attaining them. These purposes are their corporate purposes. The legislature may declare that corporate purposes may be promoted by affording aid to a

railroad. The unchanging course of legislation shows that this is a public purpose, as well as a corporate purpose; and, without question, cities, towns, villages and counties have again and again been clothed with this power. It is true that in *Floyd v. Perrin*, 30 S. Car. 1, 8 S. E. 14, *arguendo*, the court says that counties have the right to aid in such construction, because they have jurisdiction over highways, and a railroad is a highway. But streets in cities, towns and villages are also highways; and, although the authority of the county over its highways ends at its boundaries, a county has the right to aid a railroad whose termini are in other counties—perhaps in other states. *Floyd v. Perrin*, relied on in argument, does not decide that aid to a railroad can not be a corporate purpose." The doctrine is broadly stated in the opinion from which we have quoted, but there can be no doubt that the power of the legislature to determine what are corporate purposes is very broad and comprehensive. Railroad



be the extent to which the legislature can go, there can be no doubt that the legislature may confer the right to aid railroad companies, although the power to levy taxes is limited to taxes for "corporate purpose."<sup>16</sup>

**§ 1000 (817). Constitutional prohibitions.**—A provision in a state constitution forbidding municipal corporations from becoming stockholders in railroad corporations, and from raising money for such a corporation, or loaning their credit thereto, is violated by a statute which assumes to empower a township to construct a railroad within the limits of the township, which road is designated to form part of a line of road owned by a railroad company.<sup>17</sup> Bonds issued under such a statute are void in the hands of bona fide holders.<sup>18</sup> It was also held in the

aid bonds can not be issued where the statute prohibits the municipality from incurring any indebtedness, except such as shall be "necessary to the administration of internal affairs." *Lewis v. Pima County*, 155 U. S. 54, 15 Sup. Ct. 22, 39 L. ed. 67; *Darlington v. Atlantic Trust Co.*, 68 Fed. 849.

<sup>16</sup> *Livingston County v. Darlington*, 101 U. S. 407, 411, 25 L. ed. 1015; *Johnson v. Stark Co.*, 24 Ill. 75; *Perkins v. Lewis*, 24 Ill. 208; *Chicago &c. Co. v. Smith*, 62 Ill. 268, 14 Am. Rep. 99; *Butler v. Dunham*, 27 Ill. 473; *Keithsburg v. Frick*, 34 Ill. 405. Analogous cases fully support the statement of the text. *Taylor v. Thompson*, 42 Ill. 9; *Henderson v. Lagow*, 42 Ill. 360; *Briscoe v. Allison*, 43 Ill. 291; *Johnson v. Campbell*, 49 Ill. 316; *Middleport v. Aetna Life Ins. Co.*, 82 Ill. 562.

<sup>17</sup> *Pleasant Tp. v. Aetna Life Ins. Co.*, 138 U. S. 67, 11 Sup. Ct. 215, 34 L. ed. 864; *Aetna Life Ins. Co. v. Pleasant Tp.*, 53 Fed. 214; *Aetna*

*Life Ins. Co. v. Pleasant Tp.*, 62 Fed. 718; *Wyscaver v. Atkinson*, 37 Ohio St. 80; *Counterman v. Dublin Tp.*, 38 Ohio St. 515. The case of *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24, was distinguished, and it was held not to be inconsistent with the decisions in the cases last cited. We do not believe, we may say, by the way, that townships can embark in the business of building and operating railroads. See also *Atkinson v. Board*, 18 Idaho 282, 108 Pac. 1046, 28 L. R. A. (N. S.) 412, and other cases there cited in note. But see *Sun Printing &c. Assn. v. Mayor*, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788. The legislature cannot authorize municipal aid, under such constitutional prohibitions, either directly or by means of a release from pecuniary burdens. *Jersey City v. North Jersey St. R. Co.*, 78 N. J. L. 72, 73 Atl. 609.

<sup>18</sup> The conclusion stated in the text is clearly right. The statute being void there was no power to

first of the cases referred to in the note that the township might prove the facts averred in its answer, which tended to establish the unconstitutionality of the statute.

§ 1001 (818). **Direct limitations upon the state not limitations upon power to authorize municipalities to grant aid.**—The adjudged cases favor the doctrine that constitutional provisions prohibiting the state from taking stock in a corporation, lending its credit to a corporation, and incurring an indebtedness in aid of a corporation, do not restrain the legislature from empowering public corporations to grant aid to railroad companies.<sup>19</sup> Thus a constitutional provision that the state shall not subscribe for the stock of a railroad has been held not to affect the right of the legislature to authorize a municipal corporation to do so.<sup>20</sup> So, it has been held, limitations upon the power of the state to incur indebtedness to aid in internal improvements do not prevent the legislature from granting power to municipalities to issue railroad aid bonds.<sup>21</sup> Indeed, so far has judicial construction been carried in support of the system of aiding railroads by public funds, that an article in the constitution of Ohio declaring that, "The general assembly shall never authorize any county, city,

issue the bonds, and the entire absence of power is always a defense.

<sup>19</sup> The tendency of the decisions is to support statutes authorizing municipalities to grant aid to railroad companies.

<sup>20</sup> *Taylor v. Yipsilanti*, 105 U. S. 60, 26 L. ed. 1008; *Cotton v. Leon Co.*, 6 Fla. 610; *Prettyman v. Supervisors*, 19 Ill. 406, 71 Am. Dec. 230; *Robertson v. Rockford*, 21 Ill. 451; *Aurora v. West*, 9 Ind. 74; *Dubuque County v. Dubuque &c. R. Co.*, 4 G. Greene (Iowa) 1; *Leavenworth Co. v. Miller*, 7 Kans. 479, 12 Am. Rep. 425; *Slack v. Maysville &c. R. Co.*, 13 B. Mon. (Ky.) 1; *Clark v. Janesville*, 10 Wis. 136. But see *Griffith v. Crawford Coun-*

*ty*, 20 Ohio 609; *People v. State Treas.*, 23 Mich. 499. See generally *Cass v. Dillon*, 2 Ohio St. 607; *Clark v. Janesville*, 10 Wis. 136; *Sioux City v. Weare*, 59 Iowa 95, 12 N. W. 786. A restriction as to counties does not apply to cities. *Thompson v. Peru*, 29 Ind. 305; *Aurora v. West*, 9 Ind. 74. But see as to township. *Harshman v. Bates Co.*, 92 U. S. 569, 23 L. ed. 747.

<sup>21</sup> *Prettyman v. Supervisors*, 19 Ill. 406, 71 Am. Dec. 230; *Thompson v. Peru*, 29 Ind. 305; *Slack v. Maysville &c. R. Co.*, 13 B. Mon. (Ky.) 9; *Police Jury v. McDonogh*, 8 La. Ann. 341.

town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money or loan its credit to, or in aid of, any such company, corporation, or association," was held not to prohibit the legislature from authorizing a city to issue its bonds in payment of a loan of ten million dollars, to be expended in the construction of a railroad lying almost entirely outside the state.<sup>22</sup> But where there is an express limitation upon the power of a public corporation the legislature can not confer upon it authority to grant aid to railroad companies.<sup>23</sup>

**§ 1002 (819). Constitutional restrictions operate prospectively.**—The general rule is that constitutional provisions operate prospectively and not retroactively. Under this rule it is held that,

<sup>22</sup> Walker v. Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24. But see Atkinson v. Board, 18 Idaho 282, 108 Pac. 1046, 28 L. R. A. (N. S.) 412; Pleasant Tp. v. Aetna L. Ins. Co., 138 U. S. 67, 11 Sup. Ct. 215, 34 L. ed. 864; Taylor v. Ross County, 23 Ohio St. 22.

<sup>23</sup> See Garland v. Montgomery County, 87 Ala. 223, 6 So. 402; Atkinson v. Board, 18 Idaho 282, 108 Pac. 1046, 28 L. R. A. (N. S.) 412; Colburn v. Chattanooga &c. R. Co., 94 Tenn. 43, 28 S. W. 298. A statute of Ohio which authorized a certain township to construct a few miles of railroad within its limits, intended to ultimately form part of a continuous line of road to be operated and equipped by private capital, was held to violate a constitutional provision, which prohibits the general assembly from authorizing any county, city, town or township to become a stockholder in any private corporation, or to raise money for or loan its credit to or in aid of such corpor-

ation. Pleasant Tp. v. Aetna Life Ins. Co., 138 U. S. 67, 11 Sup. Ct. 215, 34 L. ed. 864. And a scheme by which a municipal corporation is to issue bonds for the larger part of the cost of a tunnel to be used mainly by a railroad company, with option to purchase, has been held to contravene a constitutional provision against the municipality lending its credit to any corporation. Lord v. Denver, 58 Colo. 1, 143 Pac. 284, 2 L. R. A. 1915B, 306. But compare Haenssler v. St. Louis, 205 Mo. 656, 103 S. W. 1034; Sun Pub. &c. Assn. v. New York, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788; Admiral Realty Co. v. New York, 206 N. Y. 110, 99 N. E. 245, Ann. Cas. 1914A, 1054; Lehigh Val. R. Co. v. Canal Board, 204 N. Y. 471, 97 N. E. 964, Ann. Cas. 1913C, 1228; Walker v. Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; Churchill v. Grant's Pass, 70 Ore. 283, 141 Pac. 164; Brooke v. Philadelphia, 162 Pa. St. 123, 29 Atl. 387, 24 L. R. A. 781.

where there is a statute in force, a constitutional provision adopted after proceedings resulting in a contract were had under the statute, does not invalidate or impair the validity of such proceedings.<sup>24</sup> If, however, a constitutional provision is adopted before proceedings are taken under the statute, the proceedings are not effective.<sup>25</sup> Constitutional or statutory provisions may, however, be so worded as to affect prior proceedings,<sup>26</sup> but contract rights can not be impaired.

<sup>24</sup> Norton v. Brownsville, 129 U. S. 479, 9 Sup. Ct. 322, 32 L. ed. 774, 26 Am. & Eng. Corp. Cas. 583; Aspinwall v. Daviess County, 22 How. (U. S.) 364, 16 L. ed. 296; Wadsworth v. Supervisors, 102 U. S. 534, 26 L. ed. 221; Scotland County v. Hill, 132 U. S. 107, 10 Sup. Ct. 26, 33 L. ed. 261; Callaway County v. Foster, 93 U. S. 567, 23 L. ed. 911; Henry County v. Nicolay, 95 U. S. 619, 24 L. ed. 394; Schuyler County v. Thomas, 98 U. S. 169, 25 L. ed. 88; Cass County v. Gillett, 100 U. S. 585, 25 L. ed. 585; Ralls County v. Douglass, 105 U. S. 728, 26 L. ed. 957. See Green County v. Conness, 109 U. S. 104, 3 Sup. Ct. 69, 27 L. ed. 872; Livingston County v. First Nat. Bank, 128 U. S. 102, 9 Sup. Ct. 18, 32 L. ed. 359. Contra State v. Dallas Co. &c., 72 Mo. 329; State v. County Court, 51 Mo. 522; State v. Gurrouthe, 67 Mo. 445. See also Decker v. Hughes, 68 Ill. 33; Maxcy v. Williamson Co., 72 Ill. 207; Board v. Bolton, 104 Ill. 220; Mason v. Shawneetown, 77 Ill. 533; Knox County v. Ninth Nat. Bank, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. ed. 93; Nelson v. Haywood Co., 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648.

<sup>25</sup> Concord v. Robinson, 121 U. S. 165, 7 Sup. Ct. 937, 30 L. ed. 885; Citizens' Sav. &c. Assn. v. Perry County, 156 U. S. 692, 15 Sup. Ct. 547, 39 L. ed. 585. See also Buffalo &c. R. Co. v. Falconer, 103 U. S. 821, 26 L. ed. 471.

<sup>26</sup> Wadsworth v. Supervisors, 102 U. S. 534, 26 L. ed. 221; Railroad Co. v. Falconer, 103 U. S. 821, 26 L. ed. 471. Upon the general subject, see Supervisors v. Galbraith, 99 U. S. 214, 25 L. ed. 410; Fairfield v. Gallatin County, 100 U. S. 47, 25 L. ed. 544; Slack v. Maysville &c. R. Co., 13 B. Mon. (Ky.) 1; State v. Clark, 23 Minn. 422; State v. Green Co., 54 Mo. 540; Dodge v. Platte Co., 16 Hun (N. Y.) 285; Fosdick v. Perrysburg, 14 Ohio St. 472. It was held, in Louisville v. Savings Bank, 104 U. S. 469, 26 L. ed. 775, that the constitution of Illinois, adopted on July 8, 1870, did not invalidate bonds issued in pursuance to a vote of the township on the same day that the constitution was adopted, although it provides that "no county, city, township or other municipality shall ever become a subscriber to the capital of any railroad or private corporation, or make donation to or loan its credit in aid of

§ 1003 (820). **Limitation upon the power of municipalities to incur debts.**—A constitutional provision prohibiting a municipal corporation from aiding a railroad by subscriptions or donations would, it is hardly necessary to say, place it beyond the power of the legislature to empower municipal corporations to grant such aid.<sup>27</sup> But a provision of the constitution prohibiting municipal corporations from incurring a debt in aid of a corporation does not necessarily prohibit the municipalities from giving aid to railroad companies. The effect of such a provision is to preclude the municipalities from incurring a debt, but it does not preclude them from raising money by taxation in aid of railroad companies. There can be no debt created, but a donation or subscription may be authorized.<sup>28</sup> In jurisdictions where municipi-

such corporation," unless the subscription shall "have been authorized under existing laws, by a vote of the people prior to such adoption." The court says that they will presume the vote upon the question of levying the tax to have been completed before the close of the day, since the meeting for an election was called for nine o'clock in the morning and only fifty-two votes were cast. But the supreme court of Illinois holds that where the issuance of railroad aid bonds is authorized by a vote at the same election at which this amendment to the constitution was adopted, the issue is unconstitutional. *People v. Bishop*, 111 Ill. 124, 53 Am. Rep. 605. The party asserting the validity of bonds issued after this provision referred to in the above case took effect is held to have the burden of proof to show that they come within the exception. *Williams v. People*, 132 Ill. 574, 24 N. E. 647.

<sup>27</sup> *Norton v. Brownsville*, 129 U. S. 479, 9 Sup. Ct. 322, 32 L. ed. 774; *Wadsworth v. Supervisors*, 102 U.

S. 534, 26 L. ed. 221; *Buffalo &c. R. Co. v. Falconer*, 103 U. S. 821, 26 L. ed. 471; *Kelley v. Milan*, 127 U. S. 139, 154, 8 Sup. Ct. 1101, 32 L. ed. 77; *Mayor &c. v. Gilmore*, 21 Fed. 870; *Taxpayers &c. v. Tennessee &c. R. Co.*, 11 Lea (Tenn.) 329; *List v. Wheeling*, 7 W. Va. 501. See also *Southern R. Co. v. Hartshorn*, 162 Ala. 491, 50 So. 139; *Underground R. Co. v. New York*, 116 Fed. 960.

<sup>28</sup> *Aspinwall v. Daviess County*, 22 How. (U. S.) 364, 16 L. ed. 296; *Concord v. Portsmouth Savings Bank*, 92 U. S. 625, 23 L. ed. 628; *Lafayette &c. R. Co. v. Geiger*, 34 Ind. 185; *Harney v. Indianapolis &c. R. Co.*, 32 Ind. 244; *Aurora v. West*, 9 Ind. 74; *Dronberger v. Reed*, 11 Ind. 420; *Evansville &c. Co. v. Evansville*, 15 Ind. 395; *Board v. Bright*, 18 Ind. 93; *Falconer v. Buffalo &c. R. Co.*, 69 N. Y. 491. See also as to appropriation for a claim founded on justice and equity, *Lehigh Val. R. Co. v. Canal Board*, 204 N. Y. 471, 97 N. E. 964, Ann. Cas. 1913C, 1228.

palities are forbidden to incur an indebtedness the railroad company is not, as it is held, entitled to the money until it is collected.<sup>29</sup>

§ 1004 (821). **Constitutional questions—Delegation of legislative power.**—It is a well-known principle of constitutional law that legislative power can neither be surrendered nor delegated. This principle, however, does not forbid the legislature from enacting a law authorizing the inhabitants of a locality to determine by ballot, petition or otherwise, whether they will lay a tax upon themselves to aid a railroad company by donation or subscription.<sup>30</sup> In enacting a general law authorizing public corporations to aid railroad companies, there is no delegation of legislative power, nor is the taking effect of the law made to depend upon the act or authority of any other persons or bodies than that of the lawmakers. The law is effective when it leaves the hands of the law-making power, and all that is left to the inhabitants of a locality is to determine whether they will avail themselves of the provisions of the law.<sup>31</sup> If, however, the legis-

<sup>29</sup> Pope v. Board, 51 Fed. 769; Bittinger v. Bell, 65 Ind. 445; Board v. Louisville &c. R. Co., 39 Ind. 192; Sankey v. Terre Haute &c. R. Co., 42 Ind. 402; Petty v. Myers, 49 Ind. 1; Jager v. Doherty, 61 Ind. 528; Board v. State, 115 Ind. 64, 4 N. E. 589, 17 N. E. 855. Where aid is voted and an additional levy is required a tax-payer may have mandamus to compel the proper officers to make the additional levy of taxes. Board v. State, 86 Ind. 8. See also Board v. Montgomery, 106 Ind. 517, 6 N. E. 915; Board v. State, 109 Ind. 596, 10 N. E. 625; State v. Board, 166 Ind. 162, 76 N. E. 986. It is held, that where a tax is levied the railroad company acquires such an interest therein as will pass to a company with which it consoli-

dates. Scott v. Hansheer, 94 Ind. 1; Pope v. Board, 51 Fed. 760.

<sup>30</sup> Baltimore &c. R. Co. v. Jefferson Co., 29 Fed. 305; Stein v. Mobile, 24 Ala. 591; Hobart v. Supervisors, 17 Cal. 23; Cotton v. Leon Co., 6 Fla. 610; Lafayette &c. R. Co. v. Geiger, 34 Ind. 185, 220; Slack v. Maysville &c. R. Co., 13 B. Mon. (Ky.) 1; Police Jury v. McDonogh, 8 La. Ann. 341; Clarke v. Rochester, 24 Barb. (N. Y.) 446; Starin v. Genoa, 23 N. Y. 439; Cincinnati &c. R. Co. v. Clinton Co., 1 Ohio St. 77; Moers v. Reading, 21 Pa. St. 188; Louisville &c. R. Co. v. County Court, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424.

<sup>31</sup> Aspinwall v. Daviess Co., 22 How. (U. S.) 364, 16 L. ed. 296; Board v. Spitler, 13 Ind. 235; Thompson v. Peru, 29 Ind. 305;

lature should provide that a law should take effect only in the event that the people should vote in favor of its taking effect the enactment would not be valid,<sup>32</sup> but this is a very different thing from enacting a general law and simply leaving it to localities to take action under it.

**§ 1005 (822). Submission to vote.**—The general legislative practice is to provide for submitting the question of granting aid to a railroad to the people and allowing them to determine, either by ballot or by petition, whether aid shall be granted, but where there is no constitutional provision requiring it the legislature may authorize a municipality to grant aid without submitting the matter to the people. The subject is essentially legislative, and the legislature is not bound to provide for a vote or petition by the inhabitants of the municipality, except where a provision of the constitution so requires.<sup>33</sup> If the legislature does provide for a submission to vote or petition, then there must be an election held as the enabling act requires or such a petition as the act prescribes.<sup>34</sup>

**§ 1006 (823). Submission to popular vote—Constitutional requirements.**—Where the constitution requires the question of granting aid to a railroad company to be submitted to a vote of the taxpayers or inhabitants of the municipality, the requirement is mandatory and must be obeyed. The legislature in such a case has no power to authorize the grant of aid without submitting the question to the people of the locality. Where a

Robinson v. Schenck, 102 Ind. 307, 1 N. E. 698.

<sup>32</sup> State v. Young, 26 Iowa 122, 2 Am. & Eng. R. Cas. 348.

<sup>33</sup> Ralls County v. Douglass, 105 U. S. 728, 26 L. ed. 957; Thomson v. Lee Co., 3 Wall. (U. S.) 327, 18 L. ed. 177; Long v. New London, 9 Biss. (U. S.) 539; Livingston Co. v. Darlington, 101 U. S. 407, 415, 25 L. ed. 1015; Keithsburg v. Frick, 34 Ill. 405; Marshall v. Silliman, 61

Ill. 218; Quincy &c. R. Co. v. Morris, 84 Ill. 410; McCallie v. Chattanooga, 3 Head (Tenn.) 317. But see Union Bank v. Board Comrs., 116 N. Car. 339, 21 S. E. 410.

<sup>34</sup> See Rich v. Mentz Twp., 134 U. S. 632, 10 Sup. Ct. 610, 33 L. ed. 1074; Lewis v. Bourbon Co., 12 Kans. 186; Jacksonville R. Co. v. Virden, 104 Ill. 339. See also Stern v. Fargo (N. Dak.), 122 N. W. 403, 26 L. R. A. (N. S.) 665.

specified number of votes in favor of the aid is required by the constitution in order to authorize the municipality to grant the aid it is not in the power of the legislature to provide that aid may be granted unless the vote prescribed is given in favor of granting the aid.<sup>35</sup> There is a difference between cases where the statute assumes to authorize municipal officers to grant aid without submitting the question to a vote and cases where the statute provides for a submission, but the municipal officers do not submit the question to the voters as the statute requires. If it appears on the face of the statute that the legislature has assumed to confer authority upon the municipal officers to grant aid without submitting the matter to the voters of the locality there can be no power, since, if the statute be in conflict with the constitution, it is void, and a void statute cannot confer authority or right. In such a case there can be no estoppel, for when the constitution is consulted and the statute tested by it the absence of legislative power is at once revealed. No person can be heard to say that he was ignorant of the constitution or the statute under which public corporations are organized, so that there is no ground upon which an estoppel can be founded. Where, however, the legislature obeys the constitutional mandate and provides for a submission of the question to the voters of the municipality, and the municipal officers do not follow the provisions of the statute, then there is reason for holding that there may be an estoppel in cases where the other elements essential to the existence of an estoppel are present.

**§ 1007 (823a). Necessity of regularity in the election.**—The rule demanding a strict compliance with statutory requirements

<sup>35</sup> *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. 562, 33 L. ed. 887; *Hill v. Memphis*, 23 Fed. 872. In the case of *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. 562, 33 L. ed. 887, the court held that a vote of two-thirds of the electors in favor of subscribing for the stock of a railroad company did not authorize the municipal authorities to issue bonds of the municipality. The

principles declared by the cases below cited were applied, *Police Jury v. Britton*, 15 Wall. (U. S.) 566, 21 L. ed. 252; *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. 1101, 32 L. ed. 77; *Young v. Clarendon Township*, 132 U. S. 340, 10 Sup. Ct. 107, 33 L. ed. 356; *Claiborne County v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. ed. 470.



in making subscriptions to the capital of railroad companies applies with particular force to the manner of holding the election to authorize the subscription. The purpose of the election is to ascertain the public mind on the proposed question and the legislative method is presumed the best method of obtaining this result. Thus, where registration of voters is required, and no registration is had, it has been held that the election will be declared illegal and the bonds invalid.<sup>36</sup> So, where a statute required an election board composed of three judges and two clerks, a bond election held by one judge with one clerk was held to confer no authority on the municipality to issue the bonds.<sup>37</sup> Where, however, the statute is silent as to the manner of holding and conducting the election, then it may be conducted in the manner prescribed by the law of the organization of the body in which it is held.<sup>38</sup>

§ 1008 (823b). **Form of the ballot.**—Great strictness as to the form of the ballot is not demanded. It is generally held sufficient if the ballot substantially complies with the statute and does not tend to deceive the voter, and, when voted, shows his preference.<sup>39</sup> Thus, it has been held that votes "For subscription" and "Against subscription" did not substantially depart from the statutory requirement that the ballot should be "Subscription" and "No subscription."<sup>40</sup> And in another case, where the statutory form of ballot for those opposed to the issue of bonds was "Against taxation," it was held proper to count the ballots of

<sup>36</sup> *People v. Santa Anna*, 67 Ill. 57; *People v. Laenna*, 67 Ill. 65. See also *Pacific Imp. Co. v. Clarksdale*, 74 Fed. 528; *Kentucky Un. R. Co. v. Bourbon Co.*, 85 Ky. 98, 2 S. W. 687; *Wilmington &c. R. Co. v. Onslow County*, 116 N. Car. 563, 21 S. E. 205.

<sup>37</sup> *Chicago &c. R. Co. v. Mallory*, 101 Ill. 583. And it must be called by proper officers. *Cedar Rapids &c. R. Co. v. Boone Co.*, 34 Iowa 45; *Young v. Webster City &c. R.*

*Co.*, 75 Iowa 140, 39 N. W. 234; *Jacksonville &c. R. Co. v. Virden*, 104 Ill. 339.

<sup>38</sup> *People v. Dutcher*, 56 Ill. 144.

<sup>39</sup> *State v. Bissel*, 4 Green (Iowa), 328; *West v. Whitaker*, 37 Iowa 598.

<sup>40</sup> *Claybrook v. Rockingham Co.*, 114 N. Car. 453, 19 S. E. 593. But ballots must be furnished by the designated authorities. *Current v. Luther*, 164 Ind. 252, 72 N. E. 556.

those opposed to the proposition which bore the words "against taxation for the benefit of railroad companies or any other monopolies to the indebtedness of the poor man."<sup>41</sup>

§ 1009. **Form of ballot—Double question.**—Two or more distinct and separate cannot, however, be combined and submitted as a single question.<sup>42</sup> To permit such a course would not only tend to mislead but would also deprive the voters of the right and power to vote for or against each distinct proposition or question submitted. So, for the same or similar reasons, a proposition in the alternative to aid one railroad or another has been held bad.<sup>43</sup>

§ 1010 (824). **Constitutional power—Compelling public corporations to aid railroad companies.**—The power of the legislature over public corporations is, as we have seen, very great. It seems to be a necessary conclusion from the rule asserted by the weight of authority that the legislature may, without consulting the citizens of a locality, compel them to tax themselves to aid public enterprises.<sup>44</sup> Accordingly it has been held that it may

<sup>41</sup> *Cattell v. Lowry*, 45 Iowa 478.

<sup>42</sup> *Fulton County v. Mississippi &c. R. Co.*, 21 Ill. 373; *Williams v. People*, 132 Ill. 574, 24 N. E. 647; *Garngies v. Parke County*, 39 Ind. 66; *Goforth v. Rutherford R. &c. Co.*, 96 N. Car. 535, 2 S. E. 361; *Stern v. Fargo*, 18 N. Dak. 289, 122 N. W. 403, 26 L. R. A. (N. S.) 665, and note where additional authorities are cited, including *Tolson v. St. Tammany Parish*, 119 La. 215, 43 So. 1011.

<sup>43</sup> *Jones v. Hurlburt*, 13 Nebr. 125, 13 N. W. 5; *North v. Platte County*, 29 Nebr. 447, 45 N. W. 692, 26 Am. St. 395 (but railroad aid bonds may be valid in the hands of bona fide purchaser). Indeed, such a proposition assumes that one or the other must be

aided. But see *Louisville &c. R. Co. v. County Ct.*, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424.

<sup>44</sup> This is the general rule. *Martin v. Dix*, 52 Miss. 53, 24 Am. Rep. 661; *New Orleans v. Clark*, 95 U. S. 644, 654, 24 L. ed. 521; *United States v. Memphis*, 97 U. S. 284, 24 L. ed. 937; *Livingston Co. v. Darlington*, 101 U. S. 407, 25 L. ed. 1015; *Napa Valley R. Co. v. Napa County*, 30 Cal. 435; *Madera &c. Dist. In re*, 92 Cal. 296, 14 L. R. A. 755, and note, 27 Am. St. 106; *Marks v. Purdue University*, 37 Ind. 155; *Jewell v. Weed*, 18 Minn. 272; *Gordon v. Cornes*, 47 N. Y. 608; *Bass v. Fountleroy*, 11 Tex. 698; *Walker v. Tarrant Co.*, 20 Tex. 16. Although it seems to be an arbitrary rule to compel tax-

compel the various municipalities through which the railroad passes to take stock in the enterprise, even against the will of the inhabitants,<sup>45</sup> though this right is denied by some authorities,<sup>46</sup> and but few attempts have been made to exercise it.

§ 1011 (825). **Scope of the legislative power.**—The scope of the legislative power, when not fenced about by constitutional limitations, is very wide and far reaching. The subject of taxation is a legislative one, and where it is not restricted by constitutional provisions the legislature may authorize a tax for almost any strictly public purpose. The power to tax has, however, inherent limitations, since it is always implied that the power to raise revenues by taxation is limited by the subject itself, insomuch as taxes can only be levied for public or governmental purposes. As it is settled that using money to aid in

payers to burden themselves in order to aid railroad companies, it is difficult to perceive why it is not a necessary conclusion from the settled principle. But see *Choisser v. People*, 140 Ill. 21, 29 N. E. 546; *Cairo &c. R. Co. v. Sparta*, 77 Ill. 505; *Horton v. Thompson*, 71 N. Y. 513.

<sup>45</sup> *Napa Valley R. Co. v. Napa Co.*, 30 Cal. 435. Permitting the authorities to subscribe without a submission of the question to the people may amount to a compulsory assessment of taxes, but the right of the legislature to do this has been upheld. *Thompson v. Perrine*, 106 U. S. 589, 1 Sup. Ct. 564, 27 L. ed. 298; *Ralls County v. Douglass*, 105 U. S. 728, 26 L. ed. 957; *Thomson v. Lee County*, 3 Wall. (U. S.) 327, 18 L. ed. 177; *Long v. New London*, 9 Biss. (U. S.) 539; *McCallie v. Chattanooga*, 3 Head (Tenn.) 317. And even where the state constitution prohibits the passage of laws for the

benefit of individuals, the legislature may enact a valid law permitting certain counties to grant aid without a preliminary vote of the inhabitants, when the general law requires such a vote. *Tipton Co. v. Rogers Locomotive Works*, 103 U. S. 523, 26 L. ed. 341.

<sup>46</sup> *Cairo &c. R. Co. v. Sparta*, 77 Ill. 505; *Williams v. Roberts*, 88 Ill. 11; *Sykes v. Columbus*, 55 Miss. 115; *People v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480; *Horton v. Thompson*, 71 N. Y. 513. See *Choisser v. People*, 140 Ill. 21, 29 N. E. 546; *Post v. Pulaski Co.*, 49 Fed. 628. To compel local aid to railroad companies seems to be carrying the authority of the legislature pretty far, as against the rights of the local property owners, even if such aid might be compelled as to certain other public improvements which are entirely public and as to which the locality may be said to rest under a public duty.

building a railroad is devoting it to a public purpose, it necessarily follows that the legislature has very great and extensive power over the subject of granting aid to railroad companies. So great and extensive is this power that it is competent for the legislature to authorize a municipality to give aid to a railroad, although the railroad may not be located within the territorial limits of the municipality. The legislature, where no constitutional limitation prohibits, may doubtless group counties and townships together, or may separate them into districts for the purpose of authorizing them to grant aid to railroad companies.<sup>47</sup> The decisions which lay down the rule that the legislature may create taxing or assessment districts support the rule we have stated.<sup>48</sup>

§ 1012 (826). **Scope of the legislative power—Illustrative cases.**—The power of the legislature to authorize a municipal corporation to aid in the construction of a railroad was recognized in a case wherein it was held that the action of the municipality granting aid to a railroad company, under a statute providing that townships might subscribe to the stock of any railway company, "building or proposing to build a railroad into, through or near such township," was conclusive upon the courts, although the railroad was nine miles distant from the township.<sup>49</sup> Where the building of a road will tend to increase the business

<sup>47</sup> *McFerron v. Alloway*, 14 Bush (Ky.) 580. See also *Breckenridge County v. McCracken*, 61 Fed. 191.

<sup>48</sup> *Gilson v. Board*, 128 Ind. 65, 27 N. E. 234, 11 L. R. A. 835; *Challis v. Parker*, 11 Kans. 394; *Hingham &c. Turnpike Corp. v. County of Norfolk*, 6 Allen (Mass.) 353; *Howell v. Buffalo*, 37 N. Y. 267, 273; *Scovill v. Cleveland*, 1 Ohio St. 126; *Hill v. Higdon*, 5 Ohio St. 243, 245, 67 Am. Dec. 289, and note; *Philadelphia v. Field*, 58 Pa. St. 320; *Langhorne v. Robinson*, 20 Grat. (Va.) 661. See generally *Livingston Co. v. Darling-*

*ton*, 101 U. S. 407, 25 L. ed. 1015; *Burr v. Carbondale*, 76 Ill. 455; *Shaw v. Dennis*, 10 Ill. 405; *Hensley Township v. People*, 84 Ill. 544; *Waterville v. Kennebec Co.*, 59 Maine 80. See generally *Merrick v. Amherst*, 12 Allen (Mass.) 500; *Litchfield v. Vernon*, 41 N. Y. 123.

<sup>49</sup> *Kirkbride v. Lafayette County*, 108 U. S. 208, 2 Sup. Ct. 501, 27 L. ed. 705. See also *Brokaw v. Board*, 73 Ind. 543; *Nixon v. Campbell*, 106 Ind. 47, 4 N. E. 296, 7 N. E. 258; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24.

of other roads leading to the municipality it is held that aid may be given, although the road aided lies at a distance from the municipality authorized to aid it.<sup>50</sup> It has also been held that where counties through which a proposed road will run are authorized to aid the construction of it or its connecting lines, aid in the construction of the latter may lawfully be extended, as soon as the construction of such a connecting line has been duly authorized by charter, and a contract for its construction has been entered into.<sup>51</sup> Municipalities may exercise the same privilege of taking stock to aid in building branches of a railroad that they may exercise in aid of the main road, in case the company is chartered to build the road with branches.<sup>52</sup> It has been held that a railroad may be lawfully aided by a subscription to its stock, although it lies outside the state,<sup>53</sup> and, indeed, even if it lies outside the country.<sup>54</sup> There are also cases holding that the legislature may confer the power to subscribe to a corporation not in existence, but to be subsequently created.<sup>55</sup> A pro-

<sup>50</sup> In the case of *Van Hostrup v. Madison City*, 1 Wall. (U. S.) 291, 17 L. ed. 538, it was held that authority "to take stock in any chartered company for making a road, or roads, to said city," empowered the city of Madison to take stock in the Columbus and Shelby Railroad, which approached no nearer to Madison than forty-six miles distant, at which point it connected with another road running to that city.

<sup>51</sup> *Kenicott v. Supervisors*, 16 Wall. (U. S.) 452, 21 L. ed. 319.

<sup>52</sup> *Tyler v. Elizabethtown &c. R. Co.*, 9 Bush. (Ky.) 510.

<sup>53</sup> *Chicago &c. R. Co. v. Otoe County*, 16 Wall. (U. S.) 667, 21 L. ed. 375; *Quincy &c. R. Co. v. Morris*, 84 Ill. 410; *State v. Charleston*, 10 Rich. (S. Car.) 491. See *Falconer v. Buffalo &c. R. Co.*, 69 N. Y. 491; *Walker v. Cincinnati*

*&c. R. Co.*, 21 Ohio St. 14, 8 Am. Rep. 24. In *Moulton v. Evansville*, 25 Fed. 382, it was held that the constitution of Indiana presents no obstacle to a grant by the legislature to a city in that state of power to aid a railroad corporation whose road lies entirely in other states, and which connects with such city by means of a line of boats running from its terminus.

<sup>54</sup> In *White v. Syracuse &c. R. Co.*, 14 Barb. (N. Y.) 559, it is held that the statute of New York, authorizing railway companies of that state to subscribe for stock in the Great Western Railway, Canada West, is constitutional.

<sup>55</sup> *James v. Milwaukee*, 16 Wall. (U. S.) 159, 21 L. ed. 267. It is held that the provisions of a general act, conferring on counties, cities, and towns, generally, power to make donations to railroad com-

vision in the charter of a railroad company, authorizing any town or village along the line of its route to extend aid to it, will, as it has been held, confer such power upon a village which comes into existence after the charter is granted.<sup>56</sup> The legislature may authorize subscriptions to aid a railroad company whose charter empowers it to carry on some other business in connection with the operation of its road, as dealing in coal, or mining,<sup>57</sup> but we suppose that it is only in so far as the business is of a public nature that aid can be given by public corporations. It has been expressly held that a general power to subscribe aid to a railroad may be exercised by making a subscription to the stock of a company chartered to build and operate a railroad, even though it also engaged in the business of mining, and in other transactions expressly authorized by its charter. And bonds issued in pursuance of such subscriptions were held valid.<sup>58</sup>

**§ 1013 (827). Power to aid railroads—Statutory authority.—** Statutory authority is essential to the existence of power in a municipal or governmental corporation to aid railroad companies by donations or subscriptions. Upon this point there is no diversity of opinion.<sup>59</sup> In the absence of express legislative enactment the power cannot exist inasmuch as the power to aid a railroad company by donations or subscriptions is not an in-

panies, practically become a part of all subsequent charters of cities and towns. *Madry v. Cox*, 73 Tex. 538, 11 S. W. 541. See also *MacKenzie v. Wooley*, 39 La. Ann. 944, 3 So. 128.

<sup>56</sup> *Perrin v. New London*, 67 Wis. 416, 30 N. W. 623.

<sup>57</sup> *Kentucky Improvement Co. v. Slack*, 100 U. S. 648, 25 L. ed. 609; *Randolph County v. Post*, 93 U. S. 502, 23 L. ed. 957; *MacKenzie v. Wooley*, 39 La. Ann. 944, 3 So. 128, where the railroad company was also to erect and operate a cotton compress. But the subscription must be used only to aid in con-

structing the railroad. *MacKenzie v. Wooley*, 39 La. Ann. 944, 3 So. 128.

<sup>58</sup> *Randolph County v. Post*, 93 U. S. 502, 23 L. ed. 957.

<sup>59</sup> *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. 1101, 32 L. ed. 77; *Norton v. Dyersburg*, 127 U. S. 160, 8 Sup. Ct. 1111, 32 L. ed. 85; *Young v. Clarendon Township*, 132 U. S. 340, 10 Sup. Ct. 107, 33 L. ed. 356; *Concord v. Robinson*, 121 U. S. 165, 7 Sup. Ct. 937, 30 L. ed. 885; *Daviess County v. Dickinson*, 117 U. S. 657, 29 L. ed. 1026; *Lewis v. Shreveport*, 108 U. S. 282, 2 Sup. Ct. 634, 27 L. ed. 728; *Claiborne*

herent or incidental corporate power. Statutory authority to manage or control the affairs and business of a public or governmental corporation is not sufficient to authorize aid to a railroad company.<sup>60</sup> The power to aid railroad companies is said by some of the authorities to be an extraordinary power, and this is true. But, while the power is not an ordinary one, yet it is one that is

County v. Brooks, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. ed. 470; South Ottawa v. Perkins, 94 U. S. 260, 24 L. ed. 154; Wells v. Supervisors, 102 U. S. 625, 26 L. ed. 122; Weightman v. Clark, 103 U. S. 256, 26 L. ed. 392; Coloma v. Eaves, 92 U. S. 484, 23 L. ed. 579; St. Joseph Tp. v. Rogers, 16 Wall. (U. S.) 644, 21 L. ed. 328; Kenicott v. Supervisors, 16 Wall. (U. S.) 453, 21 L. ed. 319; Thomson v. Lee County, 3 Wall. (U. S.) 327, 18 L. ed. 177; Marsh v. Fulton County, 10 Wall. (U. S.) 676, 19 L. ed. 1040; Commercial Nat. Bank v. Iola, 2 Dillon (U. S. C. C.) 353; Katzenberger v. Aberdeen, 16 Fed. 745; New Orleans &c. R. Co. v. Dunn, 51 Ala. 128; McCoy v. Briant, 53 Cal. 247; Bridgeport v. Housatonic &c. R. Co., 15 Conn. 475; Gaddis v. Richland Co., 92 Ill. 119, 36 Cent. L. J. 133; Welch v. Post, 99 Ill. 471; Aurora v. West, 22 Ind. 88, 85 Am. Dec. 413; Board &c. v. McClintock &c., 51 Ind. 325; Jeffries v. Lawrence, 42 Iowa 498; Atchison v. Butcher, 3 Kans. 104; Clay v. Nicholas Co., 4 Bush (Ky.) 154; Cook v. Sumner &c. Manufacturing Co., 1 Sneed (Ky.) 698; Kentucky Union R. Co. v. Bourbon Co., 85 Ky. 98, 2 S. W. 687; Minneapolis &c. Trac. Co. v. Minneapolis, 124 Minn. 351, 145 N. W. 609, 610 (citing text and other cases); Hawkins v. Board &c., 50 Miss. 735; St. Louis v. Al-

exander, 23 Mo. 483; Reineman v. Covington &c. Co., 7 Nebr. 310; Starin v. Genoa, 23 N. Y. 439; Pennsylvania R. Co. v. Philadelphia Co., 47 Pa. St. 189; State v. Whitesides, 30 S. Car. 579, 9 S. E. 661, 3 L. R. A. 777, and note; Johnson City v. Charlestown &c. R. Co., 100 Tenn. 138, 44 S. W. 670; Fisk v. Kenosha, 26 Wis. 23.

<sup>60</sup> In the case of *Lewis v. Pima County*, 155 U. S. 54, 15 Sup. Ct. 22, 39 L. ed. 67, the statute of the United States provided, inter alia, that the general assembly of the territory should have power to create towns, cities or other municipal corporations and to confer upon them corporate powers and privileges necessary to their local administration, but also provided that the corporations should not be invested with power to incur any debt or obligation "other than such as shall be necessary to the administration of its internal affairs," and the court held that municipal corporations could not incur any debt to aid a railroad company. The court, in the course of the opinion, said: "It could never have been contemplated, however, that this power would be used to incur obligations in favor of a railroad operated by a private corporation for private gain, though also subserving a public purpose."

often essential to the interests of municipalities and to the exercise of which many counties, towns and cities owe their development and prosperity. If it be the object of law to promote the public welfare, as unquestionably it is, statutes conferring authority to aid in constructing improvements of a public character are wise and politic. Because a power may be abused is not, as it seems to us, a sufficient reason for condemning legislative action in granting it to municipalities. The danger of abuse may be, and doubtless is, sufficient reason to call for great care in guarding and limiting the grant of the power. The power is so far an extraordinary one as to require that it be not held to exist in municipal corporations unless conferred by clear statutory provisions, and to require, also, that the construction of statutes conferring such power be strict, as against railroad companies claiming aid.<sup>61</sup>

§ 1014 (828). **Power to grant aid is continuous.**—Where power is conferred upon a municipal corporation to aid a railroad company, it is a continuous power, and is not exhausted by a single exercise.<sup>62</sup> Where a limit is fixed by the enabling act, the municipality may repeatedly exercise the power, provided it does not go beyond the limit fixed by the statute. A failure at one meeting or at one election to order the granting of aid does not preclude the municipality from holding other meetings or elections.<sup>63</sup> It has been held that a general authority to accept, by a two-thirds vote, a power conferred upon the municipality to subscribe in aid of a railroad, is not exhausted by a single

<sup>61</sup> *Empire Township v. Darlington*, 101 U. S. 87, 25 L. ed. 878; *Brokaw v. Board*, 73 Ind. 543, 548. See also *Burlingham v. New Berne*, 213 Fed. 1014; *Louisiana &c. R. Co. v. Shaw*, 121 La. 997, 49 So. 994 (special tax voted in aid of railroad not a local assessment). A statute authorizing a subscription to railroad companies has been held not to include electric and interurban railways. *O'Malley*

*v. Comrs. of Riley Co.*, 86 Kans. 752, 121 Pac. 1108, Ann. Cas. 1913C, 576.

<sup>62</sup> *Harding v. Rockford &c. R. Co.*, 65 Ill. 90; *Demaree v. Johnson*, 150 Ind. 419, 49 N. E. 1062; *Smith v. Omaha &c. R. Co.*, 97 Iowa 545, 66 N. W. 104; *Bowling Green &c. R. Co. v. Warren Co.*, 10 Bush (Ky.) 711.

<sup>63</sup> *Society for Savings v. New London*, 29 Conn. 174.



vote, and that the power will survive repeated rejections, and that a two-thirds vote at a subsequent meeting will be a valid acceptance of the power to extend the desired aid.<sup>64</sup> The common council of a city cannot, however, two years after having rejected a petition presented by the stockholders, asking that aid be given to a certain railroad, reconsider such petition and extend the aid for which it asks.<sup>65</sup> But the doctrine of the case cited in the note cannot be understood as preventing a second or subsequent petition from being presented to and acted upon by the common council. A general authority to subscribe to the capital stock of any railroad does not fail with a single exercise, but subscriptions may be made to the stock of any number of companies, so long as the terms of the statute are followed in each case.<sup>66</sup> And a municipality may make several subscriptions to

<sup>64</sup> *Society for Savings v. New London*, 29 Conn. 174. In the absence of any prohibition in the statutes against submitting the question to the electors more than once, a second vote may be taken. *Supervisors v. Galbraith*, 99 U. S. 214, 25 L. ed. 410. A township subscribed to the stock of a railroad, on the condition, among others, that a depot should be built at a certain place. By mistake this place, as set out in the petition and notices of election, was different from that intended, and from that where the depot was built. Upon discovery of this mistake, it was attempted to hold another election, in which the true route of the road and place for the depot should be set out, relying on the provisions of the statute that a second election should be held "for the same purpose" as the first, under certain circumstances. In the preliminaries for the second election a different amount for the subscription, and a different route

and time of completion of the road, were specified. The court held that the election was not for the same purpose as the first, and the subscription was invalid. *Kansas City &c. R. Co. v. Rich Tp.*, 45 Kans. 275, 25 Pac. 595.

<sup>65</sup> *Madison v. Smith*, 83 Ind. 502.

<sup>66</sup> *Chicot County v. Lewis*, 103 U. S. 164, 26 L. ed. 495. See also *Scotland County v. Thomas*, 94 U. S. 682, 24 L. ed. 219; *Empire v. Darlington*, 101 U. S. 87, 25 L. ed. 878. Provided, of course, that the total of the subscriptions does not exceed the amount that the municipality has power to subscribe. It is held, under the provisions of the Kansas statute limiting the amount of subscription or loan to a railroad by a county, city or township, that such limit is not confined to the subscription or loan to any one railroad, but restricts indebtedness for railroad purposes generally, whether the aid be extended to one or more corporations. *Chicago &c. R. Co. v. Free-*

the same company if their sum does not exceed the amount which it is empowered to subscribe in aid of such company.<sup>67</sup>

**§ 1015 (829). Railroad aid laws not restricted to new companies.**—It is obvious that the welfare of a community may be promoted by the extension of an existing railroad, and hence there is no reason for denying that a statute authorizing, in general terms, the grant of aid to railroad companies may apply to the extension of the road of an existing company. The theory upon which railroad aid laws principally rests is that the construction of the road is a benefit to the municipality, and as the extension of an old road into a municipality is a benefit to the municipality there is no just ground upon which it can be held that aid may not be granted in order to secure an extension.<sup>68</sup> It may, perhaps, be competent for the legislature to limit the power to grant aid to new roads, but where there is no provision limiting the authority conferred upon the municipal corporation to grant aid to corporations newly created the courts cannot make such a limitation, since that would be to legislate.

**§ 1016 (830). Taxing the property of one railroad company to aid in the construction of the road of another company.**—The property of a railroad company within the limits of a municipality which has voted aid to a competing railroad is subject to taxation to pay the aid voted.<sup>69</sup> It is affirmed in the case referred to in the note that all property subject to taxation must be made to

man, 38 Kans. 597, 16 Pac. 828. Under the New Mexico statute, authorizing any county to issue county bonds to assist in the construction of any railroad passing through the county, "not exceeding five per centum of the assessed value of the property of the county," bonds to the extent of five per centum may be issued to each road passing through the county, when so ordered by a vote of the people. *Coler v. Santa Fe Co.*, 6 N. Mex. 88, 27 Pac. 619.

<sup>67</sup> *Empire Tp. v. Darlington*, 101 U. S. 87, 25 L. ed. 878; *Henry County v. Nicolay*, 95 U. S. 619, 24 L. ed. 394; *Scotland County v. Thomas*, 94 U. S. 682, 24 L. ed. 219; *People v. Waynesville*, 88 Ill. 469; *Brokaw v. Board of Comrs.*, 73 Ind. 543; *Hurt v. Hamilton*, 23 Kans. 76; *First Nat. Bank v. Concord*, 50 Vt. 257.

<sup>68</sup> *Pittsburgh &c. R. Co. v. Harden*, 137 Ind. 486, 37 N. E. 324.

<sup>69</sup> *Pittsburgh &c. R. Co. v. Harden*, 137 Ind. 486, 37 N. E. 324.

bear its share of the burden, otherwise the tax would not be equal and uniform.<sup>70</sup> The court refused assent to the argument of counsel that, as the existing company could not be benefited by the construction of a rival road, there was no power to levy the tax.<sup>71</sup> The good of the local public is to be regarded, not that of particular corporations or persons, and it is for the majority to determine what is for the good of the municipality. It is evident that if particular corporations or persons could defeat a tax because they were not benefited the public good might be sacrificed to private interests. Such a result is always to be avoided, since it is opposed to fundamental principles of government.

**§ 1017 (831). Construction of statutes conferring authority to aid railroad companies.**—As the power to aid railroad companies is not an ordinary corporate power, but exists only by virtue of express statutory grant,<sup>72</sup> it necessarily follows that

<sup>70</sup> *Pittsburgh &c. R. Co. v. Harden*, 137 Ind. 486, 37 N. E. 324.

<sup>71</sup> On this point it was said: "There may always be found one or more persons who might make the claim that the imposed tax is of no benefit to them; and there are many more persons who, by reason of absence, sex, infancy or other disability, are denied a voice in the imposition of the tax. Yet, when a majority have determined in favor of the burden, it is taken as the voice of the whole community; and not only those who do not or can not vote upon the proposition, but even those who vote against it are equally bound by the result. The majority of the voters proceeding under the forms and by the authority sanctioned by the legislature, speaks for the general good. Even the rival railroad company participates in the in-

creased prosperity caused by the construction of the new road." *Pittsburgh &c. R. Co. v. Harden*, 137 Ind. 486, 37 N. E. 324.

<sup>72</sup> *Northern Bank v. Porter Township*, 110 U. S. 608, 4 Sup. Ct. 254, 28 L. ed. 258; *Brodie v. McCabe*, 33 Ark. 690; *Bissell v. Kankakee*, 64 Ill. 249, 16 Am. Rep. 554; *Campbell v. Paris &c. R. Co.*, 71 Ill. 611; *Barnes v. Lacon*, 84 Ill. 461; *Lamoille &c. R. Co. v. Fairfield*, 51 Vt. 237; *Lynchburg v. Slaughter*, 75 Va. 57; ante § 1013. See also *Purdy v. Lansing*, 128 U. S. 557, 9 Sup. Ct. 172, 32 L. ed. 531; *Mellen v. Lansing*, 11 Fed. 820, 829. There must, in every instance, be a valid statute. *Amoskeag Bank v. Ottawa*, 105 U. S. 667, 26 L. ed. 1204; *Gilson v. Dayton*, 123 U. S. 59, 8 Sup. Ct. 66, 31 L. ed. 74; *Turner v. Commissioners*, 27 Kans. 314.

statutes conferring power to aid railroad companies must be strictly construed. The cardinal rule that the legislative intention is to be ascertained and carried into effect controls, but nevertheless the construction is to be strict as against the company and liberal in favor of the public. The construction, to be sure, is not to be so strict as to defeat the intention of the framers of the statute, but the statute cannot be construed as granting authority that is not conferred either expressly or by clear and necessary implication.<sup>73</sup>

§ 1018 (831a). *Inadequacy of statute.*—It has been held that a statute authorizing cities to procure land to be donated to a railroad company for depot grounds, engine houses, and the like, but containing no provision authorizing the levy of a tax to meet the indebtedness in procuring such grounds, and creating no funds to pay for same, only gives the city the right to

<sup>73</sup> *Lewis v. Shreveport*, 3 Woods (U. S.) 205; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676, 19 L. ed. 1040; *Allen v. Louisiana*, 103 U. S. 80, 26 L. ed. 318; *Lewis v. Shreveport*, 108 U. S. 282, 2 Sup. Ct. 634, 27 L. ed. 728; *Pitzman v. Freesburg*, 92 Ill. 111; *Leavenworth Co. v. Miller*, 7 Kans. 479, 12 Am. Rep. 425. See *Singer &c. Co. v. Elizabeth*, 42 N. J. L. 249; *State v. Charleston*, 10 Rich. (S. Car.) 491; *City Council v. Wentworth &c. Baptist Church*, 4 Strob. 306, 308; *State v. Board*, 166 Ind. 162, 76 N. E. 986, 996, citing text. In the case of *Meyer v. Muscatine*, 1 Wall. (U. S.) 384, 17 L. ed. 564, a broader doctrine than that stated in the text was announced, but we think that the decision in that case is greatly modified if not entirely overruled by later and better considered cases. *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. 1101, 32 L. ed. 77, 22 Am. & Eng. R. Cas. 1; *Mer-*

*rill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. 441, 34 L. ed. 1069; *Brenham v. German Am. Bank*, 144 U. S. 173, 12 Sup. Ct. 559, 36 L. ed. 390; *Claiborne County v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. ed. 470; *Indiana v. Glover*, 155 U. S. 513, 15 Sup. Ct. 186, 39 L. ed. 243; *Coffin v. Indianapolis*, 59 Fed. 221, and cases cited. See also *United States v. Oregon &c. R. Co.*, 164 U. S. 526, 17 Sup. Ct. 165, 41 L. ed. 541. A statute authorizing subscriptions to railroad companies has been held not to include electric and interurban railways. *O'Malley v. Comrs. of Riley County*, 86 Kans. 752, 121 Pac. 1108, Ann. Cas. 1913C, 576. And a statute authorizing counties to subscribe for railroad stock has been held not to warrant issuance of bonds by townships to aid in the construction of a railroad. *Witowsky v. Jackson County*, 150 N. Car. 90, 63 S. E. 275.

pay for the site with warrants payable out of its general or incidental funds, and does not empower the city to issue its bonds for this purpose.<sup>74</sup> And it is a general rule that where statutes of this character are fatally defective the courts have no power to supply omissions.<sup>75</sup>

§ 1019 (832). **Impairment of contract rights.**—The obligation of a contract is protected by the federal constitution against the people of a state, as well as against a state legislature. A contract right cannot, therefore, be impaired by an amendment to a state constitution, nor by a change thereof.<sup>76</sup> It is quite clear that the rights of a railroad company, when vested by virtue of an effective contract, cannot be impaired, but the difficulty is in determining when there is an effective contract. It cannot be held that a mere vote or order declaring that aid be granted constitutes a contract, but if the railroad company should accept the proffered aid, and especially if it should, in reliance on the offer of aid, actually undertake the work of constructing the road, and should expend money in the work, there would, as we believe, be a contract within the protection of the constitution.<sup>77</sup> If, however, the offer of aid should be withdrawn before acceptance, there would be no contract. It has been held that the contract is not complete until the subscription is actually placed upon the books of the railroad com-

<sup>74</sup> *Swanson v. Ottumwa*, 131 Iowa 540, 106 N. W. 9.

<sup>75</sup> *State v. Board*, 175 Ind. 400, 404, 94 N. E. 716; *State v. Peneau*, 75 Nebr. 1, 104 N. W. 1151, 106 N. W. 451.

<sup>76</sup> *Gunn v. Barry*, 15 Wall. (U. S.) 610, 21 L. ed. 212; *United States v. Jefferson Co.*, 1 McC. (U. S.) 356.

<sup>77</sup> See *Red Rock v. Henry*, 106 U. S. 596, 1 Sup. Ct. 434, 27 L. ed. 251; *Callaway County v. Foster*, 93 U. S. 567, 23 L. ed. 911; *Nelson*

*v. Haywood Co.*, 87 Tenn. 781, 11 S. W. 885. Even in those jurisdictions where the rule is that the railroad company is not entitled to the money until it is collected, it is held that it has such an interest as will pass to the consolidated corporation, of which it forms part. *Scott v. Hansheer*, 94 Ind. 1; *Pope v. Board*, 51 Fed. 769. But see *State v. Board*, 166 Ind. 162, 76 N. E. 986. See ante, § 379, and authorities cited in note 1.

pany,<sup>78</sup> but this seems to us a doctrine that cannot justly be extended to cases where the railroad company, acting upon the order granting aid and influenced thereby, has expended money in the construction of the road. It is held in a recent case, however, that it is not to be supposed that a railroad was built for the purpose of selling stock or obtaining a donation; that the performance of conditions precedent by the company under the statute does not constitute a contract, and that, under the Indiana statute, although the road had been completed and a special tax levied against the township, the company had no interest therein as against the township, and could not maintain mandamus to compel the collection of the tax.<sup>79</sup> Where there is a failure to perform the acts required, in order to entitle the railroad company to the aid ordered or voted it, there is no contract,<sup>80</sup> for until those acts are performed the agreement is not complete. If, however, there is a complete agreement, the failure to do what is required will not, as we believe, destroy or annul the contract, but may be cause for defeating a claim to the aid, or for adjudging the contract to be ineffective. Where the constitution declares that its provisions shall not apply to prior proceedings, they are not, it is obvious, affected by such provisions.<sup>81</sup> Where bonds are issued and sold there can be no question as to the existence of a contract within the pro-

<sup>78</sup> *Aspinwall v. Daviess County*, 22 How. (U. S.) 364, 16 L. ed. 296; *Cumberland &c. R. Co. v. Barren Co. &c.*, 10 Bush (Ky.) 604; *List v. Wheeling*, 7 W. Va. 501; *Land Grant &c. Co. v. Davis Co.*, 6 Kans. 256. See also *Aspinwall v. Daviess County*, 22 How. (U. S.) 364, 16 L. ed. 296.

<sup>79</sup> *State v. Board*, 166 Ind. 162, 76 N. E. 986. The statute provided that the board of county commissioners might make a donation after the assessment had been levied and collected.

<sup>80</sup> *Jeffries v. Lawrence*, 42 Iowa 498; *Birch Cooley v. First Nat.*

*Bank*, 86 Minn. 385, 90 N. W. 788; *Falconer v. Buffalo R. Co.*, 69 N. Y. 491.

<sup>81</sup> *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. ed. 544; *Louisville v. Portsmouth &c. Bank*, 104 U. S. 469, 26 L. ed. 775; *Clay County v. Society for Savings*, 104 U. S. 579, 26 L. ed. 856; *Moultrie County v. Fairfield*, 105 U. S. 370, 26 L. ed. 945, 7 Am. & Eng. R. Cas. 194; *Lippincott v. Pana*, 92 Ill. 24; *Middleport v. Aetna &c. Co.*, 82 Ill. 562; *People v. Hamill*, 134 Ill. 666, 17 N. E. 799, 22 Am. & Eng. Corp. Cas. 39.

tection of the federal constitution, although there may be a question as to the validity of such bonds, as, for instance, where the conditions essential to the existence of power to issue them were not complied with by the municipal officers. But where the statute provided for assessments to meet interest on bonds, but made it unlawful to levy more than five mills on the dollar, it was held that the rate was left to the discretion of the levying authority, within the prescribed limit, and that a constitutional provision prohibiting a levy of more than one-half of one per cent. for all purposes, except to pay indebtedness existing at the time of the ratification of the constitution, in which case it was provided that an additional one-half per cent. might be levied, did not impair the obligation of the contract with the bondholders.<sup>82</sup>

**§ 1020 (833). Impairment of contract rights.—Illustrative cases.**—Where rights become contract obligations they will not be affected by constitutional amendments adopted after the date of their acquisition.<sup>83</sup> But it has been held that where a railroad company, after the adoption of a new constitution, accepts an amendment to its charter, authorizing its extension through other counties not included in the route designated in the original charter, all subscriptions by counties along such extension will be controlled by the provisions of the new constitution.<sup>84</sup> A repeal of the act authorizing the issue of municipal bonds in aid of a railroad will not affect the liability of the municipality upon bonds issued under authority of such act before its repeal, and the municipality may be compelled by mandamus to raise a tax with which to pay them.<sup>85</sup>

**§ 1021 (834). Construction of statutes — Implied powers. —** Statutes conferring power upon municipalities to aid railroad

<sup>82</sup> Desha Co. v. State, 73 Ark. 387, 84 S. W. 625.

<sup>83</sup> Henry County v. Nicolay, 95 U. S. 619, 24 L. ed. 394; Slack v. Maysville &c. R. Co., 13 B. Mon. (Ky.) 1; Kansas City &c. R. Co. v. Nodaway Co., 47 Mo. 349.

<sup>84</sup> State v. Saline Co., 51 Mo. 350, 11 Am. Rep. 454.

<sup>85</sup> Sibley v. Mobile, 3 Woods (U. S.) 535, 4 Am. L. T. (N. S.) 226; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; People v. Tazewell Co., 22 Ill. 147; St.

companies usually prescribe the nature of the aid that may be given and provide what means shall be adopted for paying the donations or subscriptions, but in many cases no provision is made as to the mode for paying the subscriptions or the bonds, so that resort must be had to other statutes or to the general rules of law. A statute is not to be considered as an isolated or detached fragment of law, but as a part of one uniform system of laws,<sup>86</sup> hence a statute providing for giving aid to a railroad company, not fully effective in itself, may be made entirely effective by the help of other statutes or the general rules of the unwritten law. It may happen, it is true, that a statute may be so vague and indefinite as to be incapable of enforcement, but this can very seldom occur. A rule which often aids in giving effect to statutes is this: the grant of a principal power carries with it such incidental powers as are necessary to effectuate it. By force of this rule statutes empowering a municipal corporation to grant aid to a railroad give power to levy a tax to raise the money necessary to pay the donation or subscription, or, if bonds are lawfully issued, to pay the bonds.<sup>87</sup> Where a tax is provided for, and no specific provision is made for collecting it, the implication is that it is to be collected as taxes are ordinarily collected, with the usual interest and penalties for delinquencies.<sup>88</sup> The rule that a statute forms part of a uniform system authorizes the conclusion we have stated. It may be noted, also, that the rule is that statutes will not be suffered to fail, if, by considering them in connection with other statutes, or with principles of the common law, they can be given effect. Reference may be had to other statutes to determine whether delinquents can be charged with a penalty.<sup>89</sup>

Joseph &c. R. Co. v. Buchanan County Ct., 39 Mo. 485.

<sup>86</sup> Humphries v. Davis, 100 Ind. 274, 50 Am. Rep. 788.

<sup>87</sup> Ralls County Court v. United States, 105 U. S. 735, 736, 26 L. ed. 1220; Nelson v. Haywood Co., 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648; Nichol v. Mayor &c., 9 Humph. (Tenn.) 251.

<sup>88</sup> Bothwell v. Millikan, 104 Ind. 162, 3 N. E. 816.

<sup>89</sup> Although the statute specifically limits the tax that may be assessed to a designated per centum, a penalty may be charged against delinquent tax-payers. Chicago &c. Co. v. Hartshorn, 30 Fed. 541; Tobin v. Hartshorn, 69 Iowa 648, 29 N. W. 764. See Snell v. Campbell,



§ 1022 (835). **Construction of statutes conferring authority to aid railroad companies—Illustrative instances.**—Authority conferred upon a county to aid a company which constructs a road through the county does not empower the county to vote aid to a company that locates and builds its road entirely outside of the county.<sup>90</sup> Where authority is conferred to grant aid to a designated road and to a certain other road, aid may be given to either.<sup>91</sup> Statutes authorizing counties to subscribe for railroad stock do not authorize the issuance of bonds by townships to aid in the construction of the railroad.<sup>92</sup> And power conferred by the charter of a municipal corporation to "borrow money and issue bonds therefor" does not confer authority to aid railroad companies.<sup>93</sup> While the later cases must be regarded as settling the law and as adjudging that authority to aid a railroad company by subscriptions does not carry with it power to execute negotiable instruments, still the language of the statute may be such as to carry such authority.<sup>94</sup> A statute conferring authority to subscribe for stock and issue bonds does not empower the municipality to make a donation of property;<sup>95</sup> neither does a statute authorizing a subscription to the stock of a railroad company empower the city to endorse its bonds. Under such a statute the city receives something in return for its money, but an endorsement creates a liability, being, in effect, a con-

24 Fed. 880. In the case last cited it was held that the state might remit the penalties, but this was denied in *Tobin v. Hartshorn*, supra, and in *Chicago &c. Co. v. Hartshorn*, 30 Fed. 541, the court followed *Tobin v. Hartshorn*.

<sup>90</sup> *State v. Hancock Co.*, 11 Ohio St. 183.

<sup>91</sup> *First National Bank v. Concord*, 50 Vt. 257.

<sup>92</sup> *Wittowsky v. Jackson Co.*, 150 N. Car. 90, 63 S. E. 275.

<sup>93</sup> *Jonesboro City v. Cairo &c. R. Co.*, 110 U. S. 192, 4 Sup. Ct. 67, 28 L. ed. 116; *Lewis v. Shreveport*, 108 U. S. 282, 2 Sup. Ct. 634,

27 L. ed. 728.

<sup>94</sup> *Ashley v. Board*, 60 Fed. 55; *Evansville v. Woodbury*, 60 Fed. 718; *Commonwealth v. Williamston*, 156 Mass. 70, 30 N. E. 472. See generally *Nolan Co. v. State*, 83 Tex. 182, 17 S. W. 823; *Brenham v. German-American Bank*, 144 U. S. 173, 12 Sup. Ct. 555, 36 L. ed. 390; *Coffin v. Board*, 57 Fed. 137; *Dodge v. Memphis*, 51 Fed. 165.

<sup>95</sup> *Choisser v. People*, 140 Ill. 21, 29 N. E. 546. See *Post v. Pulaski Co.*, 49 Fed. 628; *Sampson v. People*, 140 Ill. 466, 30 N. E. 689.

tract of suretyship.<sup>96</sup> A sale of stock back to the company and a nominal consideration paid in bonds does not, it has been held, render the bonds invalid in the hands of a bona fide holder, although the statute requires stock to be subscribed and does not provide for a donation,<sup>97</sup> but on this point there is a conflict of authority.<sup>98</sup> Where cities are authorized to aid railroad companies they may exercise the power, although they form part of townships to which a like power is given.<sup>99</sup> It was held under a statute authorizing "any village, city, county or township" to aid a railroad company that aid might be given by an incorporated town, as towns were included in the term any village,<sup>1</sup> but upon this point there is some conflict of authority.<sup>2</sup> So, upon a somewhat similar line of reasoning to that pursued by the Supreme Court of the United States in one of the cases referred to,<sup>3</sup> it was held that a city incorporated by a special charter might grant aid, although one of the state statutes provided that "no general laws as to the powers of cities shall be construed to extend to cities organized under a special charter."<sup>4</sup> A statute authorizing aid when "necessary to aid in the completion of any railroad" has been held not to authorize aid to a road not yet begun.<sup>5</sup> But the United States Circuit Court of Appeals took a different view of the statute and refused to follow the state court.<sup>6</sup>

<sup>96</sup> *Blake v. Macon*, 53 Ga. 172.

<sup>97</sup> *Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 803, 37 L. ed. 673; *Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. 358, 30 L. ed. 523.

<sup>98</sup> *Post v. Pulaski Co.*, 49 Fed. 628; *Choisser v. People*, 140 Ill. 21, 29 N. E. 546; *Board v. State*, 115 Ind. 64, 4 N. E. 589, 17 N. E. 855. See *Olcott v. Supervisors*, 16 Wall. (U. S.) 678, 21 L. ed. 382; *Queensbury v. Culver*, 19 Wall. (U. S.) 83, 22 L. ed. 100.

<sup>99</sup> *Bard v. Augusta*, 30 Fed. 906; *Iola v. Merriman*, 46 Kans. 49. But we suppose that if the language of the statute conferred power upon the townships only it

could not be exercised by cities.

<sup>1</sup> *Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. 358, 30 L. ed. 523; *Martin v. People*, 87 Ill. 524.

<sup>2</sup> *Welch v. Post*, 99 Ill. 471. See *Sampson v. People*, 141 Ill. 17, 30 N. E. 781.

<sup>3</sup> *Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. 358, 30 L. ed. 523.

<sup>4</sup> *Bartemeyer v. Rohlf*, 71 Iowa 582, 32 N. W. 673.

<sup>5</sup> *Graves v. Moore Co. Comrs.*, 135 N. Car. 49, 47 S. E. 134; *Commissioners v. Snuggs*, 121 N. Car. 394, 28 S. E. 539, 39 L. R. A. 439.

<sup>6</sup> *Board v. Coler*, 113 Fed. 705. This case and those cited in the last preceding note also contain a

**§ 1023 (836). Construction of enabling acts—Adjudged cases.**

—Questions of construction present themselves in different forms, and it is very difficult to state rules. Not only is it true that it is difficult to state rules, but it is also true that a better practical conception of the prevailing doctrines can be obtained by a reference to the adjudged cases, and for that reason we refer to cases in addition to those to which we have already directed attention. The statute which confers the power must be reasonably construed to carry into effect the purposes of its enactment,<sup>7</sup> and such of its provisions as are merely directory need not always be strictly complied with.<sup>8</sup> The authority by

review of the authorities as to the effect of recitals in bonds. The decision of the circuit court of appeals was affirmed in *Stanley County v. Coler*, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. ed. 1126. See also *Wilkes County v. Coler*, 113 Fed. 725, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. ed. 642; *Wilkes County v. Coler*, 190 U. S. 107, 23 Sup. Ct. 738, 47 L. ed. 971; and compare *Stanley Co. v. Coler*, 96 Fed. 284.

<sup>7</sup> *Curtis v. Butler County*, 24 How. (U. S.) 435, 16 L. ed. 745; *Woods v. Lawrence County*, 1 Black (U. S.) 386, 17 L. ed. 122. The term "village," in the Illinois act amending the charter of the Illinois Southeastern Railway Company, authorizing "any village, city, county or township" along the route of the road to subscribe or make donations to the stock of the company, and to issue bonds therefor, includes "towns," and the bonds of an incorporated town issued thereunder are valid. *Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. 358, 30 L. ed. 523. The notice provided that "one-half of the tax should be levied and collected in

the year 1887, and the other half in the year 1888." As the board of supervisors had no power to levy taxes and collect them the same year, but the taxes levied in one year were not collectible until the next, the clause of the notice was held to mean that the levy should be made within such time as that the tax would be collectible in the year 1887, and a levy made in 1886 was proper. *Bartemeyer v. Rohlfes*, 71 Iowa 582, 32 N. W. 673.

<sup>8</sup> As to what provisions are merely directory and what are mandatory, see the following cases: *Wood v. Lawrence County*, 1 Black (U. S.) 386, 17 L. ed. 122; *Stanton v. Alabama &c. R. Co.*, 2 Woods (U. S.) 523; *Coloma v. Eaves*, 92 U. S. 484, 23 L. ed. 579; *Supervisors v. Galbraith*, 99 U. S. 214, 25 L. ed. 410; *Cass County v. Gillett*, 100 U. S. 585, 25 L. ed. 585; *Roberts v. Bolles*, 101 U. S. 119, 25 L. ed. 880; *Draper v. Springport*, 104 U. S. 501, 26 L. ed. 812; *Society for Saving v. New London*, 29 Conn. 174; *Eagle v. Kohn*, 84 Ill. 292; *Mt. Vernon v. Hovey*, 52 Ind. 568; *McPherson v. Foster*, 43

which a municipality is enabled to subscribe aid to a railroad may be contained in the charter of the railroad company, and such a grant will generally carry with it by necessary implication the power to levy taxes to meet the subscription.<sup>9</sup> If the power to subscribe be granted to all the towns and villages along the line of the road, which is undetermined, a town will have no authority to subscribe until the road is finally and definitely located with reference to it.<sup>10</sup> Such a subscription can be voted only to a corporation authorized to receive it, and it can be made only to the corporation designated in the vote.<sup>11</sup> A grant to a

Iowa 48, 22 Am. Rep. 215; *Deming v. Houlton*, 64 Maine 254, 18 Am. Rep. 253, and note; *Vicksburg v. Lombard*, 51 Miss. 111; *State v. Saline Co. Ct.*, 48 Mo. 390, 8 Am. Rep. 108; *Hardensbergh v. Van Keuren*, 16 Hun (N. Y.) 17; *Wilmington &c. R. Co. v. Commissioners*, 116 N. Car. 563, 21 S. E. 205; *Board v. Texas &c. R. Co.*, 46 Tex. 316; *Redd v. Commissioners*, 31 Grat. (Va.) 695. But it must be borne in mind that the interpretation of the statute is very much more liberal when the validity of bonds actually issued is in question than when the question arises between the original parties before the aid has been given. A statute provided that the clerk of the election should certify the result of the election, together with the time, terms, and conditions upon which the tax, when collected, should be paid to the railroad company, and also provided that the order of the board of supervisors making the levy should indicate upon what conditions the tax should be paid over to the railroad company. The clerk made out his certificate, as required, and the supervisors, in making the levy, had this certifi-

cate before them, but failed to direct in their order upon what terms the railroad should be entitled to the tax. The court held that this was a mere omission, not of the essence of the thing done, and that it did not affect the validity of the levy, especially as the certificate of the clerk had made all the stipulations and conditions of record. *Meriwether v. Muhlenburg County Court*, 120 U. S. 354, 7 Sup. Ct. 563, 30 L. ed. 653.

<sup>9</sup> *Peoria &c. R. Co. v. People*, 116 Ill. 401, 6 N. E. 497. See also *Loan Assn. v. Topeka*, 20 Wall. (U. S.) 655, 22 L. ed. 455; *Nelson v. Haywood Co.*, 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648. But we think that the rule that the authority of the municipality to subscribe may be given in the charter of the company can not apply under constitutions forbidding special or local laws, and requiring legislative acts to embrace only one subject.

<sup>10</sup> *Purdy v. Lansing*, 128 U. S. 557, 9 Sup. Ct. 172, 32 L. ed. 531.

<sup>11</sup> *Bates County v. Winters*, 97 U. S. 83, 24 L. ed. 933; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676, 19 L. ed. 1040; *Bell v. Mobile &c. R. Co.*, 4 Wall. (U. S.) 598, 18

railroad of power to receive aid from certain classes of municipalities will not necessarily authorize such municipalities to grant the aid. Such a grant has been construed to be made with reference to an existing general statute by which only a portion of the municipalities were empowered to make subscriptions of this character, and it was held that the charter did not extend the powers contained in the general act to other municipalities not embraced by its terms.<sup>12</sup> But the general rule is that a special act will be construed to be independent of a prior general act, and in addition thereto, if it makes no reference to the general act. And the powers conferred by the different acts may be separately exercised.<sup>13</sup> So, where a charter authorized the railroad to receive subscriptions from a county upon certain terms, it was held that the validity of bonds issued in accordance there-

L. ed. 338; *Big Grove v. Wells*, 65 Ill. 263; *Board &c. Fulton Co. v. Mississippi &c. R. Co.*, 21 Ill. 338. But compare *Denison v. Columbus*, 62 Fed. 775. A proposition submitted to the voters of a county, in which it is proposed to vote the bonds of such county to a railroad company, must specifically designate the donee. A proposition in the alternative, to issue to a certain corporation named, or to another designated corporation, is not sufficient to authorize the bonds, although adopted by the legal voters. *State v. Roggen*, 22 Nebr. 118, 34 N. W. 108. An order submitting to the voters of a county a proposition to subscribe stock in aid of a railroad under the general railroad law of Missouri, need not specify the name of the corporation, where the proposition describes the proposed route of the road with the requisite certainty. *Ninth Nat. Bank v. Knox Co.*, 37 Fed. 75. See also *Onstott v. People*, 123 Ill. 489, 15 N. E. 34; *Young*

*v. Webster City &c. R. Co.*, 75 Iowa 140, 39 N. W. 234; *Kentucky Union R. Co. v. Bourbon Co.*, 85 Ky. 98, 2 S. W. 687; *MacKenzie v. Wooley*, 39 La. Ann. 944, 3 So. 128; *State v. Harris*, 96 Mo. 29, 8 S. W. 794.

<sup>12</sup> *Pitzman v. Freeburg*, 92 Ill. 111. See also *Campbell v. Paris &c. R. Co.*, 71 Ill. 611; *East Oakland v. Skinner*, 94 U. S. 255, 24 L. ed. 125.

<sup>13</sup> See *Stevens v. Anson*, 73 Maine 489, where two several subscriptions were made under a general and a special act, and both were held valid. The Kansas act for the organization of cities of the third class, providing that such cities shall remain a part of the corporate limits of the townships in which they are situated, for various purposes, including that of subscribing stock in aid of constructing railroads, is held not to exclude such cities from the power to issue railroad aid bonds. *Bard v. Augusta*, 30 Fed. 906.

with was not affected by a prior special act of the legislature requiring the question of issuing such bonds to be submitted to a vote of the taxpayers.<sup>14</sup> Where a special act refers to a prior general act as fixing the limits of the authority conferred by it and defining the mode of its exercise, the court will construe the special act as conferring the powers enumerated in the general act.<sup>15</sup> A general act forbidding municipal subscriptions in aid of railroads has been construed to repeal special acts authorizing them.<sup>16</sup> But it has been held that the facts which would authorize a writ of mandamus to compel a subscription do not necessarily establish a binding contract. And the repeal of a statute under which a subscription was made, and to enforce the provisions of which the proceedings in mandamus were pending, was held to defeat the proceedings.<sup>17</sup>

**§ 1024 (837). Means and methods.**—Where there are no limiting constitutional provisions the legislature has a choice of means and methods, and may provide how and upon what terms and conditions donations or subscriptions in aid of railroads may be made. The subject is legislative, and, in the absence of constitutional limitations, the general rule is that it is for the legislature to determine the means and methods that shall be employed.<sup>18</sup> Municipal corporations are creatures of legislation and subject to legislative control, so that it is within the power of the legislature, except where limitations are imposed by the constitution, to control the action of such corporations.<sup>19</sup> The

<sup>14</sup> *Burr v. Chariton Co.*, 2 McC. (U. S.) 603. But the bonds in this case were in the hands of innocent purchasers. See *Butz v. Muscatine*, 8 Wall. (U. S.) 575, 19 L. ed. 490; *Quincy v. Jackson*, 113 U. S. 332, 5 Sup. Ct. 544, 28 L. ed. 1001.

<sup>15</sup> *Henderson v. Jackson Co.*, 2 McC. (U. S.) 615.

<sup>16</sup> *Jeffries v. Lawrence*, 42 Iowa 498.

<sup>17</sup> *Covington &c. R. Co. v. Kenton County Court*, 12 B. Mon. (Ky.) 144, 152. See *State v. Garrouette*,

67 Mo. 445; *People v. Pueblo Co.*, 2 Colo. 360.

<sup>18</sup> *Legal Tender Cases*, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. ed. 204; *State v. Haworth*, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240; *Hancock v. Yaden*, 121 Ind. 366, 23 N. E. 235, 6 L. R. A. 576; *State v. Kolsem*, 130 Ind. 434, 442, 29 N. E. 595, 14 L. R. A. 566, and note.

<sup>19</sup> *Laramie Co. v. Albany Co.*, 92 U. S. 307, 308, 23 L. ed. 552; *Meriwether v. Garrett*, 102 U. S. 472, 511, 26 L. ed. 197; *Mobile v. Wat-*

general doctrines to which we have referred give to the legislature very extensive dominion over the subject of aiding railroads, for the subject lies within the legislative domain, and the legislative decision upon questions of policy and expediency is conclusive. It is only where some constitutional provision is violated that the courts can interfere.

**§ 1025 (838). Requirements of statute—Classes of cases.—**

It seems to us that there are two general classes of cases, namely, those in which taxpayers bring suit before the acquisition of rights by third persons, and those in which the rights of third persons are acquired before suit is brought. There is an essential difference between the two classes, and there should be, as we believe, different rules for each class. If interested persons have an opportunity to test the proceedings of municipal officers and negligently fail to make use of it until third persons acquire rights, they should not be allowed to avail themselves of irregularities or errors to defeat the proceedings unless the errors go to the question of power or jurisdiction. The distinction between the two classes of cases is lost sight of or disregarded by some of the courts, for they apply quite as strict rules in cases where the rights of third persons have intervened as in cases where suit is brought before the acquisition of rights by third persons. It is true that the power is purely statutory, and that where a power is statutory the provisions of the statute conferring it must be strictly pursued, but statutory provisions may be waived either by words or conduct, and persons who stand by until third persons acquire rights should be held to have waived a compliance with the requirements of the statutes except where the failure to comply affects the question of power or jurisdiction.

**§ 1026 (839). Power to aid by subscription does not authorize the execution of bonds.—**Power conferred upon a municipal corporation to aid a railroad company, by subscribing for

son, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. ed. 620; State v. Jennings, 27 Ark. 419; Clinton v. Cedar Rapids &c. R. Co., 24 Iowa 455; Cheaney v. Hooser, 9 B. Mon. (Ky.) 330;

People v. Morris, 13 Wend. (N. Y.) 325; Demarest v. New York, 74 N. Y. 161; David v. Portland &c. Co., 14 Ore. 98, 12 Pac. 174.

stock, does not empower the municipality to issue bonds. The power to issue municipal bonds, whether aid bonds or any other class of bonds, is not, as a rule, to be implied from the mere grant of authority to aid railroad companies by donations or subscriptions.<sup>20</sup> The later decisions very much, and, as we believe, very wisely, restrict the earlier decisions.<sup>21</sup> It seems to us that, as municipal corporations are not business or trading corporations, but instrumentalities of government,<sup>22</sup> it should be held that there is no power to issue negotiable bonds or promis-

<sup>20</sup> *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. 1101, 32 L. ed. 77, 22 Am. & Eng. Corp. Cas. 1; *Sheboygan Co. v. Parker*, 3 Wall. (U. S.) 93, 18 L. ed. 33; *Claiborne Co. v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. ed. 470; *Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. ed. 1026; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676, 19 L. ed. 1040; *Scipio v. Wright*, 101 U. S. 655, 25 L. ed. 1037; *Wells v. Supervisors*, 102 U. S. 625, 26 L. ed. 122, 2 Am. & Eng. R. Cas. 605; *Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. 361, 27 L. ed. 669; *Norton v. Dyersburg*, 127 U. S. 160, 8 Sup. Ct. 1111, 32 L. ed. 85; *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. 562, 33 L. ed. 887; *Barnum v. Okolona*, 148 U. S. 393, 13 Sup. Ct. 638, 37 L. ed. 495; *Mayor &c. of Pulaski v. Gilmore*, 21 Fed. 870; *Tax-payers v. Tennessee &c. R. Co.*, 11 Lea (Tenn.) 330; *Young v. Clarendon Tp.*, 132 U. S. 340, 10 Sup. Ct. 107, 33 L. ed. 356. See also *Burlingham v. New Berne*, 213 Fed. 1014.

<sup>21</sup> *Brenham v. German-American Bank*, 144 U. S. 173, 12 Sup. Ct. 559, 36 L. ed. 390; *Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. 441, 34 L. ed. 1069; *Jonesboro City*

*v. Cairo &c. R. Co.*, 110 U. S. 192, 4 Sup. Ct. 67, 28 L. ed. 116; *Concord v. Robinson*, 121 U. S. 165, 7 Sup. Ct. 937, 30 L. ed. 885; *Katzenberger v. Aberdeen*, 121 U. S. 172, 7 Sup. Ct. 947, 30 L. ed. 911; *Norton v. Dyersburg*, 127 U. S. 160, 8 Sup. Ct. 1111, 32 L. ed. 85. In *Barnum v. Okolona*, 148 U. S. 393, 13 Sup. Ct. 638, 37 L. ed. 495, it was said, in speaking of authority to aid railroad companies: ". . . that such legislative permission does not carry with it authority to execute negotiable securities except subject to the conditions and restrictions of the enabling act, are propositions so well settled by frequent decisions that we do not pause to consider them." See also note to *Weil v. Newbern*, 126 Tenn. 223, in Ann. Cas. 1913E, 25. Such cases as *Rogers v. Burlington*, 3 Wall. (U. S.) 654, 18 L. ed. 79, and *Mitchell v. Burlington*, 4 Wall. (U. S.) 270, 18 L. ed. 350, can not be regarded as authority, for the doctrine they assert has been repeatedly denied.

<sup>22</sup> *Claiborne Co. v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. ed. 470; *White v. Board*, 129 Ind. 396, 28 N. E. 846; *Elliott Roads and Streets*, 317.



sory notes, unless the power is conferred by statute. Persons who deal in municipal bonds ought to be made to understand that municipal corporations have only such powers as are clearly conferred by statute, so that in dealing with municipal corporations they must ascertain whether power to issue the bonds exist, and where they are fully put upon inquiry and there is no element of estoppel, determine for themselves whether the bonds are valid.

§ 1027 (840). **Levy of taxes—Withdrawal of power—Time.—**

Where power is expressly conferred upon a municipal corporation to incur an indebtedness the power to provide for its payment by taxation is usually implied.<sup>23</sup> The power to tax can not be withdrawn until the debt is satisfied.<sup>24</sup> The failure, neglect

<sup>23</sup> *United States v. Jefferson Co.*, 5 Dill. (U. S.) 310; *Riggs v. Johnson County*, 6 Wall. (U. S.) 166, 194, 18 L. ed. 768; *Loan Association v. Topeka*, 20 Wall. (U. S.) 655, 22 L. ed. 455; *United States v. New Orleans*, 98 U. S. 381, 393, 25 L. ed. 225; *Ralls County Court v. United States*, 105 U. S. 733, 735, 26 L. ed. 1220; *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. ed. 238; *United States v. Macon County*, 99 U. S. 582, 25 L. ed. 331; *Quincy v. Jackson*, 113 U. S. 332, 5 Sup. Ct. 544, 28 L. ed. 1001, 7 Am. & Eng. Corp. Cas. 368; *Minden-Edison Light & Co. v. Minden*, 94 Nebr. 161, 142 N. W. 673.

<sup>24</sup> *Ralls County Ct. v. United States*, 105 U. S. 733, 26 L. ed. 1220; *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. ed. 1090; *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535, 18 L. ed. 403; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Louisiana v. New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. ed. 936; *Galena v. Amy*, 5 Wall. (U. S.) 705,

18 L. ed. 560; *Rees v. Watertown*, 19 Wall. (U. S.) 107, 22 L. ed. 72; *Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. ed. 620; *Cape Girardeau County Ct. v. Hill*, 118 U. S. 68, 6 Sup. Ct. 951, 30 L. ed. 73; *McGahey v. Virginia*, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. ed. 304; *Lansing v. County Treasurer*, 1 Dill. (U. S.) 522; *United States v. Jefferson Co.*, 1 McCr. (U. S.) 356; *Commissioners v. Rather*, 48 Ala. 433; *Edwards v. Williamson*, 70 Ala. 145; *Vance v. Little Rock*, 30 Ark. 435, 440; *Trustees v. Bailey*, 10 Fla. 112, 81 Am. Dec. 194; *Beckwith v. English*, 51 Ill. 147; *Henderson & Co. v. Dickerson*, 17 B. Mon. (Ky.) 173, 66 Am. Dec. 148; *Coffin v. Rich*, 45 Maine 507, 71 Am. Dec. 559; *Williams v. Johnson*, 30 Md. 500, 96 Am. Dec. 613; *People v. Common Council*, 140 N. Y. 300, 37 Am. St. 563; *Western Saving Fund Society v. Philadelphia*, 31 Pa. St. 175, 72 Am. Dec. 730; *State v. Milwaukee*, 25 Wis. 122.

or refusal of the municipal officers to levy the tax at the time designated by the statute does not impair the authority to make the levy,<sup>25</sup> nor does one levy exhaust the power.

§ 1028 (841). **Donations and subscriptions.**—If the legislature has authority over the general subject, then upon the principle that it has a choice of means and methods and is “master of its own discretion,” it may determine whether the aid shall be given by way of donation or by subscription to the capital stock of the company. The legislature may, if no constitutional provision forbids, determine the mode in which the aid shall be granted. If it deems proper the legislature may leave it to the inhabitants of the local governmental subdivision to determine whether they will aid by subscription or donation.<sup>26</sup>

<sup>25</sup> *Commissioners v. Rather*, 48 Ala. 433; *Darlington v. Atlantic Trust Co.*, 68 Fed. 849. Compare *Josselyn v. San Francisco*, 168 Cal. 436, 143 Pac. 705.

<sup>26</sup> The legislature has the same right to authorize a donation of money or property to a railway company by a municipal corporation that it has to authorize a subscription to the capital stock of such a company. *Scott v. Hansheer*, 94 Ind. 1; *Converse v. Fort Scott*, 92 U. S. 503, 23 L. ed. 621. The court will not presume, in the absence of proof, that a donation was intended, although the consideration is grossly inadequate to a sale of bonds, as where fifty thousand dollars of municipal bonds were sold to the railroad company for one dollar. *County Court of Madison Co. v. People*, 58 Ill. 456. See also *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. ed. 873, distinguishing *Whiting v. Sheboygan &c. R. Co.*, 25 Wis. 167, 3 Am. Rep. 30. Where

a county agreed, by popular vote, to subscribe for \$100,000 of stock in a railroad company, and to issue bonds therefor, but, before delivery of the bonds, the county authorities agreed to sell and did sell the stock back to the company in exchange for \$30,000 in said bonds, which were returned to the county, the court held that the \$70,000 of bonds delivered to the company were void, since the transaction, being in effect a gift instead of a subscription, was not authorized by the popular vote. *Sampson v. People*, 140 Ill. 466, 30 N. E. 689; *Choisser v. People*, 140 Ill. 21, 29 N. E. 546; *Post v. Pulaski Co.*, 49 Fed. 628, 9 U. S. App. 1. But see *Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 893, 37 L. ed. 673. In the case of the *Board &c. v. Center Township*, 105 Ind. 422, 2 N. E. 368, 7 N. E. 189, it appeared that a donation of money was voted in aid of a railroad in 1870, that the money was collected in 1871 and 1873 and placed in the county treas-

§ 1029 (842). **Repeal of the enabling act—Withdrawal of authority.**—It is obvious that if an enabling act is repealed before a subscription is made the authority of the municipal corporation is taken away. It is equally clear that if rights in the nature of a contract have been acquired prior to the repeal of the act under which they were acquired the repeal does not destroy those rights.<sup>27</sup> The question of difficulty, as suggested in another connection, is as to when the rights of a railroad company can be regarded as so far fixed by contract as to be within the protection of the constitution. If there is a complete right to the aid, then, as we believe, the right cannot be rendered nugatory by a refusal to levy the necessary tax or issue the proper bonds.<sup>28</sup> In one of the cases it was held that, although there was no binding contract between the town and the rail-

ury, and that the road was not completed until 1880, and the court held it entitled to the donation.

<sup>27</sup> *Wolff v. New Orleans*, 103 U. S. 358, 26 L. ed. 395; *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535, 18 L. ed. 403; *Scotland County Ct. v. Hill*, 140 U. S. 41, 11 Sup. Ct. 697, 35 L. ed. 351; *Murfreesboro R. Co. v. Commissioners*, 108 N. Car. 56, 12 S. E. 952; *Nelson v. Haywood Co.*, 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648. See generally *Randolph County v. Post*, 93 U. S. 502, 23 L. ed. 957; *Henry County v. Nicolay*, 95 U. S. 619, 24 L. ed. 394; *Ray County v. Vansycle*, 96 U. S. 675, 24 L. ed. 800; *United States v. Norton*, 97 U. S. 164, 24 L. ed. 907; *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. ed. 544; *Louisville v. Savings Bank*, 104 U. S. 469, 26 L. ed. 775; *Louisiana v. Taylor*, 105 U. S. 454, 26 L. ed. 1133; *Edwards v. Williamson*, 70 Ala. 145; *People v. Clark*, 1 Cal. 406; *People v. Logan County*, 63 Ill. 374; *East St. Louis v. Maxwell*, 99 Ill. 439; *Rich-*

*eson v. People*, 115 Ill. 450, 5 N. E. 121; *Jeffries v. Lawrence*, 42 Iowa 498; *Barthel v. Meader*, 72 Iowa 125, 33 N. W. 446; *State v. Commissioners*, 38 Kans. 317, 16 Pac. 337; *Kennedy v. Palmer*, 6 Gray (Mass.) 316; *State v. Greene Co.*, 54 Mo. 540; *Hays v. Dowes*, 75 Mo. 250; *List v. Wheeling*, 7 W. Va. 501.

<sup>28</sup> *Babcock v. Helena*, 34 Ark. 499; *State v. Lancaster Co.*, 6 Nebr. 214. See *Callaway County v. Foster*, 93 U. S. 567, 23 L. ed. 911; *Macon County v. Shores*, 97 U. S. 272, 24 L. ed. 889; *Huidekoper v. Dallas Co.*, 3 Dill. (U. S.) 171; *Louisiana v. Taylor*, 105 U. S. 454, 26 L. ed. 1133; *Schuyler County v. Thomas*, 98 U. S. 169, 25 L. ed. 88; *Henry County v. Nicolay*, 95 U. S. 619, 24 L. ed. 394; *Nicolay v. St. Clair Co.*, 3 Dill. (U. S.) 163; *Moultrie Co. v. Rockingham Ten-Cent Savings Bank*, 92 U. S. 631, 23 L. ed. 631; *Supervisors v. Galbraith*, 99 U. S. 214, 25 L. ed. 410.

road company, but the company had done work on the faith of the action of the town authorities, the court would so construe the statute as to preserve the rights of the company and relieve the legislature from imputation of bad faith.<sup>29</sup> It was also held in the case referred to, that, after the company had done all that it was required to do, a repeal of the statute under which the town officers acted would not be allowed to impair the rights of the railroad company.<sup>30</sup> In order to entitle the railroad company to the aid ordered to be given it by a popular vote it must show, it has been held, that the company acted upon the belief that it would receive aid, and in that belief expended money in the construction of the road prior to the repeal of the statute under which the aid was voted.<sup>31</sup> But it was held by the same court that, if the company does act on the faith of the vote, and does expend money in the construction of its road, the repeal of the statute will not sweep away its rights,<sup>32</sup> and this seems to us to

<sup>29</sup> *Red Rock v. Henry*, 106 U.S. 596, 1 Sup. Ct. 434, 27 L. ed. 251, citing *Broughton v. Pensacola*, 93 U.S. 266, 23 L. ed. 896.

<sup>30</sup> *Red Rock v. Henry*, 106 U.S. 596, 1 Sup. Ct. 434, 27 L. ed. 251. In the course of the opinion it was said: "The amendatory act of March 2, 1871, with its repealing clause, can have no effect on this controversy. That act was passed more than six months after the railroad had fully complied with all the conditions upon which the town of Red Rock had agreed to issue its bonds. It was too late then for the legislature to interfere. The railroad company was entitled to the bonds, and any attempt by the legislature to forbid their issue would be unconstitutional."

<sup>31</sup> *Barthel v. Meader*, 72 Iowa 125, 33 N. W. 446. In this case the

tax was voted, but the statute under which it was voted was repealed before the levy was made and the company in whose favor the tax was voted had not, prior to the repeal, expended any money in reliance upon the tax in constructing the road and never did construct it, but transferred its rights by perpetual lease to another company which did construct it, but there was no mention of the tax in the transfer to the other company, and it did not appear that the lessee company had built the railroad relying on the tax. It was held that the tax was void and its collection properly enjoined.

<sup>32</sup> *Burgess v. Mabin*, 70 Iowa 633, 27 N. W. 464; *Cantillon v. Dubuque & C. R. Co.*, 78 Iowa 48, 42 N. W. 613, 5 L. R. A. 726, and note.

be the sound doctrine, notwithstanding the decisions to which we have elsewhere referred.<sup>33</sup>

**§ 1030 (843). Validating proceedings—Retrospective laws.**—Where there is no constitutional provision interdicting it the legislature has power to pass laws curing or healing defects in proceedings had in aid of railroad companies.<sup>34</sup> The plenary nature of the legislative power, the fact that the subject of aiding railroads is essentially legislative, and the fact that the power of the legislature over municipal corporations is so broad and comprehensive, require the conclusion we have stated. If vested rights have intervened, or if constitutional limitations forbid, then, of course, defects can not be remedied by retroactive statutes.<sup>35</sup> In illustration of the principle stated we may refer to the cases which hold that the legislature has power to pass retrospective statutes confirming the validity of railroad bonds that

<sup>33</sup> *Wadsworth v. Supervisors*, 102 U. S. 534, 26 L. ed. 221; *Railroad Co. v. Falconer*, 103 U. S. 821, 26 L. ed. 471.

<sup>34</sup> *Rogers v. Keokuk*, 154 U. S. 546, 14 Sup. Ct. 1152, 18 L. ed. 74; *Bolles v. Brimfield*, 120 U. S. 759, 30 L. ed. 786; *Otoe County v. Baldwin*, 111 U. S. 1, 4 Sup. Ct. 265, 28 L. ed. 331; *Jonesboro City v. Cairo &c. R. Co.*, 110 U. S. 192, 4 Sup. Ct. 67, 28 L. ed. 116; *Quincy v. Cooke*, 107 U. S. 549, 27 L. ed. 549; *Elmwood v. Marcy*, 92 U. S. 289, 23 L. ed. 710; *Supervisors v. Schenck*, 5 Wall. (U. S.) 772, 18 L. ed. 556; *Anderson v. Santa Anna*, 116 U. S. 356, 6 Sup. Ct. 413, 29 L. ed. 633; *Pompton v. Cooper Union*, 101 U. S. 196, 25 L. ed. 803; *Grenada County v. Brogden*, 112 U. S. 261, 5 Sup. Ct. 125, 28 L. ed. 704; *Katzenberger v. Aberdeen*, 121 U. S. 178, 7 Sup. Ct. 947, 30 L. ed. 913; *Dennison v. Mayor &c.*, 62 Fed. 775; *Cairo &c. R. Co. v. Spar-*

*ta*, 77 Ill. 505; *Board v. Bright*, 18 Ind. 93; *Steines v. Franklin County*, 48 Mo. 167, 8 Am. Rep. 87; *Brown v. Mayor*, 63 N. Y. 239; *Bell v. Farmville &c. R. Co.*, 91 Va. 99, 20 S. E. 942; *Knapp v. Grant*, 27 Wis. 147; *State v. Harper*, 30 S. Car. 586, 9 S. E. 664. See also *City of Venice v. Lawrence*, 24 Cal. App. 350, 141 Pac. 406.

<sup>35</sup> Where the subject is one upon which the legislature is prohibited from enacting special laws a special curative statute will be invalid, but a general statute may be effective. *Atchison &c. R. Co. v. Commissioners*, 17 Kans. 29. See generally upon the subject of curative statutes, *State v. Saline Co.*, 48 Mo. 390, 8 Am. Rep. 108; *Williams v. Roberts*, 88 Ill. 11; *New Orleans v. Pautz*, 14 La. Ann. 853; *Wilson v. Hardesty*, 1 Md. Ch. 66; *Kunkle v. Franklin*, 13 Minn. 127, 97 Am. Dec. 226.

have been illegally issued.<sup>36</sup> A validation by competent legislative power is in effect equivalent to precedent legislative authority.<sup>37</sup> The question is always one of power, and if the legislature had no power to authorize the proceedings or the issue of bonds in the first instance, it cannot validate them by a curative act.<sup>38</sup> There is, however, some apparent, if not actual, conflict

<sup>36</sup> *Kenosha v. Lamson*, 9 Wall. (U. S.) 477, 19 L. ed. 725; *Bissell v. Jeffersonville*, 24 How. (U. S.) 287, 16 L. ed. 664; *Black v. Cohen*, 52 Ga. 621; *Steines v. Franklin Co.*, 48 Mo. 167, 8 Am. Rep. 87; *People v. Mitchell*, 35 N. Y. 551; *Duanesburgh v. Jenkins*, 57 N. Y. 177; *Knapp v. Grant*, 27 Wis. 147; *Kimball v. Rosendale*, 42 Wis. 407, 24 Am. Rep. 421. This doctrine is announced in many cases where the bonds passed into the hands of bona fide holders, and the ratifying act protects their interests. The legislature had a right to assume, from the fact that the townships had voted aid to the railroads, that a public purpose existed, warranting the exercise of the taxing power. *State v. Whitesides*, 30 S. Car. 579, 9 S. E. 661, 3 L. R. A. 777 and note; *State v. Harper*, 30 S. Car. 586, 9 S. E. 664; *State v. Neely*, 30 S. Car. 587, 9 S. E. 664, 3 L. R. A. 672. See *Hayes v. Holly Springs*, 114 U. S. 120, 5 Sup. Ct. 785, 29 L. ed. 81; *Otoe County v. Baldwin*, 111 U. S. 1, 4 Sup. Ct. 265, 28 L. ed. 331; *Thompson v. Perrine*, 103 U. S. 806, 26 L. ed. 612; *Bolles v. Brimfield*, 120 U. S. 759, 7 Sup. Ct. 736, 30 L. ed. 786; *Bissell v. Jeffersonville*, 24 How. (U. S.) 287, 16 L. ed. 664; *Kenosha v. Lamson*, 9 Wall. (U. S.) 477, 19 L. ed. 725; *Dows v. Elmwood*, 34 Fed. 114; *Black v. Cohen*, 52 Ga.

621; *Gardner v. Haney*, 86 Ind. 17; *Duanesburgh v. Jenkins*, 57 N. Y. 177; *Kimball v. Rosendale*, 42 Wis. 407, 24 Am. Rep. 421.

<sup>37</sup> *Jasper County v. Ballou*, 103 U. S. 745, 26 L. ed. 422; *Shaw v. Norfolk &c. R. Co.*, 5 Gray (Mass.) 180; *Wilson v. Hardesty*, 1 Md. Ch. 66.

<sup>38</sup> *Elmwood v. Marcy*, 92 U. S. 289, 23 L. ed. 710; *Katzenberger v. Aberdeen*, 121 U. S. 172, 7 Sup. Ct. 947, 30 L. ed. 911; *Katzenberger v. Aberdeen*, 16 Fed. 745; *Marshall v. Silliman*, 61 Ill. 218; *Sykes v. Columbus*, 55 Miss. 115; *Hardenbergh v. Van Keuren*, 4 Abb. (N. Y.) 43; *People v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480; *Horton v. Thompson*, 71 N. Y. 513; *Single v. Supervisors*, 38 Wis. 364. If there is an entire absence of power to authorize the proceedings in aid of railroad companies, then no validating or curative act can be effective but some of the cases referred to in the note seem to go further and deny the power to validate where there was original power to authorize the proceedings. So far as the cases can be regarded as holding the doctrine stated we believe them to be wrongly decided. The decision in *Horton v. Thompson*, 71 N. Y. 513, was denied by the supreme court of the United States in *Thompson v. Perrine*, 103 U. S. 806, 26 L. ed. 612.

of authority upon this question, for the existence of such a power is denied by some of the cases.<sup>39</sup> An emphatic assertion of the general rule is found in the cases which hold that the legislature may confirm and make valid bonds issued by the municipality, although no authority whatever existed in the municipality at the time the bonds were issued,<sup>40</sup> unless prohibited by the state constitution.<sup>41</sup> Upon the same general principle it is held that Congress may ratify and render valid an unauthorized subscription in aid of a railroad made by a municipal corporation in one

<sup>39</sup> *Horton v. Thompson*, 71 N. Y. 513; *People v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480. In *Thompson v. Perrine*, 103 U. S. 806, 26 L. ed. 612, the court refused to follow *Horton v. Thompson*, and referred to *Bank of Rome v. Rome*, 18 N. Y. 38; *People v. Mitchell*, 35 N. Y. 551, and *Williams v. Duanesburgh*, 66 N. Y. 129, as declaring a different doctrine. See *Richland Co. v. People*, 3 Brad. (Ill.) 210; *Marshall v. Silliman*, 61 Ill. 218; *Williams v. Roberts*, 88 Ill. 11; *Gaddis v. Richland Co.*, 92 Ill. 119; *Choisser v. People*, 40 Ill. 21, 29 N. E. 546; *Post v. Pulaski County*, 49 Fed. 628, 9 U. S. App. 1. The power may exist and yet not be effectively exercised. Thus, for example, a special act may be void if enacted in cases where only general laws are valid. But it does not follow that because special laws are not effective there is no power to enact general curative statutes.

<sup>40</sup> *Thompson v. Perrine*, 103 U. S. 806, 26 L. ed. 612; *First National Bank v. Yankton County*, 101 U. S. 129, 25 L. ed. 1046; *Cumberland Co. v. Randolph*, 89 Va. 614, 16 S. E. 722. See *Napa Valley R. Co.*

*v. Napa Co.*, 30 Cal. 435; *State v. Charleston*, 10 Rich. (S. Car.) 491; *Shelby Co. v. Cumberland &c. R. Co.*, 8 Bush (Ky.) 209; *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Bouknight v. Davis*, 33 S. Car. 410, 12 S. E. 96. The South Carolina act, declaring all township bonds theretofore issued in aid of a railroad to be a debt of the township, authorizing the levy of a tax to pay it, and providing that the bonds might be used as evidence of the amount and character of such debt, was held to impress such debt on the township, proprio vigore, and it was bound therefor, although the act authorizing the issue of the bonds was unconstitutional and the bonds void. *Granniss v. Cherokee*, 47 Fed. 427.

<sup>41</sup> See *Gaddis v. Richland Co.*, 92 Ill. 119; *People v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480; *Horton v. Thompson*, 71 N. Y. 513. Such an act will be construed to affect only aid voted before its passage, and will not be held to validate acts subsequently done. *Concord v. Robinson*, 121 U. S. 165, 7 Sup. Ct. 937, 30 L. ed. 885; *Post v. Pulaski County*, 47 Fed. 282.

of the territories.<sup>42</sup> But if the legislature could not, at the time the bonds were issued, give authority to issue them in the way they were issued, it cannot afterward confirm and make valid the bonds so issued.<sup>43</sup> It has been held that an act purporting only to cure irregularities will not validate bonds which were issued without legal authority.<sup>44</sup> It may be remarked, in passing, that where the local officers have no authority whatever to grant aid, their proceedings are not simply irregular, but are acts performed where no jurisdiction exists, so that a statute assuming to do no more than cure irregularities cannot be extended to a case where there was an entire absence of authority. If, however, the terms of the statute clearly embrace unauthorized acts, then it will, as a rule, validate them.<sup>45</sup> Where a constitutional provision forbidding the grant of aid has taken effect before the ratifying act is passed, the legislature cannot validate a prior subscription made without authority.<sup>46</sup>

**§ 1031 (844). Legislative power to authorize ratification.**—Where the legislature has power in the first instance to impose or dispense with conditions at its discretion, it may authorize a ratification, although conditions prescribed by the enabling act were not complied with in granting the aid. It has been held, in New York, that conditions imposed by the enabling act may be waived and acts done in disregard of its requirements may be ratified by the legislature, even during litigation.<sup>47</sup> There is a

<sup>42</sup> *First National Bank v. Yankton County*, 101 U. S. 129, 25 L. ed. 1046.

<sup>43</sup> *Elmwood v. Marcy*, 92 U. S. 289, 23 L. ed. 710. Such, for example, as a subscription made without a preliminary vote, where the constitution permits the legislature to confer the power of subscribing only after the proposition has been accepted by a popular vote.

<sup>44</sup> *Williamson v. Keokuk*, 44 Iowa 88.

<sup>45</sup> It is to be understood, of course, that no curative statute can

be valid if the provisions of the constitution are infringed, but a curative act, although retrospective, is not from that fact alone to be always regarded as void.

<sup>46</sup> *Sykes v. Columbus*, 55 Miss. 115; *People v. Jackson Co.*, 92 Ill. 441.

<sup>47</sup> *Duanesburg v. Jenkins*, 57 N. Y. 177. The Wisconsin act providing that all proceedings on the part of a certain county, heretofore had, in subscribing and paying for any stock of a designated railway company, "are hereby le-



difference, as appears from what has been elsewhere said, between cases where there has been some irregularity and cases where there is an entire absence of power. There is, however, some diversity of opinion, for it has been held, erroneously, as we are inclined to think, that irregularities may prevent legislative ratification.<sup>48</sup>

§ 1032 (845). **Curative statutes—Requisites of.**—The constitutional power of the legislature to validate proceedings granting aid to railroad companies must be exercised by a valid statute. In jurisdictions where special laws are prohibited and general

galized and declared to be of the same legal force and effect as though the law governing the mode and procedure" in such cases "had been in all respects complied with," was held to cure any defects in such proceedings, although it was enacted after the commencement of a suit based on alleged defects in the proceedings. *Hall v. Baker*, 74 Wis. 118, 42 N. W. 104.

<sup>48</sup> Where an act was passed by the legislature legalizing a special election to vote aid to a railroad, and certain acts of the board of county commissioners in levying the tax so voted, such note and subsequent acts having been so irregularly performed, that a suit was even then pending to set the whole proceedings aside, the supreme court of Indiana held the act to be unconstitutional. The court said: "It seems very clear, we think, that in the enactment and approval of the statute now under consideration, the legislative and executive departments of our state government have exercised, or attempted to exercise, judicial functions. . . . The powers of the general assembly are almost unlimited;

but they can not, as a rule, try and determine the rights of parties to a pending law suit." *Columbus &c. R. Co. v. Board of Comrs.*, 65 Ind. 427. See also *Allison v. Louisville &c. R. Co.*, 9 Bush (Ky.) 247. As we have elsewhere shown, it is well settled that municipalities have no inherent or implied right to subscribe stock or issue bonds in aid of a railroad company, although the purpose may be to enable such company to construct its road by or through such municipality, and that where the claim of authority rests upon mere inference it will not be sustained. *Town of South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154; *East Oakland v. Skinner*, 94 U. S. 255, 24 L. ed. 125; *Ogden v. Daviess County*, 102 U. S. 634, 26 L. ed. 263; *Young v. Clarendon Tp.*, 132 U. S. 340, 10 Sup. Ct. 107, 33 L. ed. 356; *Brodie v. McCabe*, 33 Ark. 690; *French v. Teschemaker*, 24 Cal. 518; *Campbell v. Paris &c. R. Co.*, 71 Ill. 611; *Welch v. Post*, 99 Ill. 471; *Board &c. of Delaware County v. McClintock*, 51 Ind. 325; *Goddard v. Stockman*, 74 Ind. 400; *Jeffries v. Lawrence*, 42 Iowa 498; *Cagwin v.*

laws required, a special curative statute would not be effective.<sup>49</sup> The intention of the legislature to validate prior proceedings must be expressed with reasonable clearness and precision. The intention to validate the proceedings must not be left to conjecture in cases where the aid was granted in the first instance without complying with conditions which the constitution made it the duty of the legislature to impose.<sup>50</sup> It seems, indeed, a little difficult to sustain the conclusion that proceedings not taken in conformity to the provisions of the constitution can be cured since it would seem that, where there is a failure to comply with constitutional requirements, there is an absence of power, and where power is absent the proceedings are void.<sup>51</sup> The legislature has no power to validate a debt incurred in violation of a constitutional provision, and hence cannot validate bonds issued in excess of the amount designated by the constitution.<sup>52</sup>

Hancock, 84 N. Y. 532; Pennsylvania R. Co. v. Philadelphia, 47 Pa. St. 189; Lamoille Valley R. Co. v. Fairfield, 51 Vt. 257; Macon & C. R. Co. v. Gibson, 85 Ga. 1, 11 S. E. 442, 21 Am. St. 135, 43 Am. & Eng. R. Cas. 318. But it does not follow from this settled principle that ratification of proceedings granting aid may not be authorized by subsequent statutes. Whether ratification may be authorized does not depend upon the principle that express statutory authority is essential to the existence of authority to grant aid, but upon entirely different principles.

<sup>49</sup> Davis v. Woolnough, 9 Iowa 104; Hodges v. Baltimore & C. Co., 58 Md. 603; Zeigler v. Gaddis, 44 N. J. L. 363; State v. Riordan, 24 Wis. 484; State v. Supervisors, 25 Wis. 339; Brown v. Denver, 7 Colo. 305. The legislature may enact special laws where there is no constitutional provision prohibiting it.

<sup>50</sup> Hayes v. Holly Springs, 114 U. S. 120, 5 Sup. Ct. 705, 29 L. ed.

81; Beloit v. Morgan, 7 Wall. (U. S.) 619, 19 L. ed. 205; Grenada Co. v. Brogden, 112 U. S. 261, 5 Sup. Ct. 125, 28 L. ed. 704; Brown v. New York, 63 N. Y. 239; Erskine v. Nelson Co., 4 N. Dak. 66, 60 N. W. 1050, 27 L. R. A. 696.

<sup>51</sup> St. Joseph v. Rogers, 16 Wall. (U. S.) 644, 21 L. ed. 328; Buchanan v. Litchfield, 102 U. S. 278, 26 L. ed. 138; Dixon County v. Field, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. ed. 360; Doon Tp. v. Cummins, 142 U. S. 366, 12 Sup. Ct. 220, 35 L. ed. 1044. See Sutro v. Pettit, 74 Cal. 332, 16 Pac. 7, 5 Am. St. 442; First National Bank v. District, 86 Iowa 330, 53 N. W. 301, 41 Am. St. 489; McPherson v. Foster, 43 Iowa 48, 22 Am. Rep. 215; Beard v. Hopkinsville, 95 Ky. 215, 24 S. W. 872, 44 Am. St. 222; Dunn v. Great Falls, 13 Mont. 58, 31 Pac. 1017; State v. Mayor & C., 32 Nebr. 568, 49 N. W. 272; Citizens' Bank v. Terrell, 78 Tex. 450.

<sup>52</sup> State v. Stoll, 17 Wall. (U. S.) 425, 21 L. ed. 650; Mosher v. Inde-

§ 1033 (846). **Division of municipal corporations for purpose of voting.**—The principle laid down in the cases which hold that the general power of the legislature over the subject of taxation authorizes it to create taxing districts, supports the conclusion that the legislature may divide townships or other municipal corporations into districts for the purpose of voting aid to railroad companies unless there is some provision in the constitution forbidding such a division. The whole subject of aid to railroad companies is so essentially a legislative one that it is not easy to set bounds to the legislative power, except, of course, in those jurisdictions where the power is limited and defined by the constitution. The adjudged cases show that the legislative power is one of wide sweep. The general rule is that the legislature is not confined to fixed limits of municipal bodies in laying taxation for local purposes, but may authorize their imposition upon such particular districts as are to be benefited thereby.<sup>53</sup> It has been held that a portion only of a county may be authorized to subscribe aid, where its interests are more immediately dependent upon the success of the enterprise than are those of other portions.<sup>54</sup> So, it has been held that contiguous territory may be added to a city for the purpose of subscribing.<sup>55</sup>

pendent &c. District, 44 Iowa 122; *Erskine v. Nelson Co.*, 4 S. Dak. 66, 60 N. W. 1050, 27 L. R. A. 696. See *McBryde v. Montesano*, 7 Wash. 69, 34 Pac. 559; *Massachusetts &c. Co. v. Cane Creek Tp.*, 45 Fed. 336.

<sup>53</sup> *Lexington v. McQuillan*, 9 Dana (Ky.) 513, 35 Am. Dec. 159; *People v. Mayor &c. of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266, and note.

<sup>54</sup> *Shelby Co. v. Shelby R. Co.*, 5 Bush (Ky.) 225, 229. See *Deland v. Platte Co.*, 54 Fed. 823; *Ogden v. Daviess Co.*, 102 U. S. 634, 26 L. ed. 263. The New York bonding act of 1869 transformed towns from mere divisions of the state

into municipal corporations, with power to borrow money to aid railroads, upon the consent of the tax-payers, after the requisite statutory proceedings and the proper adjudication by the county judge. *Brownell v. Greenwich*, 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685.

<sup>55</sup> *Henderson v. Jackson Co.*, 12 Fed. 676. Authority given to a city to tax property outside its corporate limits to pay bonds issued in aid of a railroad was sustained in *Langhorne v. Robinson*, 20 Grat. (Va.) 661. Contra *Wells v. Weston*, 22 Mo. 384, 66 Am. Dec. 627; *Cameron v. Stephenson*, 69 Mo. 372. The trustees of a township within which a city is located,

§ 1034 (847). **What corporations may be authorized to grant aid.**—The general rule is that counties, townships, cities and incorporated towns and villages which are invested with taxing power may be empowered by express statute to grant aid to railroad companies.<sup>56</sup> Much, of course, depends upon the constitution of the state, for it is obvious that a tax cannot be authorized where it is forbidden by constitutional provisions. It is generally held that aid cannot be granted where the construction of a railroad is foreign to the purpose for which the public corporation was created.<sup>57</sup> Taxation by municipal or public corporations must be for a corporate purpose. It is not always easy to decide whether a certain tax is within or without this limitation; but it may be safely said that, as a general rule, a corporate purpose must be some purpose which is germane to the general

and which embraces territory not within the city limits, are the proper persons to order an election to determine whether aid should be voted to a railroad company. *Young v. Webster City &c. R. Co.*, 75 Iowa 140, 39 N. W. 234. For such a city forms a part of the township for the purposes of voting aid and of taxation to pay the aid voted. *Young v. Webster City &c. R. Co.*, 75 Iowa 140, 39 N. W. 234; *Scott v. Hansheer*, 94 Ind. 1. See also *Waterville v. County Commissioners*, 59 Maine 80. And where such aid is voted by the township the tax is properly levied upon all the taxables within the township, including those within the limits of a city or town in such township. *Reynolds v. Faris*, 80 Ind. 14.

<sup>56</sup> *Folsom v. Township Ninety-six*, 159 U. S. 611, 16 Sup. Ct. 174, 179, 40 L. ed. 278; *Livingston County v. Darlington*, 101 U. S. 407, 25 L. ed. 1015; *Harter v. Kernochan*, 103 U. S. 562, 571, 26 L. ed.

411; *Anderson v. Santa Anna*, 116 U. S. 356, 6 Sup. Ct. 413, 29 L. ed. 633; *Bolles v. Brimfield*, 120 U. S. 759, 7 Sup. Ct. 736, 30 L. ed. 786; *Hackett v. Ottawa*, 99 U. S. 86, 25 L. ed. 363; *Atlantic &c. Co. v. Darlington*, 63 Fed. 76; affirmed by *Darlington v. Atlantic &c. Co.*, 68 Fed. 849; *Johnson v. Stark Co.*, 24 Ill. 75; *Chicago &c. Railroad Co. v. Smith*, 62 Ill. 268, 14 Am. Rep. 99; *Brown v. Commissioners*, 100 N. Car. 92, 5 S. E. 178; *State v. Chester &c. R. Co.*, 13 S. Car. 290; *Floyd v. Perrin*, 30 S. Car. 1, 8 S. E. 14, 2 L. R. A. 242; *State v. Whitesides*, 30 S. Car. 579, 584, 9 S. E. 661, 3 L. R. A. 777, and note; *State v. Neely*, 30 S. Car. 587, 9 S. E. 664, 3 L. R. A. 672; *Nichol v. Mayor &c.*, 9 Humph. 252.

<sup>57</sup> *Johnson v. Campbell*, 49 Ill. 316; *Harvard v. St. Clair &c. Dist.*, 51 Ill. 130; *Madison Co. v. People*, 58 Ill. 456; *Trustees v. People*, 63 Ill. 299; *People v. Depuyt*, 71 Ill. 651; *People v. Trustees &c.*, 78 Ill. 136.

scope of the object for which the corporation was created.<sup>58</sup> This principle would preclude corporations formed for educational purposes and the like from making subscriptions or donations to railroad companies, since aiding in the construction of railroads cannot be regarded as a corporate purpose in such a case.

**§ 1035 (848). Subscription to unorganized company.**—It has been held, where the statute makes it a prerequisite to the right to do corporate business, that a designated amount of stock shall be subscribed, and the designated amount has not been subscribed, a municipality can not make a valid subscription to such corporation.<sup>59</sup> The decision in the case referred to may, perhaps, be sustained upon the ground that there was not even a *de facto* corporation, but if the decision is to be regarded as going to the extent that there can not be an effective municipal subscription to a *de facto* corporation, we think that it must be regarded as unsound. If there be a *de facto* corporation, that is, a corporation assumed to be formed under a valid statute, authorizing the formation of such a corporation, and also acts performed as a corporation, then, as we believe, there may be an effective municipal subscription.<sup>60</sup> It is probably true, however, that if it should be shown by a taxpayer, or other party having a right to complain, that the corporation had not even a *de facto* existence, or that, having a bare *de facto* existence, cause existed for a *quo warranto*, and there is a likelihood that the state will proceed by *quo warranto*, the courts would enjoin the granting of aid, or if the rights of third persons had not intervened, enjoin the enforcement of the order or vote granting the aid.

**§ 1036 (849). Votes—Voters—Majority of votes.**—In construing statutes empowering municipal corporations to aid railroad companies, it often becomes important to determine the meaning of the terms employed in the statutes. Ordinarily rules

<sup>58</sup> *Weightman v. Clark*, 103 U. S. 256, 260, 26 L. ed. 392.

159, 13 N. E. 784. But see ante, §§ 120, 1012.

<sup>59</sup> *Allison v. Louisville &c. R. Co.*, 9 Bush (Ky.) 247. See also *Farnham v. Benedict*, 107 N. Y.

<sup>60</sup> See *Douglas Co. v. Bolles*, 94 U. S. 104; *Kingman Co. v. Cornell University*, 57 Fed. 149.

of construction applicable to statutes granting a right not possessed by the public generally, are, of course, to be applied to aid statutes, but there are some applications of those rules which it is important to consider. The phrase, a "majority of the voters," in such a statute, is held to mean a majority of those depositing ballots,<sup>61</sup> unless so qualified as to show distinctly that another meaning is intended.<sup>62</sup> It is generally held that all the voters who do not exercise the right to vote will be presumed to

<sup>61</sup> *Cass County v. Johnston*, 95 U. S. 360, 24 L. ed. 416; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. ed. 517; *Melvin v. Lisenby*, 72 Ill. 63; *Slack v. Maysville &c. R. Co.*, 13 B. Mon. (Ky.) 1; *Reiger v. Commissioners*, 70 N. Car. 319; *Louisville &c. R. Co. v. County Court*, 1 Sneed (Tenn.) 638; *Louisville &c. R. Co. v. State*, 8 Heisk. (Tenn.) 663. A majority of those voting on the particular proposition. *Murphy v. Long Branch* (N. J.), 61 Atl. 593. But see the reasoning in *McWhorter v. People*, 65 Ill. 290; *Hawkins v. Carroll Co.*, 50 Miss. 735; *Webb v. Lafayette Co.*, 67 Mo. 353; *Denny, In re*, 156 Ind. 104, 59 N. E. 359, 361, 51 L. R. A. 722; *Cleveland Cotton Mills v. Cleveland Co.*, 108 N. Car. 684, 13 S. E. 271. In *State v. Harris*, 96 Mo. 29, 8 S. W. 794, it is held, that in order that a county court may subscribe to the stock of a railroad company, it must appear that two-thirds of the qualified voters of the county, at an election held thereon, assented to the subscription by voting in favor of it; and the fact that a voter does not vote does not express his assent, within the Missouri

constitution. In another case it was held that where a statute provides for an election, and requires that a majority of the qualified voters of a county assent to a county subscription to the capital stock of a railway construction company, it is necessary to look to the whole number of registered "qualified voters" in the county in order to determine the result of the election; and a majority of the votes actually cast is not sufficient to give validity to a subscription under such statute when such majority is not a majority of the whole number of registered qualified voters. *McDowell v. Rutherford R. Const. Co.*, 96 N. Car. 514, 2 S. E. 351. See generally *Pacific Imp. Co. v. Clarksdale*, 74 Fed. 528; *Cedar Rapids &c. R. Co. v. Boone Co.*, 34 Iowa 45.

<sup>62</sup> Where the statute required a majority of the legal voters living in the county, and the result of the election showed that by the county record a majority of the voters had voted for the subscription, and the order of the county court recited that all the conditions prescribed for the election had been complied with, the court held that the number of legal voters living in the county was a matter dehors the

assent to the expressed will of a majority of those voting.<sup>63</sup> It is held, under the Minnesota statute, that the question of giving aid must be submitted to the legal voters of the town, and can not be voted upon by all resident taxpayers without regard to whether they are legal voters or not.<sup>64</sup> Where it appears that some of those voting for the subscription are aliens, and that a majority of the legal voters have not authorized it, the company can not compel a subscription.<sup>65</sup> But it has been held that the fact that a portion of the voters are absent in military service, and the question has not been submitted to them, is not a valid objection to the making of a subscription authorized by the voters who cast ballots at a properly conducted election.<sup>66</sup> A mere majority vote can not dispense with conditions annexed to

record which the county court could only determine by investigation, and that its finding was conclusive, and the county was estopped to show the contrary. *Citizens' Say. &c. Assn. v. Perry County*, 156 U. S. 692, 15 Sup. Ct. 547, 39 L. ed. 585. Number of votes registered may be test for determining majority where statute provides for registration. *Gracen v. Savannah*, 142 Ga. 141, 82 S. E. 453. In *Fowler v. Oakdale*, 158 Ky. 603, 166 S. W. 195, it is held where two-thirds of the voters were required to assent to a levy that this meant two-thirds of the electors whose votes were cast on the question.

<sup>63</sup> *Cass County v. Johnston*, 95 U. S. 360, 24 L. ed. 416. See also *Hawkins v. Carroll Co.*, 50 Miss. 735; *Milner v. Pensacola*, 2 Woods (U. S.) 632; *Taylor v. McFadden*, 84 Iowa 262, 50 N. W. 1070; *Bryan v. Lincoln*, 50 Nebr. 620, 70 N. W. 252, 35 L. R. A. 752. See where blank ballot is cast, *City of Englewood v. Kern*, 21 Cal. App. 611,

132 Pac. 780 (not to be counted for any purpose).

<sup>64</sup> *Harrington v. Plainview*, 27 Minn. 224, 6 N. W. 777. In the contemplation of the constitution and laws of Louisiana, the property tax-payers who are entitled to vote on the levy of a special tax, for the purposes therein mentioned, are only those who are entitled to vote at a general election under the election laws of the state. *MacKenzie v. Wooley*, 39 La. Ann. 944, 3 So. 128.

<sup>65</sup> *People v. Cline*, 63 Ill. 394. But where it does not appear how many illegal votes were cast for the subscription nor that a majority of the legal votes cast were against the subscription, and it is shown that the exact number of such votes could be ascertained with judicial certainty, the court will presume in favor of the legality of the proceedings. *Woolley v. Louisville &c. R. Co.*, 93 Ky. 223, 19 S. W. 595.

<sup>66</sup> *Cedar Rapids &c. R. Co. v. Boone Co.*, 34 Iowa 45.

a resolution to extend aid, adopted by a two-thirds vote.<sup>67</sup> It is the doctrine of some of the cases that, where a majority vote is obtained by means of bribery, the election will be vitiated, and the vote will confer no authority.<sup>68</sup> But we think that this doctrine cannot apply where the rights of third persons, who have acted in good faith, have intervened. Doubtless a railroad company that should directly or indirectly take part in bribing voters or in corrupting election officers could not take any benefit from the election, but if rights were acquired by it in good faith the wrongs of others should not be allowed to prejudice those rights.

§ 1037 (850). **Failure to conform to the requirements of the enabling act—Illustrative cases.**—Some of the courts lay down a very strict rule, and hold that they will not undertake to say that any of the requirements of the statute are immaterial;<sup>69</sup> but this we regard as an extreme doctrine. We think that there may be provisions a departure from which the courts may well adjudge of such little importance as not to invalidate the proceedings.<sup>70</sup> Statutes empowering municipalities to grant aid to railroad companies are, unquestionably, to receive a strict construction, but not such a construction as will make matters important that are clearly immaterial.<sup>71</sup> It has been held that the fact that the meeting for an election was not called by the particular officer designated for that duty,<sup>72</sup> or that notice of such meeting was not

<sup>67</sup> *Portland &c. R. Co. v. Hartford*, 58 Maine 23. It has been held that a subsequent vote can not change the conditions, either directly or indirectly. *People v. Waynesville*, 88 Ill. 469. But we think this doctrine of doubtful soundness.

<sup>68</sup> *People v. Supervisors*, 27 Cal. 655; *Butler v. Dunham*, 27 Ill. 473; *Chicago &c. R. Co. v. Shea*, 67 Iowa, 728, 25 N. W. 901. See *Woolley v. Louisville &c. R. Co.*, 93 Ky. 223, 19 S. W. 595.

<sup>69</sup> *Merritt v. Portchester*, 71 N. Y. 309, 27 Am. Rep. 47.

<sup>70</sup> A substantial compliance with the law by county commissioners, is, in the absence of fraud, sufficient. *Wilmington &c. R. Co. v. Comrs.*, 116 N. Car. 563, 21 S. E. 205.

<sup>71</sup> *Gooden v. Police Jury*, 122 La. 755, 48 So. 196 (quoting text).

<sup>72</sup> *Supervisors v. Schenck*, 5 Wall. (U. S.) 772, 18 L. ed. 556; *Richland Co. v. People*, 3 Brad. (Ill.) 210. See *Bowling Green &c. R. Co. v. Warren Co.*, 10 Bush (Ky.) 711. But it is held in Iowa that the majority of the board of township trustees may order an election to determine whether aid shall be



given for the requisite number of days,<sup>73</sup> or that a vote viva voce was taken when the statute required a vote by ballot, will be sufficient grounds for setting aside any action of the municipal officers based thereon.<sup>74</sup> So, it is held that, where the town is authorized to vote an appropriation in aid of a railroad at any "regular" town meeting, it cannot pass a valid vote to that effect at a special meeting called for that purpose,<sup>75</sup> but we do not believe that this doctrine can apply where the rights of persons acting in good faith have intervened or where there are effective elements of an estoppel. It has been held that a failure of the commissioners of estimate to take the prescribed oath will render the assessment void, but we cannot believe this doctrine to be sound, although it may be that under the particular statute such a conclusion is the only admissible one.<sup>76</sup> Where counties are authorized to submit the question of giving aid at some general

voted to a railroad company, where a petition therefor is signed by a majority of resident freeholders of the township, although the other trustees are not notified, being absent from the township and inaccessible for notice. *Young v. Webster City &c. R. Co.*, 75 Iowa 140, 39 N. W. 234. See also *Briggs v. Raleigh*, 166 N. Car. 149, 81 S. E. 1084.

<sup>73</sup> *Harding v. Rockford &c. R. Co.*, 65 Ill. 90; *Williams v. Roberts*, 88 Ill. 11. So, where a proposition to vote bonds was so modified just before the election as to become a new proposition, a vote upon such new proposition without again giving notice for the required time will confer upon the municipal authorities no right to extend aid of any kind. *Packard v. Jefferson Co.*, 2 Colo. 338. Where thirty days' notice is required, the fact that the order calling the election was entered less than thirty days before the election was held, is

sufficient evidence that no legal notice of the election was given. *Williams v. People*, 132 Ill. 574, 24 N. E. 647. See also *City of Miami v. Romfh*, 66 Fla. 28, 63 So. 440.

<sup>74</sup> *New Haven &c. R. Co. v. Chatham*, 42 Conn. 465. If it plainly appears by the pleadings that a majority of the legal voters did not vote for the subscription the court will not hesitate to set aside all the acts of the municipal officers based thereon. *People v. Logan Co.*, 63 Ill. 374.

<sup>75</sup> *Pana v. Lippincott*, 2 Brad. (Ill.) 466. In Indiana a petition may be presented to the board of county commissioners at any regular or special meeting, and no restrictions are placed upon the calling of a special meeting for any purpose which the auditor may think a public interest requires. *Jussen v. Board &c.*, 95 Ind. 567; *Oliver v. Keightley*, 24 Ind. 514.

<sup>76</sup> *Merritt v. Portchester*, 71 N. Y. 309, 27 Am. Rep. 47.

or special election, authority to hold a special election for that purpose will be implied.<sup>77</sup> The laws of Nebraska authorize a city to issue bonds in aid of a railroad, provided the city council "shall first submit the question of the issuing of such bonds to a vote of the legal voters" of said city; and provide that "the proposition of the question must be accompanied by a provision to levy a tax annually for the payment of the interest on said bonds as it becomes due," and "shall state the rate of interest such bonds shall draw, and when the principal and interest shall be made payable." In an action to enjoin the issuing of certain bonds of a city under this statute in aid of a railway, it appeared that the whole question had not been submitted to the electors of the city and that no vote had been submitted or adopted for the payment of the principal at any time. The court held that an injunction should be granted.<sup>78</sup>

§ 1038 (851). **Conditions—Performance of—Excuse for non-performance—Illustrative cases.**—The general rule is, as elsewhere shown, that conditions prescribed by the statute must be complied with, but there may be cases in which the doctrine of estoppel will preclude the taxpayers and the municipalities from successfully insisting upon non-performance as a defense, and so, it seems, there may be cases where performance will be excused. It has been held that a condition which cannot lawfully be fulfilled may be annexed to a subscription, although the impossibility of a performance of such condition might render the subscription void.<sup>79</sup> Thus, in the case cited, a city, under legislative authority, issued bonds as a donation to a railroad, conditioned

<sup>77</sup> Cedar Rapids. &c. R. Co. v. Boone Co., 34 Iowa 45.

<sup>78</sup> Cook v. Beatrice, 32 Nebr. 80, 48 N. W. 828. See State v. Babcock, 21 Nebr. 599, 33 N. W. 247, 59 Am. Rep. 849; Williams v. People, 132 Ill. 574, 24 N. E. 647. Where an act authorizing the issuance of aid bonds fails to provide for an election on the question, the election by necessary implication

should be conducted under the existing laws relating to the borrowing of money by municipalities; and bonds issued pursuant to such an order are valid in the hands of bona fide holders. Union Bank v. Oxford, 116 N. Car. 339, 21 S. E. 410.

<sup>79</sup> Chicago &c. R. Co. v. Aurora, 99 Ill. 205.

that they should be paid out of money to be raised by a special tax upon property in a certain part of the city. The court held that the city had a right to impose the condition, although the constitution of the state forbade the collection of such a tax; and since the condition could not be complied with, it was held that the bonds could not be enforced.<sup>80</sup> There is a conflict in the authorities as to whether time is of the essence of the contract where the subscription of a town is conditioned upon the completion of the road to a certain point within a limited time.<sup>81</sup> But the better opinion seems to be that the failure of a railway company to comply with a condition that it shall construct its road from a certain point to a certain other point within a certain time will defeat the subscription,<sup>82</sup> unless there is some element of waiver, or estoppel, or some legal excuse. It has been held that this is so, even though the company is prevented by rains and floods from completing its line within the time specified, but afterward completes it.<sup>83</sup> It has also been held that an agreement of a railroad company to refund to a municipal corporation

<sup>80</sup> *Chicago &c. R. Co. v. Aurora*, 99 Ill. 205.

<sup>81</sup> In the case of *Kansas City &c. R. Co. v. Alderman*, 47 Mo. 349, it is said by the court that a failure to complete the road within the time limited may entitle the county to an abatement in the shape of damages, but not to an entire release from payment of bonds issued to pay a subscription, where it is shown that the road has, in fact, been built.

<sup>82</sup> *Chicago &c. R. Co. v. Marseilles*, 84 Ill. 145; *Memphis &c. R. Co. v. Thompson*, 24 Kans. 170; *McManus v. Duluth &c. R. Co.*, 51 Minn. 30, 52 N. W. 980; *Clark v. Rosedale*, 70 Miss. 542, 12 So. 600. See ante, § 129; also *McCracken v. Greensboro &c. R. Co.*, 168 N. Car. 62, 84 S. E. 30; *Quinlan v. Green County*, 205 U. S. 410, 27

Sup. Ct. 505, 51 L. ed. 860. As to what is a compliance with a condition as to completion and operation of the road within a certain time, see also *Provident Life & T. Co. v. Mercer County*, 170 U. S. 593, 8 Sup. Ct. 788, 42 L. ed. 1156; *People v. Holden*, 82 Ill. 93; *Ogden v. Kirby*, 79 Ill. 555; *Southern &c. R. Co. v. Towner*, 41 Kans. 72, 21 Pac. 221; *Chicago &c. R. Co. v. Makepeace*, 44 Kans. 676, 24 Pac. 1104; *Hodgman v. St. Paul &c. R. Co.*, 23 Minn. 153; *Birch Cooley v. First Nat. Bank*, 86 Minn. 385, 90 N. W. 789; *Manchester &c. R. Co. v. Keene*, 62 N. H. 81; *West Virginia &c. R. Co. v. Harrison Co. Court*, 47 W. Va. 273, 34 S. E. 786.

<sup>83</sup> *Memphis &c. R. Co. v. Thompson*, 24 Kans. 170. See *McManus v. Duluth &c. R. Co.*, 51 Minn. 30, 52 N. W. 980.

the money received for bonds of the latter issued in payment for stock of the company, in case of a failure to construct the road within a certain time, may be strictly enforced against the railroad company upon its failure to complete its line before the expiration of the time specified in the agreement.<sup>84</sup> Where a subscription was made by a town upon condition that the railroad company should locate its machine shops at a certain point, which was accordingly done, and the subscription was paid, it was held that the town could not recover against a good faith purchaser of the property and franchise of the railroad company for removing the machine shops to another town. The contract was personal, and gave the town no lien upon the property of the railroad company.<sup>85</sup> But it is held that the maintenance and operation of the road during the life of the company, as fixed by the charter, is a consideration or condition of the grant of aid by a municipality, and if, during such time, the company abandons its road, the municipality has a cause of action against it on common law principles.<sup>86</sup>

§ 1039 (851a). **Other illustrative cases.**—The authorities are in conflict on the question of the right of the railroad company to claim the aid voted for the construction of the line, where it does not, in fact, construct the road, but purchases an existing line. It would seem that the purpose of the voters to aid the construction of an independent line would be defeated by such action.<sup>87</sup> There are cases which sustain this procedure where inconsiderable portions of existing line are acquired;<sup>88</sup> but the case against such action would seem clear where the railroad company acquires only the mere lease of a portion of another line which is

<sup>84</sup> *Chicago &c. R. Co. v. Marseilles*, 84 Ill. 145.

<sup>85</sup> *Elizabethtown v. Chesapeake &c. R. Co.*, 94 Ky. 377, 22 S. W. 609.

<sup>86</sup> *Hinckley v. Kettle River R. Co.*, 70 Minn. 105, 72 N. W. 835.

<sup>87</sup> *Lamb v. Anderson*, 54 Iowa 190, 3 N. W. 116, 6 N. W. 268; *Meeker v. Ashley*, 56 Iowa 188, 9

N. W. 124; *Iowa &c. R. Co. v. Schenck*, 56 Iowa 628, 10 N. W. 215.

<sup>88</sup> *Stockton &c. R. Co. v. Stockton*, 51 Cal. 328; *People v. Holden*, 82 Ill. 93; *Chicago &c. R. Co. v. Makepeace*, 44 Kans. 676, 24 Pac. 1104; *Bradley-Ramsay Lumber Co. v. Perkins*, 109 La. 317, 33 So. 351; *State v. Clark*, 23 Minn. 422.

terminable by notice.<sup>89</sup> A condition that the road shall be built for use within a specified time is to be reasonably construed, however, and is generally regarded as complied with when the road is built so as to be in as reasonably fit condition and as safe and convenient for the public use as new roads usually are in similar localities.<sup>90</sup> So, it has been held that, where a tax is voted in aid of railroad construction under a notice providing that the tax should be paid on the road being put in operation between two certain points, the tax is earned when the road is in actual operation between those points, regardless of the financial ability or inability of the company to extend it further.<sup>91</sup>

**§ 1040 (851b). Time for completion of road where not fixed in contract.**—Where no time is fixed for the completion of the road the law will imply a reasonable time for the performance of this condition.<sup>92</sup> There are holdings that the time may be limited, in such cases, by an amendment to the charter of the railroad company before the issue of the bonds requiring construction within a specified time,<sup>93</sup> or by notice of the municipality, duly served, that it will insist on the completion of the road within a reasonable time.<sup>94</sup>

**§ 1041 (852). Conditions—Power of municipality to prescribe.**—Where the statute specifically and definitely prescribes the

<sup>89</sup> *People v. Clayton*, 88 Ill. 45.

<sup>90</sup> *Manchester &c. R. Co. v. Keene*, 62 N. H. 81. See also *Chicago &c. R. Co. v. Shea*, 67 Iowa 728, 25 N. W. 901; *Guillory v. Avoyelles R. Co.*, 104 La. 11, 28 So. 899. But see *Hodgman v. St. Paul &c. R. Co.*, 23 Minn. 153, where upon the issue as to whether a railroad company had fully constructed and equipped its road for the carriage of freight by a certain date so as to entitle it to aid bonds, it was held that the trial court properly admitted evidence that the railroad company after that date had shipped all of its heavy

freight over another line controlled by it.

<sup>91</sup> *Whitney v. Chicago &c. R. Co.*, 133 Iowa 508, 110 N. W. 912. And the condition was held sufficiently complied with by the erection of a permanent depot at the place prescribed although off of the main line and on a spur track. See also *Railway v. Rich*, 33 Iowa 113.

<sup>92</sup> *Green v. Dyersburg*, 2 Flip. (U. S.) 477, Fed. Cas. No. 5, 756.

<sup>93</sup> *Green v. Dyersburg*, 2 Flip. (U. S.) 477, Fed. Cas. No. 5, 756.

<sup>94</sup> *Lynch v. Eastern &c. R. Co.*, 57 Wis. 430, 15 N. W. 743.

terms or conditions upon which aid may be granted to railroad companies it impliedly excludes authority to dispense with such terms or conditions or to impose any others. Where, however, there are no specific provisions as to terms and conditions, a different rule applies. It may be laid down as a general rule that a subscription may be made by a municipal corporation upon conditions annexed by the legislature, by the municipal officers who are given discretion in the matter, by the voters in their petition or vote, or by an agent appointed to make the subscription.<sup>95</sup> It is implied, it may be said, to prevent misunderstanding, that the general power of a public corporation to prescribe conditions does not authorize it to prescribe illegal conditions or such as are antagonistic to the general rules of law. The enabling act must take its place in the great system of law as part thereof, and cannot be regarded as an isolated fragment standing by itself and apart from other laws. It has been held that specifications in the proposition submitted to the township by the railroad to be

<sup>95</sup> *People v. Dutcher*, 56 Ill. 144; *People v. Glann*, 70 Ill. 232; *People v. Waynesville*, 88 Ill. 469; *People v. Holdan*, 91 Ill. 446; *Chicago & C. R. Co. v. Aurora*, 99 Ill. 205; *Bittinger v. Bell*, 65 Ind. 445; *Brokaw v. Board*, 73 Ind. 543. Compare *Louisville & C. R. Co. v. Sumner*, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; *Merrill v. Welscher*, 50 Iowa 61; *Bucksport & C. R. Co. v. Brewer*, 67 Maine 295; *Baltimore & C. R. Co. v. Pumphrey*, 74 Md. 86, 21 Atl. 559; *State v. County Court*, 51 Mo. 522; *Cooper v. Sullivan Co.*, 65 Mo. 542; *Virginia & C. R. Co. v. Lyon Co.*, 6 Nev. 68; *Falconer v. Buffalo & C. R. Co.*, 69 N. Y. 491; *Port Clinton & C. R. Co. v. Cleveland & C. R.*, 13 Ohio St. 544, 549; *Justices of Campbell Co. v. Knoxville & C. R. Co.*, 6 Coldw. (Tenn.) 598; *West Virginia & C. R. Co. v. Harrison County Ct.*, 47 W.

Va. 273. Where an act provides for a town meeting, "to see what sum the town will vote to raise and appropriate as a gratuity to" a railroad, "said road to be completed on or before" a day named, the town is empowered to vote a gratuity upon condition that the road be completed in a reasonable time, but where the town voted aid to a railroad, provided that it completed the road before January 1, 1878, but the clerk failed to record the provision as to time, and the road was completed in August, 1878, an amendment of the record in September, 1878, by inserting the condition as to time within which the road was required to have been completed, will not be allowed to defeat the railroad's claim. *Sawyer v. Manchester & K. R. Co.*, 62 N. H. 135, 13 Am. St. 541.

voted upon may amount to conditions precedent to the payment of the subscription.<sup>96</sup>

§ 1042 (853). **Change of municipality.**—The plenary power of the legislature over municipal corporations empowers it to make changes in the boundaries and organizations of such corporations, but where private contract rights have been acquired by third persons such rights cannot be impaired. But, while such rights cannot be impaired, there may be a change in the boundaries of public corporations if such rights are protected. The division of a county or other municipal corporation after a subscription has been made will not affect its liability to pay the stock taken or bonds issued in exchange therefor.<sup>97</sup> But

<sup>96</sup> *Platteville v. Galena &c. R. Co.*, 43 Wis. 493. Bonds were voted by a county to a railroad company in payment of subscription to its capital stock, on the condition, among others, that the bonds should be delivered when the road was "built of standard gauge, and completed as first-class, and in operation by lease or otherwise." The court held that, to entitle plaintiff to receive the bonds of the county, its road, if constructed according to the terms of the contract, need not have been perfect in every respect at the prescribed date for its completion, but it should have been completed and in operation at that date in such a manner that it might be properly and regularly used for the purpose of transporting freight and passengers. *Southern &c. R. Co. v. Towner*, 41 Kans. 72, 21 Pac. 221. See as to conditions precedent which must be performed to save bonds from being invalidated and other conditions which do not have that effect, and as to estoppel where bonds are held by bona fide pur-

chasers. *Quinlan v. Green County*, 157 Fed. 33, 19 L. R. A. (N. S.) 849, and cases there reviewed in note.

<sup>97</sup> *Columbia Co. v. King*, 13 Fla. 451. See also *Glazer v. Borough of Flemington*, 85 N. J. L. 384, 91 Atl. 1068, affirming 81 N. J. L. 211, 81 Atl. 163. It is said in *Hurt v. Hamilton*, 25 Kans. 76, that if a town or county is divided after aid has been voted, and the legislature provides that both parts shall remain liable for its debts as before, only the proportion of a debt created in extending such aid may be collected from each part which its valuation bears to the whole valuation at the time the aid was voted. But a more reasonable and logical rule, in case bonds have been issued, would be that stated in the text; since the holder's right to enforce payment can not be defeated nor apportioned by subsequent legislation, but is a matter of arrangement between the counties. *Columbia Co. v. King*, 13 Fla. 451.

the portion so detached will not be relieved from liability by such a division, but may be compelled, in a proper case, at the suit of the original county, to contribute to such payment.<sup>98</sup> And where, after the division of a county, funding bonds were issued by the original county to take up bonds issued before the division, on terms more favorable to the county than those upon which the loan was first made, the court held the detached territory liable on such funding bonds to the same extent that it had been liable on the railroad bonds.<sup>99</sup> In case of the extinction of a municipality by legislative action after it has incurred obligations in aid of such an enterprise, they will survive against the corporation into which it is merged, to the extent to which it succeeds to the property of the extinct corporation.<sup>1</sup> In one case a strip of territory along the side of a township was annexed after an election at which an appropriation was voted, and the railroad was built through this strip instead of through the township as it stood at the time of the election according to the proposition as voted upon by the electors. The right of the company to the appropriation was denied, since it was plain that no votes were cast in favor of the road as located, and the court refused to indulge the presumption that the voters would have approved of the change of route.<sup>2</sup>

§ 1043 (853a). **Effect of change of name of corporation.**—It is the general rule that a change in the name of a corporation, either by the legislature or by the stockholders of the corporation under legislative authority, does not affect the identity of the corporation or in any way affect the rights, privileges or obligations previously acquired or incurred by it. It follows that taxes collected, or subscriptions made to aid in the building of a railroad, are not invalidated by a change in the name of a railroad company.<sup>3</sup> As observed in one of the cases, “the mere change

<sup>98</sup> Sedgwick Co. v. Bailey, 11 Kans. 631. Contra, State v. Lake City, 25 Minn. 404.

<sup>99</sup> Marion Co. v. Harvey Co., 26 Kans. 181.

<sup>1</sup> Mount Pleasant v. Beckwith,

100 U. S. 514, 25 L. ed. 699.

<sup>2</sup> Alvis v. Whitney, 43 Ind. 83.

<sup>3</sup> Reading v. Wedder, 66 Ill. 80; Commonwealth v. Pittsburg, 41 Pa. St. 278.



of names does not and cannot change things or their properties, nor does the change of a name of a thing imply any such change of properties.”<sup>4</sup>

**§ 1044 (854). Limitations upon the amount.**—The usual course is to prescribe in the enabling act the amount of aid that may be granted, and where the amount is fixed the municipality has no power to go beyond it. But the amount is not always fixed by the statute, nor is there always a constitutional limitation upon the power of municipalities to incur debts. Where the discretionary power of fixing the amount is vested in the voters,<sup>5</sup> or in certain designated officers,<sup>6</sup> it should be exercised by fixing the amount before a subscription can lawfully be made. It has been held that a vote that an amount not exceeding a certain sum shall be subscribed will not confer authority to make the subscription. We suppose, however, that where a discretionary power respecting the amount of aid that shall be granted is vested in the municipality, a failure to designate the amount

<sup>4</sup> *Reading v. Wedder*, 66 Ill. 80. So a municipal corporation cannot extinguish its debts by merely changing its name or reorganizing under a new charter with the same people and property. *Wilson v. King's Lake Drainage &c. Co.*, 257 Mo. 266, 165 S. W. 735.

<sup>5</sup> *Cincinnati &c. R. Co. v. Wells*, 39 Ind. 539.

<sup>6</sup> *Mercer Co. v. Pittsburgh &c. R. Co.*, 27 Pa. St. 389. An act amending an act incorporating the Pittsburgh & Erie Railroad Company, provides that subscriptions to the stock of said railroad company by certain counties “shall be made by the county commissioners after, and not before, the amount of such subscriptions shall have been designated, advised, and recommended by the grand jury.” Bonds of Mercer county given for stock sub-

scribed for by the commissioners, on the mere recommendation of the grand jury that they subscribe for an amount not exceeding \$150,000, were held to be illegal, on the ground that all the discretionary power was vested in the grand jury by said act and could be exercised by no one else. *Frick v. Mercer Co.*, 138 Pa. St. 523, 21 Atl. 6, 27 W. N. Cas. 352. Failure to state the maximum amount proposed to be subscribed will not invalidate an order directing the submission to the voters of the question of a subscription to aid a railroad, under a charter providing for subscriptions according to the forms prescribed by the Virginia code of 1873. *Taylor v. Board of Supervisors*, 86 Va. 506, 10 S. E. 433, 13 Va. L. J. 802, 29 Am. & Eng. Corp. Cas. 187.

prior to making the final contract would not make the proceedings void as against third persons who had acquired rights in good faith and upon the belief that the proceedings were regular. If the proceedings were void in the proper sense of the term, and not simply irregular, then, as we believe, the principle of estoppel would be applied for the protection of third persons who had acquired rights in good faith, but if the proceedings were absolutely void, then an estoppel could not arise. There is difficulty in some instances in determining when the proceedings are void and when only voidable.<sup>7</sup> The fact that a township or a city is indebted to the full constitutional amount will not operate to prevent a county or township, in which it is included, from also voting aid within the limits prescribed for such a political subdivision.<sup>8</sup> Where a statutory requirement is violated in designating the amount, then the proceedings may usually be regarded as void, since the question is one of power to be determined from an examination of a public statute. If the statute specifically limits the amount and the municipality assumes to grant aid in violation of the statutory provisions, there is no foundation for the proceedings, for the reason that it is established law that a municipality cannot aid in the construction of a railroad except by virtue of a valid statute expressly conferring upon it authority to grant such aid.

**§ 1045 (855). Valuation of property.**—It is often provided in the enabling acts that the limit shall not exceed a designated per centum upon the value of property subject to taxation, and it is sometimes difficult to determine the valuation intended. The valuation must, of course, be that referred to by the statute, but it is not always easy to determine what that valuation is. It has been held that, where the statute confers authority to vote aid in a sum not exceeding a certain per cent. of the valuation of property in the municipality, the valuation in force at the time the

<sup>7</sup> The general rule is that objections, because of formalities and irregularities in the proceedings, must be made before the rights of innocent third persons have inter-

vened. *Johnson v. Stark Co.*, 24 Ill. 75; *Jasper County v. Ballou*, 103 U. S. 745, 26 L. ed. 422.

<sup>8</sup> *Irwin v. Lowe*, 89 Ind. 540.

vote is taken will control, although another valuation is even then in process of completion, and takes effect before the subscription is made.<sup>9</sup> It is obvious that, unless the words of the statute clearly require a different construction, the natural construction is that an existing valuation is meant since it cannot be presumed that the action of the municipal voters or officers was based on a valuation not known at the time the action was taken.

**§ 1046 (856). Conditions must be performed.**—Where the question is not affected by the doctrine of estoppel the conditions prescribed in granting the aid must, as a general rule, be performed. A railroad company, or one claiming through it, there being no estoppel, must perform the conditions prescribed or else there can be no effective claim to the aid. The conditions relating to a vote of the people of the municipality to a preliminary petition, or the like, must, as a rule, be substantially complied with or the proceedings will not be effective. The construction of the road substantially upon the route as chartered by the legislature is generally a condition precedent to the payment of the subscription.<sup>10</sup> But in all such matters the statute governs,

<sup>9</sup> *Hurt v. Hamilton*, 25 Kans. 76. See *Municipal Trust Co. v. Johnson City*, 116 Fed. 458.

<sup>10</sup> See *Jacks v. Helena*, 41 Ark. 213; *Meeker v. Ashley*, 56 Iowa 188, 9 N. W. 124; *Illinois Midland R. Co. v. Barnett*, 85 Ill. 313; *Ravenswood &c. R. Co. v. Ravenswood*, 41 W. Va. 732, 24 S. E. 597, 56 Am. St. 906. But see *Quinlan v. Green County*, 157 Fed. 33, 19 L. R. A. (N. S.) 849, affirmed in 211 U. S. 382, 29 Sup. Ct. 162, 53 L. ed. 335. For other conditions generally, see *Citizens' Sav. &c. Assn. v. Perry County*, 156 U. S. 692, 15 Sup. Ct. 547, 39 L. ed. 585; *Casey v. People*, 132 Ill. 546, 24 N. E. 570; *People v. Glann*, 70 Ill. 232; *Atchison &c. R. Co. v. Jefferson Co.*, 21 Kans. 229; *Chicago &c. R. Co. v. Chase County*, 49 Kans.

399, 30 Pac. 456; *Irwin v. Lowe*, 89 Ind. 540; *Bradley-Ramsay &c. Co. v. Perkins*, 109 La. 317, 33 So. 357; *Coe v. Caledonia &c. R. Co.*, 27 Minn. 197, 6 N. W. 621; *Missouri Pac. R. Co. v. Tygard*, 84 Mo. 263, 54 Am. Rep. 97. As to statutory conditions, see *Breckenridge Co. v. McCracken*, 61 Fed. 191; *Sellers v. Beaver*, 97 Ind. 111; *Marion Co. v. Center Tp.*, 105 Ind. 422, 2 N. E. 368; *Nixon v. Campbell*, 106 Ind. 47, 4 N. E. 296; *McManus v. Duluth &c. R. Co.*, 51 Minn. 30, 52 N. W. 980; *Lamb v. Anderson*, 54 Iowa 190, 3 N. W. 416. As to effect of departure from route specified in charter, see *Cantillon v. Dubuque &c. R. Co.*, 78 Iowa 48, 42 N. W. 613, 5 L. R. A. 726, and note.

and regard must always be had to its provisions. It has been held that a tax voted by a town in aid of a railroad whose charter stated that its object was to construct, operate, and maintain a railroad from Dubuque, in a western and northwestern direction in Iowa, Minnesota, and Dakota, to a junction with the Northern Pacific, was not invalidated by the fact that the company sold and merged its line with that of another company after it had completed fifty miles of road in Iowa, where the road of such consolidated company extended from Dubuque to St. Paul, in Minnesota, and where the tax was not conditioned upon the construction of the original road as specified by its charter.<sup>11</sup>

<sup>11</sup> *Cantillon v. Dubuque &c. R. Co.*, 78 Iowa 48, 42 N. W. 613, 5 L. R. A. 726, and note; *Lamb v. Anderson*, 54 Iowa 190, 3 N. W. 416; *Noesen v. Port Washington*, 37 Wis. 168. See *Platteville v. Galena &c. R. Co.*, 43 Wis. 493. Where the county commissioners were authorized to subscribe to the capital stock of any railway company which might locate its road through the county, and to issue its bonds in payment thereof, it was held that the fact that the road had never been located through or in the county was sufficient defense to a suit upon bonds purporting to have been issued in aid of a railway company, even though they were in the hands of a bona fide holder. *State v. Hancock Co.*, 11 Ohio St. 183. See also *Green County v. Shortell*, 116 Ky. 108, 75 S. W. 251. But compare *Quinlan v. Green County*, 157 Fed. 33, 19 L. R. A. (N. S.) 849, affirmed in 211 U. S. 582, 29 Sup. Ct. 162, 53 L. ed. 335. In Indiana the statute suspends the company's right to aid voted by townships until the road is completed and a train of cars is run over the same. *Board*

*&c. v. Louisville &c. R. Co.*, 39 Ind. 192. Where an interest coupon covers a period before and after the completion and acceptance of the road, only so much of the interest thereon as was earned after such completion can be recovered under the act providing that no tax shall be levied to pay any interest which may have accrued on railroad aid bonds prior to completion and acceptance of the road. *Grannis v. Cherokee*, 47 Fed. 427. Where the petition did not designate the time within which the road should be completed, an injunction will not lie against the collection of the tax before the completion of the road, since the commissioners may withhold the money until the road is completed. *Pittsburgh &c. R. Co. v. Harden*, 137 Ind. 486, 37 N. E. 324. A donation may be made for the completion of a railroad already so far laid as to admit of running cars over it, by the construction of grades, digging ditches, and furnishing and laying ties and iron. *Barner v. Bayless*, 134 Ind. 600, 33 N. E. 907, 34 N. E. 502.

§ 1047 (857). **Preliminary survey.**—In some of the states a survey is required as a condition precedent to the exercise of the power to vote aid. If such a survey is not made the proceedings will fall before a direct attack. It is held, however, that a popular election held in pursuance of the provisions of such a statute to determine the question of subscription to the stock is not invalid for lack of a final and definite survey and location of the entire line of the company's road, and that a substantial location, defining the general direction and route, and specifying the termini of the road, with an estimate of the cost of construction, is sufficient.<sup>12</sup> Much, it is obvious, depends upon the statute governing the particular case, and where the statute requires a survey it must be made as the statute requires. As the power to aid a railroad enterprise comes from the enabling act, the authority conferred by it must be exercised in substantial conformity to the letter and spirit of the statute; and the preliminary conditions imposed by it must be substantially performed in order to sustain the subscription.<sup>13</sup> Where the rights of third persons have not intervened and there is no element of estoppel, a taxpayer of the municipality may have an injunction to restrain the levy of a tax in pursuance of such a vote or subscription, if all the substantial requirements of the statute have not been met.<sup>14</sup>

§ 1048 (858). **Petition—Requisites of—Petitioners — Qualifications of.**—In many of the states a petition of a designated number of the taxpayers is made necessary to confer authority upon the county officials to extend aid or to order an election for the

<sup>12</sup> *Wilson County v. National Bank*, 103 U. S. 770, 26 L. ed. 488. This, however, was an action to enforce payment of bonds by bona fide holders, and the rule might be different in a direct proceeding to test the validity of the election before the rights of third parties had intervened. See *Purdy v. Lansing*, 128 U. S. 557, 9 Sup. Ct. 172, 32 L. ed. 531.

<sup>13</sup> *People v. Smith*, 45 N. Y. 772. Commissioners appointed under the

statute have no power to bind the town by an act not done in strict compliance with the authority conferred by vote of the tax-payers. *Horton v. Thompson*, 71 N. Y. 513.

<sup>14</sup> *Peed v. Millikan*, 79 Ind. 86; *Alvis v. Whitney*, 43 Ind. 83. See *People v. Waynesville*, 88 Ill. 469; *People v. Spencer*, 55 N. Y. 1; *Daviess Co. v. Howard*, 13 Bush (Ky.) 101; *Lawson v. Schnellen*, 33 Wis. 288.

purpose of determining whether aid shall be extended. There is much diversity of opinion as to the rules which govern such petitions. Some of the courts lay down very strict rules,<sup>15</sup> while others, with more reason, as it seems to us, adopt more liberal rules.<sup>16</sup> It may be said that the authorities generally affirm that the petition must conform, in all substantial respects, to the requirements of the statute. In such a case the requisite number of signers must be procured before any steps can legally be taken toward granting the aid.<sup>17</sup> Where such a petition is required it has been held that several petitions may be circulated at once and presented at different times.<sup>18</sup> The term "taxpayers" will be

<sup>15</sup> Where a verification is required it should always be made. It has been held, pressing the doctrine very far, that the verification must cover all the essential allegations of the petition or it will be held fatally defective. *Angel v. Hume*, 17 Hun (N. Y.) 374. We can not believe that the doctrine of the case cited can be correct, if sound in any case, where the attack upon the proceedings is collateral. Where the assault is a direct one and made before rights are acquired by third persons a different rule prevails from that which obtains where the proceedings of the municipality are assailed in a collateral proceeding. *Loesnitz v. Seelinger*, 127 Ind. 422, 26 N. E. 887; *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124. See upon the general question, *Longfellow v. Quimby*, 29 Maine 196, 48 Am. Dec. 525; *Maxwell v. Board*, 119 Ind. 20, 19 N. E. 617; *Gay v. Bradstreet*, 49 Maine 580, 77 Am. Dec. 272; *Dwight v. Springfield*, 4 Gray (Mass.) 107; *Parks v. Boston*, 8 Pick. (Mass.) 218, 19 Am. Dec. 322; *Ballard v. Thomas*, 19 Grat.

(Va.) 14; *State v. Prince*, 45 Wis. 610.

<sup>16</sup> *Gooden v. Police Jury*, 122 La. 755, 48 So. 196, 203, citing text. See also *Wilmington v. Railroad Comrs.*, 116 N. Car. 563, 21 S. E. 205.

<sup>17</sup> *People v. Hughitt*, 5 Lans. (N. Y.) 89. Under the New York statute providing that a majority of the tax-payers, other than those only taxed for dogs and highways, of any municipal corporation, may petition the county judge for the issue of railroad aid bonds by their municipality, the petition must aver that its signers are a majority of tax-payers, excluding those taxed for dogs and highways only, though the act itself defines the word "tax-payers" as used therein as excluding that class. *Mentz v. Cook*, 108 N. Y. 504, 15 N. E. 541; *Rich v. Mentz Township*, 134 U. S. 632, 10 Sup. Ct. 610, 33 L. ed. 1074; *Strang v. Cook*, 47 Hun (N. Y.) 46.

<sup>18</sup> *People v. Hughitt*, 5 Lans. (N. Y.) 89. And that the initials of the Christian name may be used in signing. *Good v. Burk*, 167 Ind. 462, 77 N. E. 1080.

given a liberal construction; and it has been held that persons representing property in the payment of taxes should be counted, even though they do not own the property.<sup>19</sup> Joint owners of property and partners, it has been held, must be counted separately.<sup>20</sup> And non-residents who pay taxes must be counted like other taxpayers,<sup>21</sup> unless the statute restricts the right of petition to residents of the municipality. But it has been held that the agent of a taxpayer is not a proper party to such a petition.<sup>22</sup> Where there is a direct attack upon the proceedings the petitioners must be identified as the taxpayers of the county. The fact that the names are the same as those on the assessment roll is *prima facie* evidence that the persons are the same as those paying taxes.<sup>23</sup> It is held that, where the petition is required to be signed by "legal voters," proof that they are "citizens" of the municipality is insufficient,<sup>24</sup> but this doctrine can not, as we believe, be justly applied where there is a collateral and not a direct attack. It has been held that a town is not bound by the decision of its assessor that a majority of the taxpayers have

<sup>19</sup> *People v. Hulbert*, 59 Barb. (N. Y.) 446. The petition for an election to authorize a township to subscribe to the capital stock of a railroad company was in all respects in conformity with the provisions of the statute, save that it purported to be signed by two-fifths of the "legal voters" of the township, instead of "tax-payers," as required by the statute. The voting at the election was general, and a majority of the votes being for the subscription, the subscription was treated as valid by all parties, and the railroad company, on the faith of it, changed the location of the road to conform to its conditions, at an additional expense, and constructed the road, ready for operation. The township brought suit to enjoin the

issue of bonds in payment of the railroad company's stock, as contemplated by the subscription, on the ground that the petition was defective as purporting to be signed by "legal voters" instead of "tax-payers." The railroad was allowed to show that the petition was signed by tax-payers, as required by the statute. *Kansas City & C. R. Co. v. Rich*, 45 Kans. 275, 25 Pac. 595.

<sup>20</sup> *People v. Franklin*, 5 Lans. (N. Y.) 129; *People v. Hughitt*, 5 Lans. (N. Y.) 89.

<sup>21</sup> *People v. Oliver*, 1 T. & C. (N. Y.) 570.

<sup>22</sup> *People v. Smith*, 45 N. Y. 772.

<sup>23</sup> *People v. Smith*, 45 N. Y. 772.

<sup>24</sup> *People v. Supervisor of Old-town*, 88 Ill. 202.

signed the petition,<sup>25</sup> but the question must depend very largely upon the provisions of the statute involved in the particular case. If the officer is invested with power to decide, then, as against a collateral attack, his decision is conclusive. Where there is a direct attack upon the proceedings they will fail if the petition be insufficient. If, however, facts sufficient to confer jurisdiction over the general subject are alleged, a collateral attack will not prevail, although the petition may be defective. Strictly speaking, all of the matters required by statute should be fully set out in the petition,<sup>26</sup> but a failure to set them out will not always invalidate the proceedings. It has been held essential that the petition should direct whether the money raised by an issue of bonds should be invested in stock or in bonds of the railroad;<sup>27</sup> and this ruling is correct where there is a direct attack, but we think that it can not be the law where the attack is collateral. So it has been held that the petition should specify the amount to be appropriated,<sup>28</sup> and that it must designate with certainty the road

<sup>25</sup> *People v. Barrett*, 18 Hun (N. Y.) 206. But see *Andes v. Ely*, 158 U. S. 312, 15 Sup. Ct. 954, 39 L. ed. 996; *Cherry Creek v. Becker*, 123 N. Y. 161.

<sup>26</sup> See generally as to the petition, *Scipio v. Wright*, 101 U. S. 665, 25 L. ed. 1037; *Rich v. Mentz Township*, 134 U. S. 632, 10 Sup. Ct. 610, 33 L. ed. 1074; *Andes v. Ely*, 158 U. S. 312, 15 Sup. Ct. 954, 39 L. ed. 996; *State v. Kokomo*, 108 Ind. 74, 18 N. E. 718; *Evansville &c. R. Co. v. Evansville*, 15 Ind. 395; *Wellsborough v. New York &c. R. Co.*, 76 N. Y. 182; *State v. Tomahawk*, 96 Wis. 73, 71 N. W. 86.

<sup>27</sup> *People v. Van Valkenburgh*, 63 Barb. (N. Y.) 105. But under the Indiana statute it is held unnecessary to state in the petition whether the money is to be donated or used for the purchase of stock. *Jussen v. Board*, 95 Ind. 567; *Petty*

*v. Myers*, 49 Ind. 1. It is held in Indiana that the levy of a tax to aid in the construction of a railroad is not vitiated by any uncertainty or ambiguity in the language of the petition for the appropriation, when it appears that no one was deceived thereby, nor in fact could be, since the intention of the petitioners could not be misapprehended. *Jussen v. Board &c.*, 95 Ind. 567. See also *Scott v. Hانشeer*, 94 Ind. 1; *Goddard v. Stockman*, 74 Ind. 400.

<sup>28</sup> *Wilson v. Board*, 68 Ind. 507; *Detroit &c. R. Co. v. Bearss*, 39 Ind. 598. See also *Herbert v. Griffith*, 99 S. Car. 1, 82 S. E. 986. But see *State v. Knowles*, 117 La. 129, 41 So. 439. For petition held sufficient in this regard, see *Gooden v. Police Jury*, 122 La. 755, 48 So. 196, 203, 204. See also *Thomas v. Blakely*, 141 Ga. 488, 81 S. E. 218.



to which the aid shall be given, where the municipality is authorized to aid either of two or more roads.<sup>29</sup>

§ 1049 (859). **Notice of election.**—Where, as is usually the case, notice of an election is required by the enabling act, the notice required must be given.<sup>30</sup> Here, again, it is necessary to direct attention to the doctrine of estoppel and to the difference between a direct and a collateral attack. The doctrine of estoppel may often so operate as to preclude taxpayers from taking advantage of defects in a notice, and defects may be available in a direct attack which would be unavailing if the attack were a collateral one.<sup>31</sup> Formal defects in a notice or defects that are not of any materiality ought not to be held to render the election ineffective. In Wisconsin it is held that the requirement that notices of an election to determine whether aid shall be granted shall be posted by the town clerk or supervisors need not be literally complied with; but it is sufficient if others post the notices for them.<sup>32</sup> Other cases hold that a notice of such an election will be held sufficient if it sets forth with reasonable certainty the matters to be acted upon.<sup>33</sup>

<sup>29</sup> *Monadnock R. Co. v. Peterborough*, 49 N. H. 281.

<sup>30</sup> See generally as to the notice, *McClure v. Oxford Tp.*, 94 U. S. 429, 24 L. ed. 129; *Knox County v. New York Ninth Nat. Bank*, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. ed. 93; *Williams v. Roberts*, 88 Ill. 11; *Yarish v. Cedar Rapids &c. R. Co.*, 72 Iowa 556, 34 N. W. 417; *Demaree v. Johnson*, 150 Ind. 419, 49 N. E. 1062. As to when there is a presumption of proper notice, see *Knox County v. New York Ninth Nat. Bank*, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. ed. 93; *Wilmington &c. R. Co. v. Onslow County*, 116 N. Car. 563, 21 S. E. 205; *State v. Lime*, 23 Minn. 521.

<sup>31</sup> It is held by some of the courts that the decision of the local offi-

cers, such as the board of county commissioners, board of supervisors or the like is conclusive as against a collateral assault where there is some notice, although it may be defective. *Hilton v. Mason*, 92 Ind. 157; *Faris v. Reynolds*, 70 Ind. 359; *Reynolds v. Faris*, 80 Ind. 14.

<sup>32</sup> *Philips v. Albany*, 28 Wis. 340; *Lawson v. Milwaukee &c. R. Co.*, 30 Wis. 597. See also *City of Venice v. Lawrence*, 24 Cal. App. 350, 141 Pac. 406; *Briggs v. Raleigh*, 166 N. Car. 149, 81 S. E. 1084.

<sup>33</sup> *Belfast &c. R. Co. v. Brooks*, 60 Maine 568, where the meeting was called "to see if the town will loan its credit to aid in the construction" of the railroad. An or-

**§ 1050 (859a). Notice of election—Strictness with reference thereto.**—The Supreme Court of Illinois has stated the rule under this head thus: “where a municipality is empowered to subscribe to the capital stock of a railroad company and issue its bonds in payment of the subscription, but it is also required that there shall, first be an affirmative vote of a majority of the electors of the municipality to that effect, no power exists to make the subscription and issue the bonds until after such vote shall have been obtained at an election, held for that purpose, called by the authority prescribed by law, and upon such notice of the time and place of holding the election as the law shall direct”; and, that whoever deals in municipal bonds is chargeable with knowledge whether these precedent conditions to the existence of the power of making the subscription and issuing the bonds have been complied with.<sup>34</sup> Thus, where a statute required a certain number of notices to be posted for a specified time, it was held that this requirement must be complied with in order to render the subscription and bonds issued in payment therefor valid and binding on the municipality.<sup>35</sup> So it has been held

der of the county court submitting to the voters of the county a proposition to subscribe for stock in aid of a railroad, under the laws of Missouri in force March 4, 1867, was not defective because it failed to specify the name of the corporation, where it had described the proposed route with requisite certainty. *Ninth Nat. Bank v. Knox County*, 37 Fed. 75. Under the general law of Iowa, requiring that the notice of a railroad aid tax to be voted shall specify the line of railroad to be aided, it was held that a notice naming the railroad, and giving location of line in direction and terminal points, meets the requirements of the statute. *Yarish v. Cedar Rapids &c. R. Co.*, 72 Iowa 556, 34 N. W. 417; *Burges v. Mabin*, 70 Iowa 633, 27 N. W. 464.

<sup>34</sup> *Williams v. Roberts*, 88 Ill. 11. See also *Wells v. Ponponpoc Co.*, 102 U. S. 625, 26 L. ed. 122; *Lincoln v. Iron Co.*, 103 U. S. 412, 26 L. ed. 518; *Packard v. Board &c.*, 2 Colo. 338; *People v. Logan*, 63 Ill. 384; *Middleport v. Aetna Ins. Co.*, 82 Ill. 562; *Stebbins v. Perry Co.*, 167 Ill. 567, 47 N. E. 1048; *Demaree v. Johnson*, 150 Ind. 419, 49 N. E. 1062; *Yarish v. Cedar Rapids &c. R. Co.*, 72 Iowa 556, 34 N. W. 417; *Jones v. Hulburt*, 13 Nebr. 125, 13 N. W. 5; *Justices v. Knoxville &c. R. Co.*, 6 Coldw. (Tenn.) 598.

<sup>35</sup> *Harding v. Rockford &c. R. Co.*, 65 Ill. 90. See also *McClure v. Oxford Tp.*, 94 U. S. 429, 24 L. ed. 129; *Windsor v. Hallett*, 97 Ill. 204; *Sauerhering v. Iron Ridge &c. R. Co.*, 25 Wis. 447; *Philips v. Albany*, 28 Wis. 340.

that the notice must show the particular railroad to the capital stock of which the subscription was to be made.<sup>36</sup> Aid bonds are generally held invalid where the insufficiency of the notice of the election appears on the face of the bonds.<sup>37</sup>

**§ 1051 (860). Influencing voters.**—Some of the courts hold that oral misrepresentations made to voters to induce them to vote for furnishing aid will not affect the validity of the tax<sup>38</sup> if voted without conditions, although such misrepresentations are made by the agents of the company,<sup>39</sup> but there is conflict among the authorities.<sup>40</sup> So it has been held that the fact that the officers of the municipality were induced by means of false and fraudulent promises to submit the question to a popular vote will

<sup>36</sup> *Ferris v. Reynolds*, 70 Ind. 359.

<sup>37</sup> *McClure v. Oxford Tp.*, 94 U. S. 429, 24 L. ed. 129; *George v. Oxford*, 16 Kans. 72.

<sup>38</sup> *Cedar Rapids &c. R. Co. v. Boone Co.*, 34 Iowa 45; *Platteville v. Galena &c. R. Co.*, 43 Wis. 493.

<sup>39</sup> *Illinois Midland R. Co. v. Barnett*, 85 Ill. 313, where the proposed route was misrepresented. *State v. Lake City*, 25 Minn. 404, where the alleged misrepresentations related to the location of car and machine shops, etc.

<sup>40</sup> Many who signed a petition for the calling of an election to vote for the issue of bonds by the township in aid of a railroad, as authorized by the laws of Nebraska, were induced to sign the petition by representations on behalf of the railroad that it would locate a depot on a certain section. After the bonds were authorized the depot was located on another section and the aggrieved petitioners were granted an injunction restraining the issue of the bonds,

on account of the false representations. In this case two agents of the company were engaged in the common purpose of soliciting the freeholders of a town to sign a petition for an election to vote bonds in aid of the railroad. One made promises and inducements to the freeholders, and shortly afterward the other secured their signatures to the petition. The court held that such promises and inducements were a part of the *res gestae*. *Wullenwaber v. Dunigan*, 33 Nebr. 477, 47 N. W. 420. See also *People v. San Francisco*, 27 Cal. 655; *People v. Logan Co.*, 63 Ill. 374; *Bish v. Stout*, 77 Ind. 255; *Demaree v. Johnson*, 150 Ind. 419, 49 N. E. 1062; *Chicago &c. R. Co. v. Shea*, 67 Iowa 628, 25 N. W. 901; *Chicago &c. R. Co. v. Chase Co.*, 43 Kans. 760, 23 Pac. 1064; *Kentucky &c. R. Co. v. Bourbon Co.*, 85 Ky. 98, 2 S. W. 687; *Wooley v. Louisville &c. R. Co.*, 93 Ky. 223, 19 S. W. 595; *Goforth v. Rutherford &c. Co.*, 96 N. Car. 535, 2 S. E. 361.

not be sufficient grounds for setting aside the proceedings.<sup>41</sup> It seems to us that, where there is no ground of estoppel, and the vote in favor of the aid has been procured by the fraud of the beneficiary company, it should be set aside upon opportune and appropriate application to the courts, or, at least, that such fraud may be shown as a defense to an action by the company, or an injunction granted in a proper case. But, of course, to warrant this conclusion, there must be fraud in all that the term implies on the part of the beneficiary.

**§ 1052 (861). Vote does not of itself constitute a contract.**—A vote in favor of granting aid, when a vote is required by the enabling act, is the foundation of the power to contract. It authorizes the municipality to enter into a contract, but is not, of itself, a contract. In order that there may be an effective contract there must be appropriate action upon the vote by the municipality. Such a vote does not constitute a subscription, and the power to subscribe may be taken away by the legislature after the vote is taken and before a binding subscription is made,<sup>42</sup> or agreed to be made.<sup>43</sup> But after the agreement to subscribe has been fully entered into it constitutes a contract which

<sup>41</sup> *State v. Lake City*, 25 Minn. 404.

<sup>42</sup> *Aspinwall v. Daviess County*, 22 How. (U. S.) 364, 16 L. ed. 296; *Concord v. Portsmouth Savings Bank*, 92 U. S. 625, 23 L. ed. 628; *Cumberland &c. R. Co. v. Washington Co.*, 10 Bush (Ky.) 564; *State v. Garrouette*, 67 Mo. 445; *List v. Wheeling*, 7 W. Va. 501. Thus where a railroad was entitled to the aid voted only on condition that the road was completed within a specified time "from the date of the subscription," it was held that the subscription was consummated when the mayor signed the subscription as directed by a resolution of the council, and not at

the time of the passage of the resolution. *Red River Furnace Co. v. Tennessee Cent. R. Co.*, 113 Tenn. 697, 87 S. W. 1016. Under the Indiana statute of 1869, the simple voting of aid by a township is not a subscription to the stock of a railroad company, but the subscription can be perfected only by the county board, and until the subscription is so made no liability attaches. *Hamilton Co. v. State*, 115 Ind. 70, 17 N. E. 855.

<sup>43</sup> *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 23 L. ed. 628. In Iowa it is held that if money be expended before the repeal of a statute, upon the faith of a tax provided for by it, the repeal does

cannot be impaired by the laws of the state.<sup>44</sup> Where the statute requires something to be done by the officers after the vote of the directors, wherein such officers are allowed any discretion, the preliminary vote confers no rights upon the company to which the aid is voted, until the officers have acted in making the subscription.<sup>45</sup>

**§ 1053 (862). Aid authorized by popular vote—Duty of local officers.**—Where the statute requires that aid be granted by popular vote, and the voters are empowered to prescribe conditions and do prescribe conditions, the local officers must carry out the will of the voters. In such case the administrative officers appointed to carry the vote into effect can not make any change in the conditions upon which the subscription is voted.<sup>46</sup> It is the duty of such officers to obey the expressed will of the voters, and if they disobey it their proceedings will not be effective except where the doctrine of estoppel applies. Leaving out of consideration the principle of estoppel, it may be said that the conditions prescribed by the voters, where they are in accordance with the statute, constitute, in a great degree, the measure of power. Local officers cannot, without statutory authority, organize taxing districts, and a vote by an arbitrarily organized district, and acts done in pursuance thereof, are not valid. It has been held that such a proceeding cannot be validated by a subsequent enactment of the legislature, since such acts could not be said to be done by the representatives of the people affected

not invalidate the tax and it may be collected. *Burges v. Mabin*, 70 Iowa 633, 27 N. W. 464; *Barthel v. Meader*, 72 Iowa 125, 33 N. W. 446.

<sup>44</sup> Cases cited, *supra*.

<sup>45</sup> *Wadsworth v. St. Croix Co.*, 4 Fed. 378; *People v. Pueblo Co.*, 2 Colo. 360; *Cumberland &c. R. Co. v. Barren Co.*, 10 Bush (Ky.) 604. And so where the vote is for a subscription upon condition, the railroad company has a right to the

voted aid only upon a strict performance of the conditions. *Brokaw v. Gibson Co.*, 73 Ind. 543; *Memphis &c. R. Co. v. Thompson*, 24 Kans. 170; *Chicago &c. R. Co. v. Aurora*, 99 Ill. 205; *People v. Hitchcock*, 2 T. & C. (N. Y. S.) 134. See also *McCrecken v. Greensboro &c. R. Co.*, 168 N. Car. 62, 84 S. E. 30.

<sup>46</sup> *People v. Waynesville*, 88 Ill. 469. See also *State v. Daviess Co.*, 64 Mo. 30.

by the tax.<sup>47</sup> It may, however, be doubted whether the broad doctrine of the case cited can be sustained since the general rule is that what the legislature can authorize it may validate,<sup>48</sup> but it is also to be kept in mind that acts which are absolutely void cannot be validated by subsequent legislation.<sup>49</sup> Where commissioners are appointed, under authority of the enabling act, to make a subscription for a municipality, they are the agents of the corporation to the extent of making the subscription, and it may adopt or reject their acts done outside the limits of their authority. If they annex to the subscription conditions beyond what are contained in the instrument of assent by which they received their appointment and authority, their act in so doing is not void, but such conditions are binding unless repudiated by the municipality.<sup>50</sup> Such commissioners cannot bind the town by a waiver of any of the conditions imposed, or by an agreement that other terms and conditions shall be substituted.<sup>51</sup> And

<sup>47</sup> *Williams v. Roberts*, 88 Ill. 11.

<sup>48</sup> *Unity v. Burrage*, 103 U. S. 447, 26 L. ed. 405; *Pelt v. Payne*, 60 Ark. 637, 30 S. W. 426; *Bennett v. Fisher*, 26 Iowa 497; *Boyce v. Sinclair*, 3 Bush (Ky.) 261; *Allen v. Archer*, 49 Maine 346; *Shaw v. Norfolk R. Co.*, 5 Gray (Mass.) 162; *Kunkle v. Franklin*, 13 Minn. 127, 97 Am. Dec. 226; *State v. Guttenberg*, 38 N. J. L. 419; *Brewster v. Syracuse*, 19 N. Y. 116; *Commonwealth v. Marshall*, 69 Pa. St. 328; *May v. Holdridge*, 23 Wis. 93.

<sup>49</sup> *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *Thames & Co. v. Lathrop*, 7 Conn. 550; *Johnson v. Board*, 107 Ind. 15, 8 N. E. 1; *Abbott v. Lindenbower*, 42 Mo. 162; *Maxwell v. Goetschius*, 40 N. J. L. 383, 29 Am. Rep. 242; *Andrews v. Beane*, 15 R. I. 451; *Kimball v. Rosendale*, 42 Wis. 407, 24 Am. Rep. 421. See *Hasbrouck v. Milwaukee*, 13 Wis. 37, 80 Am. Dec. 718, and note; *Pryor v. Downey*,

50 Cal. 388, 19 Am. Rep. 656; *Yeatman v. Day*, 79 Ky. 186; *State v. Doherty*, 60 Maine 504; *Roche v. Waters*, 72 Md. 264, 18 Atl. 866, 7 L. R. A. 533.

<sup>50</sup> *Danville v. Montpelier & C. R. Co.*, 43 Vt. 144. Where a petition of tax-payers, relating to an issue of railroad aid bonds, provides that a certain quantity shall be issued when the road is located through the town, the commissioners appointed in pursuance of the petition are thereby authorized to postpone their issue to a later stage in the progress of the work, by contract with the company. *Cherry Creek v. Becker*, 2 N. Y. S. 514.

<sup>51</sup> *Falconer v. Buffalo & C. R. Co.*, 69 N. Y. 491. Nor can they bind the town by any act not done in compliance with the authority conferred by the vote of the inhabitants. *Horton v. Thompson*, 71 N. Y. 513.

where a subscription, absolute in form, was made by commissioners appointed by a town to make the subscription upon certain conditions, and it appeared at the hearing of an application for a peremptory writ of mandamus to compel the delivery of bonds by the town, that the subscription was made under the belief, induced in part by the representations of the railroad company's officers, that the town could not be compelled to deliver the bonds until an agreement as to the performance of the conditions had been made, and that the conditions had not been performed by the relator, the writ was denied.<sup>52</sup>

**§ 1054 (863). Contract granting aid—Subscription—Enforcement.**—Where the statute conferring power to grant aid has been complied with, and the railroad company has fully complied with the terms and conditions of the statute and agreement, a contract exists which cannot be annulled except, of course, for sufficient legal or equitable cause. Thus, it has been held that authority to make a subscription to be paid by the issue of municipal bonds only after the road is open for traffic will enable a town to make a binding subscription from which it cannot be released without the consent of the railroad company, and that valid bonds may be issued after the completion of the road although the statute authorizing the subscription has, in the meantime, been repealed.<sup>53</sup> It may be laid down as a general rule that, where the statute has been pursued in all its requirements, and the aid regularly voted, and the railroad company has complied with the conditions imposed, the corporation or its creditors may have a writ of mandamus to compel the issue of the bonds by officers whose only duties are ministerial, and who are given no

<sup>52</sup> *People v. Hitchcock*, 2 Thomp. & C. (N. Y.) 134.

<sup>53</sup> *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 23 L. ed. 628; *Livingston County v. First Nat. Bank*, 128 U. S. 102, 126, 9 Sup. Ct. 18, 32 L. ed. 367. The repeal of the law under which a tax was voted will not invalidate the tax where the proceedings have been

regular, and the company has, on the faith of the vote, expended money in constructing its line in the town which voted the tax. *Cantillon v. Dubuque & C. R. Co.*, 78 Iowa 48, 42 N. W. 613, 5 L. R. A. 726, and note. See also *Powell v. Brunswick Co.*, 88 Va. 707, 14 S. E. 543.

discretion in the matter.<sup>54</sup> If no conditions are imposed, the officers may be compelled to make the subscription as soon as it is fully authorized by a vote and the rights of the beneficiary become vested.<sup>55</sup> But until there is an effective contract there

<sup>54</sup> *United States v. Clarke County*, 96 U. S. 211, 24 L. ed. 628; *Muscatine v. Mississippi &c. R. Co.*, 1 Dill. (U. S.) 536; *Selma &c. R. Co.*, Ex parte, 45 Ala. 696, 6 Am. Rep. 722; *Brodie v. McCabe*, 33 Ark. 690; *Napa Valley R. Co. v. Napa Co.*, 30 Cal. 435; *Chicago &c. R. Co. v. St. Anne*, 101 Ill. 151; *Mt. Vernon v. Hovey*, 52 Ind. 563; *Cumberland &c. R. Co. v. Washington Co.*, 10 Bush (Ky.) 564; *Howland v. Eldeidge*, 43 N. Y. 457; *Raleigh &c. R. Co. v. Jenkins*, 68 N. Car. 502; *Cincinnati &c. R. Co. v. Clinton Co.*, 1 Ohio St. 77; *Louisville &c. R. Co. v. County Court*, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424. Under the Kansas act of 1885, relating to municipal aids to railroads, providing that townships shall issue no more than \$15,000 and five per cent. on its assessed value for such purpose, a subscription to the amount limited, duly made and accepted by the company, is a contract binding on the township, and the conditions being performed, the company is entitled to the township bonds to the exclusion of another road, to whose stock the town has afterwards subscribed, though the latter perform its conditions first. *Chicago &c. R. Co. v. Board &c.*, 38 Kans. 597, 16 Pac. 828. In case of a subscription to the stock of a railroad company by the county board, the certificate of stock thus subscribed may be demanded as a condition of the

payment of the money, and where the property of such company is sold on foreclosure, and bought in by a new company having no power to issue stock of the old company, such new company can not, by mandamus, compel the levy of a tax for the purpose of paying them the amount voted to be paid for stock in the original company. *Board of Commissioners v. State*, 115 Ind. 64, 70, 4 N. E. 589, 7 N. E. 855. If one whose land has been taken for use in the construction of a railroad without compensation so assents to the entry of the railroad as to waive his right to dispossess it, the omission to make such compensation can not be urged as a defense to an action by a railroad to recover money voted by a city to the railroad company to be paid on completion of the road. *Manchester &c. R. Co. v. Keene*, 62 N. H. 81.

<sup>55</sup> *People v. Cass Co.*, 77 Ill. 438; *People v. Logan Co.*, 63 Ill. 374. The supreme court of Kansas has held that the vote of the people of a county to subscribe for the stock of a railroad company and to issue its bonds, does not create a contract between the county and the company, even though such vote was upon conditions which the company subsequently performed; and the court refused a mandamus to compel the subscription. *Land Grant &c. R. Co. v. Davis Co.*, 6 Kans. 256.



is no right to a mandamus. The general rule is that the subscription will be held to have been made as of the date when it became the duty of the officers to make it. There is a sufficient subscription to entitle the railroad company to all the rights which a manual subscription on its books would confer, whenever the corporation, in the mode prescribed by the statute, directs its officers to subscribe for a certain amount of its stock, and there is either an actual or constructive acceptance on its part.<sup>56</sup> A manual subscription is not necessary on their part, however, but the agreement to take stock may be made binding by a resolution or vote of the municipal authorities or officers charged with discretion in the matter, if designed to have that effect, and passed for the purpose of completing the agreement.<sup>57</sup>

<sup>56</sup> *Nugent v. Supervisors*, 19 Wall. (U. S.) 241, 21 L. ed. 83; *State v. Jennings*, 48 Wis. 549. As to what constitutes an effective contract, see *Nugent v. Supervisors*, 19 Wall. (U. S.) 241, 21 L. ed. 83; *Clarke Co. v. Paris &c. Turnpike Co.*, 11 B. Mon. (Ky.) 143; *Shelby Co. Ct. v. Cumberland &c. R. Co.*, 8 Bush. (Ky.) 209; *Welch v. Post*, 99 Ill. 471; *Clay County v. Society for Savings*, 104 U. S. 579, 26 L. ed. 856. The mere vote by the inhabitants of a municipality to the effect that bonds shall be issued does not make the contract to issue them a binding one. *State v. Lancaster Co.*, 6 Nebr. 214; *Harshman v. Bates County*, 92 U. S. 569, 23 L. ed. 747; *Chesapeake &c. R. Co. v. Barren Co.*, 10 Bush (Ky.) 604; *Bound v. Wisconsin R. Co.*, 45 Wis. 543; *Jeffries v. Lawrence*, 42 Iowa 498; *Land Grant R. Co. v. Davis Co.*, 6 Kans. 256.

<sup>57</sup> *Cass County v. Gillett*, 100 U. S. 585, 25 L. ed. 585; *Illinois Midland R. Co. v. Barnett*, 85 Ill. 313; *Justices County Ct. v. Paris &c.*

*Tpk. Co.*, 11 B. Mon. (Ky.) 143. See also *Bates County v. Winters*, 112 U. S. 325, 5 Sup. Ct. 157, 28 L. ed. 744; *State v. Delaware Co.*, 92 Ind. 499; *Nelson v. Haywood County*, 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648. Where the order is that a subscription be made with conditions and terms annexed, and it is not of itself final and complete, such order must be fully obeyed to render the subscription binding. *Bates County v. Winters*, 97 U. S. 83, 24 L. ed. 933. Where the law requires stock to be paid for at the time it is subscribed, the railroad company has no right to the voted aid until the stock is subscribed and the money paid. And it can not by mandate compel the levy of a tax voted by a municipality to pay for stock which the municipality proposes to take. *Board &c. v. State*, 115 Ind. 64, 4 N. E. 859, 7 N. E. 855; *Board &c. v. Louisville &c. R. Co.*, 39 Ind. 192. All the steps which precede the taking of stock, or the making of a donation by a county in such

The burden of proof is upon a railroad company asking the enforcement of the issuance of bonds, to show that the bonds are authorized to be issued by a vote of the people had pursuant to laws existing at the time the company was entitled thereto.<sup>58</sup>

**§ 1055 (864). Power of municipal officers where the statute requires submission to popular vote.**—Municipal officers, as is well known, have only such powers as the statute confers upon them, and municipalities can only grant aid when expressly authorized by statute, so that it follows that, where a vote is required, there is no power to enter into a contract until the vote prescribed has been taken. It is correctly held that a contract with reference to the giving of aid made in advance of a popular vote will not be regarded as valid, even though it is made to procure such vote, and the vote is afterward obtained.<sup>59</sup> The vote is the foundation of the power, and until it has been taken it cannot be justly said that the municipality had any power to contract.

**§ 1056 (865). Decision of local officers as to jurisdictional facts.**—Some of the cases hold that a municipality is not bound by the decision of its officers as to jurisdictional facts, unless the rights of innocent third parties have so intervened as to estop it from disputing the correctness of such decision, and that a court of chancery may investigate the election and other preliminary acts conferring the alleged right to extend aid.<sup>60</sup> But

a case, are between the people of the county and its officers only, and only a voter can maintain a suit for mandate for this purpose. *Board of Commissioners v. Louisville &c. R. Co.*, 39 Ind. 192; *Caffyn v. State*, 91 Ind. 324.

<sup>58</sup> *Chicago &c. R. Co. v. Mal-lory*, 101 Ill. 583.

<sup>59</sup> *People v. Cass Co.*, 77 Ill. 438. But see *Chicago &c. R. Co. v. Ozark*, 46 Kans. 415.

<sup>60</sup> *Winston v. Tennessee &c. R.*

*Co.*, 1 Baxt. (Tenn.) 60. See *Horton v. Thompson*, 71 N. Y. 513. An entry and order made by the board of county commissioners to the effect that a subscription in aid of railroads submitted to the sense of the "qualified voters" of the county had been carried by a majority of such voters, while it can not be attacked collaterally does not so adjudicate the question of the legality of the election that it can not be contested by a direct

there is conflict upon this general question, and we are of the opinion that, where the attack is collateral, the decision is conclusive, except, perhaps, where no action constituting a change of position has been taken by the railroad company, and no third persons have acquired rights.<sup>61</sup> As between the municipi-

proceeding for that purpose. Nor do the facts that the county commissioners have subscribed for shares of the capital stock of the railroads, and that the latter have made engagements and contracts based upon that subscription, prevent the election being contested and its validity determined by such a proceeding. *Goforth v. Rutherford R. Const. Co.*, 96 N. Car. 535, 2 S. E. 361; *McDowell v. Rutherford R. Const. Co.*, 96 N. Car. 514, 2 S. E. 351. The bonds in excess of the amount which a township was authorized to issue were obtained from the state treasurer on a false certificate by the township trustee that the conditions on which they were issued had been complied with. The railway company was cognizant of the fraud and receipted to the treasurer for the bonds, but never had actual possession of them, though it assented to their delivery to the contractor by the township trustee in payment for construction work. It was held that this did not constitute a negotiation of the bonds to an innocent purchaser; and, as the conditions on which they were issued had not been complied with, the consideration had failed, and the township was entitled to a decree for their surrender and cancellation. *Wilson v. Union Sav. Assn.*, 42 Fed. 421. The acts of a Kentucky

county court, in ascertaining the result of an election upon the question whether the county shall subscribe to the stock of the Kentucky Union Railway Company, under Kentucky act of March 10, 1854, and in subscribing the stock, are ministerial, and not judicial, and the tax-payers are not confined to the remedy by appeal, but may maintain an action in the district court to declare the subscription void, and to enjoin the collection of the tax to pay it, on the ground of the illegality of the election. *Holt, J., dissenting. Kentucky Union R. Co. v. Bourbon Co.*, 85 Ky. 98, 2 S. W. 687. From this doctrine we dissent.

<sup>61</sup> *Knox County, Indiana, v. Aspinwall*, 21 How. (U. S.) 539, 16 L. ed. 208; *Coloma v. Eaves*, 92 U. S. 484, 23 L. ed. 579; *Martin v. Mott*, 12 Wheat. (U. S.) 19, 6 L. ed. 537; *Douglas County v. Bolles*, 94 U. S. 104, 24 L. ed. 46; *Venice v. Murdock*, 92 U. S. 494, 23 L. ed. 583; *Bissell v. Jeffersonville*, 24 How. (U. S.) 287, 16 L. ed. 664; *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 64, 70, 6 L. ed. 552; *Knox County v. New York Ninth Nat. Bank*, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. ed. 93; *Landford v. Dunklin*, 71 Ala. 594; *Goodwin v. Sims*, 86 Ala. 102, 5 So. 587, 11 Am. St. 21; *Spaulding v. North & C. Assn.*, 87 Cal. 40, 24 Pac. 600, 25 Pac. 918;

pality and innocent third persons, the decision of the board of officers who are appointed to determine whether the conditions precedent to the making of a subscription have been observed is final and conclusive on the municipality.<sup>62</sup> It has been held that, where a petition is necessary, it must show that it is signed by the required number of the class authorized to present such a petition, or it will fail to confer jurisdiction.<sup>63</sup> We do not be-

Henline v. People, 81 Ill. 269; Chicago &c. Co. v. Chamberlain, 84 Ill. 333; Tucker v. Sellers, 130 Ind. 514, 517, 30 N. E. 531; Demaree v. Bridges, 30 Ind. App. 131, 65 N. E. 601; Ryan v. Varga, 37 Iowa, 78; Koehler v. Hill, 60 Iowa 543, 14 N. W. 738, 15 N. W. 609; Ela v. Smith, 5 Gray (Mass.) 121, 66 Am. Dec. 356; Betts v. Bagley, 12 Pick. (Mass.) 572; State v. Weatherby, 45 Mo. 17; State v. Nelson, 21 Nebr. 572, 32 N. W. 589; Camden v. Mulford, 26 N. J. L. 49; Vanderheyden v. Young, 11 Johns. (N. Y.) 150; Porter v. Purdy, 29 N. Y. 106, 86 Am. Dec. 283; Roderigas v. East River &c., 76 N. Y., 316, 32 Am. Rep. 309; Cherry Creek v. Becker, 123 N. Y. 161, 25 N. E. 369; Brittain v. Kinnaird, 1 Brod. & Bing. 432. See authorities cited Elliott Gen. Prac. § 260, notes. See Citizens' Sav. &c. Assn. v. Perry County, 156 U. S. 692, 15 Sup. Ct. 547, 39 L. ed. 585.

<sup>62</sup> Knox County, Indiana, v. Aspinwall, 21 How. (U. S.) 539, 544, 16 L. ed. 208; Bissell v. Jeffersonville, 24 How. (U. S.) 287, 16 L. ed. 664; Coloma v. Eaves, 92 U. S. 484, 23 L. ed. 579. On a question as to the validity of certain bonds issued by a county to a railway company, it was claimed that the issue was not authorized by two-thirds of the

qualified voters, as required by statute, and that such fact would appear from an inspection of the registration lists, although the board of supervisors, in the performance of their duties, had declared that two-thirds of the voters had voted for the measure. The court held that a bona fide purchaser was not required to go behind such returns, and one who purchased for value, without actual notice of any wrong, was entitled to recover. Madison County v. Brown, 67 Miss. 684, 7 So. 516. But see where officers had no authority to determine the question of performance of conditions precedent. Inhabitants of Harmony v. Freeman, 212 Fed. 4.

<sup>63</sup> Wilson v. Caneadea, 15 Hun (N. Y.) 218; Angel v. Hume, 17 Hun (N. Y.) 374. See Williams v. Roberts, 88 Ill. 11. Where under the Kansas statutes an election is ordered in a county for the purpose of authorizing a subscription to the capital stock of a railroad company, and an issue of the bonds of the county in payment for such stock, the election is ordered upon a petition presented to the county board, which does not contain the requisite number of names, but which the county board declares to be sufficient, and the election

lieve, however, that this can be the correct doctrine in cases where the local officers are empowered to determine jurisdictional facts.<sup>64</sup>

§ 1057 (866). **Acceptance of aid.**—The general rule is that, where an act is beneficial to a party, acceptance on his part may be presumed. This principle applies to cases where aid is granted to railroad companies. As a rule no formal acceptance of the subscription is necessary on the part of the company. If it complies with the terms upon which a subscription is voted by the municipality an acceptance will be presumed.<sup>65</sup>

§ 1058 (867). **Ratification of subscription.**—Where there is an entire absence of power to subscribe to the stock of a railroad company, the municipal corporation assuming to make the subscription cannot validate it by subsequent ratification. Possibly a statute might authorize a valid ratification, but even this is doubtful. It seems clear, at all events, that where there is no such statute, and where the municipality had no authority to make the subscription, it cannot ratify a subscription so as to give it any validity.<sup>66</sup>

is held, returns canvassed, and the result declared in favor of subscribing for the stock and issuing the bonds, and the clerk is ordered by the board to make the subscription, and does so, the election can not stand but must be deemed to be void because of want of a sufficient petition. *Chicago &c. R. Co. v. Board of Comrs.*, 43 Kans. 760, 23 Pac. 1064.

<sup>64</sup> *Evansville &c. R. Co. v. Evansville*, 15 Ind. 395. See authorities cited in second preceding note.

<sup>65</sup> *State v. Lime*, 23 Minn. 521; *State v. Hastings*, 24 Minn. 78; *Augusta v. Maysville &c. R. Co.*, 97 Ky. 145, 30 S. W. 1.

<sup>66</sup> *Treadway v. Schnauber*, 1 Dak. 236; *Ryan v. Lynch*, 68 Ill. 160.

If a municipal corporation votes to subscribe for stock of a railroad before its own charter goes into effect, the vote is a nullity, and no ratification by its officers after the charter takes effect can give it validity. *Clark v. Janesville*, 13 Wis. 414, 10 Wis. 136; *Berliner v. Waterloo*, 14 Wis. 378; *Winchester &c. Co. v. Clarke Co.*, 3 Metc. (Ky.) 140; *Rubey v. Shain*, 54 Mo. 207. But see *Daviess County v. Huidekoper*, 98 U. S. 98, 25 L. ed. 112, where bonds were held valid although authorized by a popular vote before the organization was completed. Where bonds were not payable annually as required by city charter it was held that the invalidity of the issue was not

**§ 1059 (868). Stock subscribed by municipality—Legislative control of.**—The legislative power over the property of a public or municipal corporation is, as we have seen, very broad and comprehensive. The rule that property held by a municipal corporation is under legislative control applies to stock subscribed by it in aid of a railroad company. The fact that such stock is already in the hands of the municipality will not prevent the legislature from transferring it to the taxpayers, at least in the case of imperfectly organized municipal corporations, such as counties and townships.<sup>67</sup> The legislative discretion, where discretion exists, is not subject to judicial surveillance, for the only question for the courts in such cases is power or no power. Under the general power which it possesses, the legislature may direct that the stock so taken by a municipality shall be divided amongst the taxpayers from whom the money with which it was purchased was collected, without laying the statute open to the

cured by the approval of the voters. *City of Geneva v. Fenwich*, 159 App. Div. 621, 145 N. Y. S. 884.

<sup>67</sup> *Tipppecanoe County v. Lucas*, 93 U. S. 108, 23 L. ed. 822; *Lucas v. Board of Commissioners*, 44 Ind. 524. In New York the taxes collected from the railroad must be paid to the county treasurer to form a sinking fund for the payment of the bonds issued to aid it. Laws N. Y. 1869, c. 907, as amended by Laws 1871, c. 283, and c. 925. This act is constitutional. *Clark, In re, v. Sheldon*, 106 N. Y. 104, 12 N. E. 341; *Vinton v. Board of Supervisors*, 50 Hun 600, 2 N. Y. S. 367. It applies, not only in the case of railroads constructed under the act of 1869, but to all towns bonded in aid of railroads constructed in or through them. *Clark, In re, v. Sheldon*, 106 N. Y. 104, 12 N. E. 341. Taxes collected by a

city from a railroad company, to aid which it had issued bonds, were paid over to the county treasurer and by him mingled with the county moneys, and never invested, but paid over by him to his successor. The court held that the successor was authorized, under the statute, to invest them for the benefit of the city. *Spaulding v. Arnold*, 6 N. Y. S. 336. The provisions of the North Carolina statute, by which the county taxes, levied on property and franchises of a railroad in a certain township, in aid of the construction of which railroad the township has voted its bonds, are to be applied to pay interest on such bonds, not interfering with the levy of taxes, are not unconstitutional and only direct the application of county revenue. *Brown v. Commissioners*, 100 N. Car. 92, 5 S. E. 178.

objection that it compels persons to become stockholders in a private enterprise.<sup>68</sup>

**§ 1060 (869). Rights and liabilities of municipal corporations as stockholders.**—It is held that where a municipal corporation, under legislative authority, subscribes for stock without paying for it in full, it stands in the same relation to the company and its creditors that any other subscriber does who owes for an unpaid subscription.<sup>69</sup> But, of course, much depends upon the provisions of the statute which authorizes the municipality to subscribe, since the legislature has power to prescribe the rights and liabilities of the public corporation. In general, however,

<sup>68</sup> By an act passed March 15, 1851, the legislature of Kentucky incorporated the Shelby Railroad Company, and authorized the county of Shelby to subscribe for stock, and to levy taxes to pay therefor, each person paying such tax to become entitled to his pro rata share of the stock. By an amendment of February 3, 1869, a specified portion of Shelby county was authorized to subscribe for stock, issue bonds in payment thereof, and levy taxes, with the provision that stock for which certificates had been issued to tax-payers should be voted by the individuals holding the same. By act March 11, 1870, the charter was again amended, so as to provide that any county, or part of a county, which had delivered bonds in payment of stock, should be entitled to representation, and to vote the amount of such stock through the county judge and justices of the peace. It was held that taxes paid and used merely to discharge the interest on the bonds did not entitle the tax-payers to stock, and the corporation itself was entitled

to vote the stock represented by the amount of bonds still outstanding. *Hancock v. Louisville &c. R. Co.*, 145 U. S. 409, 12 Sup. Ct. 960, 36 L. ed. 755; *Shelby R. Co. v. Louisville &c. R. Co.*, 145 U. S. 409, 12 Sup. Ct. 969, 36 L. ed. 755. Tax-payers do not acquire an equitable lien upon the property of a railroad company, in the hands of a purchaser after a foreclosure sale subject to equitable liens, by reason of payments made by them upon a subscription of the county to the capital stock of such company, and the refusal of the company to issue stock for them therefor, whether such payments entitle them to stock or not. The fact that the payments were made to one of the contractors for building the road makes no difference. *Spurlock v. Missouri Pac. R. Co.*, 90 Mo. 199, 2 S. W. 219.

<sup>69</sup> *Morgan County v. Allen*, 103 U. S. 498, 26 L. ed. 498; *Morgan County v. Thomas*, 76 Ill. 120. See also *French v. Teschemaker*, 24 Cal. 518.

it takes its stock with all the incidents which attach to the position of a stockholder.<sup>70</sup> Thus it may be held liable for labor and material furnished to the company under a statute making stockholders liable therefor,<sup>71</sup> unless the statute authorizing the subscription expressly provides otherwise.

§ 1061 (870). **Defenses to municipal subscriptions.**—Taxpayers may defend against subscriptions upon the ground that there has been a failure to comply with the requirements of the statute, and so, in some cases, may the municipality. It may be said that the general rule is that the same defenses to the payment of subscriptions, made upon condition, are open to municipalities that may be interposed by others making conditional subscriptions. It is true, however, as elsewhere indicated, that the municipality and the taxpayers may be estopped by their conduct to defend against the subscriptions.<sup>72</sup>

<sup>70</sup> Shipley v. Terre Haute, 74 Ind. 297. See Murray v. Charleston, 96 U. S. 432, 24 L. ed. 760; National Bank v. Case, 99 U. S. 628, 25 L. ed. 448; Cairo v. Zane, 149 U. S. 122, 13 Sup. Ct. 803, 37 L. ed. 673; Hancock v. Louisville &c. R. Co., 145 U. S. 409, 12 Sup. Ct. 969, 36 L. ed. 755; Missouri River &c. R. Co. v. Miami Co., 12 Kans. 482; Kreiger v. Shelby R. Co., 84 Ky. 66.

<sup>71</sup> Shipley v. Terre Haute, 74 Ind. 297.

<sup>72</sup> See Arkansas So. R. Co. v. Wilson (La. Ann.), 42 So. 976. A township subscribed certain warrants in aid of a railroad, which were to be issued when the company should have built and put in operation, "with cars running thereon, by lease or otherwise, its said railroad, between two designated cities." The railroad company built its road from one to within 111

feet of the city limits of the other, at which point it intersected another road, and by running its cars over the road to its depot from this intersection, it continuously operated the road between the two cities. The court held that this was a substantial compliance with the conditions of the subscription, and that mandamus would lie to compel the issue of the warrants. Chicago &c. R. Co. v. Makepeace, 44 Kans. 676, 24 Pac. 1104. Where a county subscribes under an act authorizing counties to subscribe to the construction of a railroad, such county, and the citizens thereof, must be taken to have acted with reference to the fact that the charter was liable to be amended as occasion should require. Powell v. Supervisors Brunswick Co., 88 Va. 707, 14 S. E. 543. Amendments to the charter, which have not been acted upon by the company, do



§ 1062 (871). **Estoppel of taxpayers.**—Taxpayers may, by silence and acquiescence, estop themselves from successfully objecting that the proceedings have not been conducted in conformity to the statute. If objections are seasonably and appropriately made they will often avail where they would be unavailing if made after rights have been acquired by the railroad company or third persons. It may be safely said that the general rule is that if the taxpayers stand by without objection while considerable sums of money are expended in the construction of the road, the courts will hold them estopped to aver that there were irregularities in the proceedings.<sup>73</sup> This doctrine

not release the county from its subscription. *Taylor v. Board*, 86 Va. 506, 10 S. E. 433. See also *Kleise v. Galusha*, 78 Iowa 310, 43 N. W. 217; *Murfreesboro R. Co. v. Hertford Co.*, 108 N. Car. 56, 12 S. E. 952; *Baltimore &c. R. Co. v. Pumphrey*, 74 Md. 86, 21 Atl. 559.

<sup>73</sup> *Dows v. Chicago*, 11 Wall. (U. S.) 108, 20 L. ed. 65; *Moulton v. Evansville*, 25 Fed. 382; *New Haven v. Fair Haven &c. R. Co.*, 38 Conn. 422, 9 Am. Rep. 399; *Menard v. Hood*, 68 Ill. 121; *Muncy v. Joest*, 74 Ind. 409; *Ricketts v. Spraker*, 77 Ind. 371; *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124; *Kellog v. Ely*, 15 Ohio St. 64; *Rochdale Co. v. King*, 16 Beav. 630; *Johnson v. Kessler*, 76 Iowa 411, 41 N. W. 57. See also *Page v. Oneida Irr. Dist.*, 26 Idaho 108, 141 Pac. 238. After the collection and payment into the county treasury of taxes voted by a township in aid of a railway, the county can not set up the defense that the railway company had sold and disposed of its property and franchises before the taxes became due. *Merrill v. Marshall Co.*, 74 Iowa 24, 36 N. W.

778. Where a township voted bonds to aid in the construction of a railroad, made a subscription to the capital stock, and received and retains the certificates of stock issued to it, the proceedings having been regular and duly authorized, and the railroad was constructed through the township in strict compliance with the terms of the subscription, and is being regularly operated, the township is estopped in an action of mandamus to compel the issue and delivery of the bonds voted, from asserting that the petition presented to the board of county commissioners, requesting an election to be called at which to vote the bonds, was not signed by two-fifths of the resident tax-payers of the township, where the board of county commissioners had found and determined at the time of its presentation that it was so signed, and was legal in all other respects. *Hutchinson &c. R. Co. v. Board of Comrs.* 48 Kans. 70, 28 Pac. 1078, 15 L. R. A. 401, 30 Am. St. 273; *Chicago &c. R. Co. v. Board of Comrs.* 49 Kans. 399, 30 Pac. 456.

cannot apply, however, where there is an entire absence of power, but it does apply where power exists, although there may be many material errors and irregularities.<sup>74</sup>

§ 1063 (872). **Remedies of taxpayers.**—The validity of a municipal subscription or donation, or the issue of bonds thereunder, may in some jurisdictions be tested in many cases by certiorari, bill of review, or writ of error.<sup>75</sup> But the remedy most often resorted to by taxpayers to prevent illegal municipal aid, or the unlawful levy of a tax to pay the same, is that by way of injunction. As a general rule, any one or more taxpayers of the municipality may institute a suit in behalf of all to enjoin the unauthorized levy of a tax or the illegal issue or payment of bonds.<sup>76</sup> So, the payment of bonds or a subscription may be enjoined by the taxpayers, in a proper case, where the company

<sup>74</sup> *Sinnett v. Moles*, 38 Iowa 25 (election invalidated by fraud).

<sup>75</sup> *Anderson Co. v. Houston &c. R. Co.*, 52 Tex. 228. See as to action of board of commissioners in regard to cancelling aid voted being final unless appealed from, and the effect of dismissing an appeal, *State v. Burgett*, 151 Ind. 94, 51 N. E. 139.

<sup>76</sup> *New Orleans &c. R. Co. v. Dunn*, 51 Ala. 128; *Campbell v. Paris &c. R. Co.*, 71 Ill. 611; *Rutz v. Calhoun*, 100 Ill. 392; *Bittinger v. Bell*, 65 Ind. 45; *Hill v. Probst*, 120 Ind. 528, 22 N. E. 644; *Alvis v. Whitney*, 43 Ind. 83; *Nefzger v. Davenport &c. R. Co.*, 36 Iowa 642; *State v. Hager*, 91 Mo. 452; *Newmeyer v. Missouri &c. R. Co.*, 52 Mo. 81, 14 Am. Rep. 394; *Winston v. Tennessee &c. R. Co.*, 1 Baxt. (Tenn.) 60; *Redd v. Henry Co.*, 31 Grat. (Va.) 695; *Lynchburg &c. R. Co. v. Dameron*, 95 Va. 547, 28 S. E. 951. See also *Morris v. Merrill*,

44 Nebr. 423, 62 N. W. 865; *Brooks v. McLean*, 95 Nebr. 16, 144 N. W. 1067; *Gregg v. Sanford*, 65 Fed. 151; *Flack v. Hughes*, 67 Ill. 384; *Finney v. Lamb*, 54 Ind. 1; *Bronenberg v. Board*, 41 Ind. 502; *Cattell v. Lowry*, 45 Iowa 478; *Blunt v. Carpenter*, 68 Iowa 265, 26 N. W. 438; *Kentucky &c. R. Co. v. Bourbon County*, 85 Ky. 98, 2 S. W. 687; *Metzger v. Attica &c. R. Co.*, 79 N. Y. 171; *Graves v. Moore Co. Comrs.*, 135 N. Car. 49, 47 S. E. 134. *McDougal v. Racine County*, 156 Wis. 663, 146 N. W. 794; note to *Pierce v. Hagans*, 79 Ohio St. 9, in 36 L. R. A. (N. S.) 1. It has been held that an allegation that the railroad company did not "legally" commence work was not equivalent to an averment that the company failed to commence work upon its road within two years from the levying of the tax. *Sellers v. Beaver*, 97 Ind. 111.

has not performed the conditions upon which the subscription was made or the bonds issued.<sup>77</sup> But it has been held that injunction will not lie until after a forfeiture has been declared.<sup>78</sup> Where the amount of taxes that may be voted and levied in aid of a railroad company is limited by law, no authority exists to submit to the electors the question of voting aid in excess of that amount, and taxes levied under such a vote may be enjoined.<sup>79</sup> But, as a general rule, injunction will not lie at the suit of taxpayers to prevent an election under legislative authority to enable the citizens of the municipality to vote to levy or not to levy a tax upon themselves in aid of a railroad.<sup>80</sup> And mere irregularities, which do not prejudice any substantial rights, will not be sufficient ground for an injunction.<sup>81</sup> So, it has been held that after a tax has been voted and levied, the sufficiency of the petition or the result of the vote as declared by the canvassing board cannot be collaterally assailed or inquired into in a suit by the taxpayers to enjoin the collection of the taxes.<sup>82</sup> This is, indeed,

<sup>77</sup> *Wagner v. Meety*, 69 Mo. 150. See also *Midland v. County Board*, 37 Nebr. 582, 56 N. W. 317; *Chicago &c. R. Co. v. Marseilles*, 84 Ill. 145; *Peed v. Millikan*, 79 Ind. 86; *Lamb v. Anderson*, 54 Iowa 190. But it is held that insolvency of the company does not necessarily render a tax previously levied invalid. *Wilson v. Hamilton Co.*, 68 Ind. 508.

<sup>78</sup> *Nixon v. Campbell*, 106 Ind. 47, 4 N. E. 296, 7 N. E. 258; *Pittsburg &c. R. Co. v. Harden*, 137 Ind. 486, 37 N. E. 324. See also *Demaree v. Bridges*, 30 Ind. App. 131, 65 N. E. 601.

<sup>79</sup> *Burlington &c. R. Co. v. Clay Co.*, 13 Nebr. 367. See also *Hedges v. Dixon Co.*, 150 U. S. 182, 14 Sup. Ct. 71; *Bradford v. San Francisco*, 112 Cal. 537, 44 Pac. 912; *State v. Woodside*, 254 Mo. 580, 163 S. W. 845, and note in 36 L. R. A. (N. S.) 9.

<sup>80</sup> *Roudanez v. New Orleans*, 29 La. Ann. 271.

<sup>81</sup> *Ricketts v. Spraker*, 77 Ind. 371; *Lafayette &c. R. Co. v. Geiger*, 34 Ind. 185; *Demaree v. Johnson*, 150 Ind. 419, 49 N. E. 1062, 50 N. E. 376; *Milwaukee &c. R. Co. v. Kossuth Co.*, 41 Iowa 57; *Louisville &c. R. Co. v. Davidson Co.*, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424; *Texas &c. R. Co. v. Harrison Co.*, 54 Tex. 119. See also *Chicago &c. R. Co. v. Grant, Clerk &c.*, 55 Kans. 386, 40 Pac. 654; *Robinson v. Wilmington*, 65 Fed. 856; *Whitney v. Chicago &c. R. Co.*, 133 Iowa 508, 110 N. W. 912. Note in 36 L. R. A. (N. S.) 25. Compare, however, *Montgomery Co. Comrs. v. Henderson*, 122 Md. 533, 89 Atl. 858.

<sup>82</sup> *Ryan v. Varga*, 37 Iowa 78; *Dwyer v. Hackworth*, 57 Tex. 245.

the general rule.<sup>83</sup> As in other cases in which an injunction is sought, the plaintiff should act promptly, and show the necessary grounds for the interposition of a court of equity.<sup>84</sup> If a taxpayer delays action until after the tax has been collected and the money paid over to the bondholders of the railroad company, when he might have obtained an injunction restraining the collection of the tax by acting in time, he cannot recover the amount of the tax paid by himself from the treasurer of the municipality,<sup>85</sup> but there are cases in which the payment of the tax to the company may be restrained even after it has been collected.<sup>86</sup> After bonds have been issued and a tax levied to pay them, a taxpayer can enjoin its collection in a suit against the municipality and its treasurer only upon grounds constituting a good defense on the part of the city to the payment of the bonds in the hands of the present holders.<sup>87</sup>

**§ 1064 (873). Remedies of municipalities.**—The rights and remedies of a municipal corporation which has subscribed for stock in aid of a railroad are, in the main, the same as those of

<sup>83</sup> *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124, and numerous authorities there cited; *Board v. Hall*, 70 Ind. 469; *Pittsburg &c. R. Co. v. Harden*, 137 Ind. 486, 37 N. E. 324; *Bell v. Maish*, 137 Ind. 226, 36 N. E. 358, 1118; *Demaree v. Bridges*, 30 Ind. App. 131, 65 N. E. 601; *Citizens' Sav. & L. Assn. v. Perry County*, 156 U. S. 692, 15 Sup. Ct. 547, 39 L. ed. 585. But see *Kentucky Union Ry. Co. v. Bourbon Co.*, 85 Ky. 98; *People v. Spencer*, 55 N. Y. 1; *McPike v. Pen*, 51 Mo. 63; *DeForth v. Wisconsin &c. R. Co.*, 52 Wis. 320, 9 N. W. 17, 38 Am. Rep. 737, 5 Am. & Eng. R. Cas. 28; *Harding v. Rockford &c. R. Co.*, 65 Ill. 90. See also as to appeal and not mandamus being the proper remedy of petitioners where a board refuses for want of authority to call an election. *State*

*v. Board of Comrs.*, 175 Ind. 400, 94 N. E. 716.

<sup>84</sup> *Moulton v. Evansville*, 25 Fed. 382, 10 Am. & Eng. Ency. of Law, 802, 857, et seq.; *Menard v. Hood*, 68 Ill. 121; *Vickery v. Blair*, 134 Ind. 554, 32 N. E. 880; *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124; *Trustees &c. School Dist. v. Garvey*, 80 Ky. 159; *Chamberlain v. Lyndeborough*, 64 N. H. 563, 14 Atl. 865; ante, § 1062. See also *Schmitz v. Zeh*, 91 Minn. 290, 97 N. W. 1049; *Parker v. Concord*, 71 N. H. 468, 52 Atl. 1095.

<sup>85</sup> *Butler v. Fayette County*, 46 Iowa 326. See also *Babcock v. Fond du Lac*, 58 Wis. 230, 16 N. W. 625 (distinguished in *McGowan v. Paul*, 141 Wis. 388, 123 N. W. 253).

<sup>86</sup> *Missouri &c. R. Co. v. Miami Co.*, 12 Kans. 230.

<sup>87</sup> *Wilkinson v. Peru*, 61 Ind. 1.

an individual subscriber.<sup>88</sup> As a general rule, any act of the railroad company that would release an individual subscriber will release the municipality as between it and the company, and, in a proper case, a bill will lie for the rescission of the subscription.<sup>89</sup> So, the municipality may, in a proper case, obtain an injunction restraining the company from violating conditions upon which the subscription was made,<sup>90</sup> or a rescission of a fraudulent contract into which it has entered.<sup>91</sup> The municipality may enforce the delivery of the stock in the same manner, and, as a rule, under the same circumstances as an individual subscriber.<sup>92</sup> A provision in the enabling act that the citizens who pay the tax shall receive from the municipality, with its consent, the stock delivered to it by the railroad company has been held not to invalidate the tax or relieve the municipality of the obligation to pay its subscription.<sup>93</sup> Where bonds have been issued fraudulently or without authority of law, the municipality may maintain a suit to have them declared void and canceled by making the bondholders parties.<sup>94</sup> As we shall hereafter show,

<sup>88</sup> It occupies, in general, the same position as any other subscriber—no better and no worse. *Pittsburg &c. R. Co. v. Allegheny Co.*, 79 Pa. St. 210; *Morgan County v. Allen*, 103 U. S. 498, 26 L. ed. 498; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Morgan County v. Thomas*, 76 Ill. 120; *State v. Holladay*, 72 Mo. 499; *Shipley v. Terre Haute*, 74 Ind. 297; *Noesen v. Port Washington*, 37 Wis. 168. Part of a county may be considered as a municipality for the purpose of owning and voting stock in a railroad company. *Hancock v. Louisville &c. R. Co.*, 145 U. S. 409, 12 Sup. Ct. 969, 36 L. ed. 755.

<sup>89</sup> *Crawford Co. v. Pittsburg &c. R. Co.*, 32 Pa. St. 141; *Lawrence Co. v. Northwestern R. Co.*, 32 Pa. St. 144; *Lawrence County's Appeal*, 67 Pa. St. 87.

<sup>90</sup> *Platteville v. Galena &c. R. Co.*,

43 Wis. 493. See also *Perkins v. Port Washington*, 37 Wis. 177.

<sup>91</sup> *People v. Logan Co.*, 63 Ill. 374.

<sup>92</sup> *Wapello v. Burlington &c. R. Co.*, 44 Iowa 585.

<sup>93</sup> *Talbot v. Dent*, 9 B. Mon. (Ky.) 526; *Slack v. Maysville &c. R. Co.*, 13 B. Mon. (Ky.) 1.

<sup>94</sup> *Waverly v. Auditor*, 100 Ill. 354; *Paola &c. R. Co. v. Anderson Co.*, 16 Kans. 302; *Comrs. of Anderson Co. v. Paola &c. R. Co.*, 20 Kans. 534. See *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. ed. 416; *Roberts v. Bolles*, 101 U. S. 119, 25 L. ed. 880; *Springport v. Teutonia &c. Bank*, 75 N. Y. 397; *Chester &c. R. Co. v. Caldwell Co.*, 72 N. Car. 486. An action may also lie to correct errors in the bonds and make them conform to the vote authorizing their issue. *Essex v. Day*, 52 Conn. 483.

a municipality which has authority to issue negotiable bonds may be estopped from questioning their validity in the hands of bona fide purchasers; but it has been held that it is not estopped from enjoining the officers of a railroad company from disposing of bonds irregularly issued by the mere fact that it has accepted the stock, and levied a tax to pay the interest upon the bonds.<sup>95</sup> It has also been held that an officer of a railroad company, who, with full knowledge that the bonds have become invalid because the company has ceased to exist, negotiates them to innocent purchasers, is liable to the municipality for what it is compelled to pay such purchasers,<sup>96</sup> and a county may have the assistance of a court of equity to restrain its treasurer from wrongfully applying funds in his hands to the payment of void bonds.<sup>97</sup>

§ 1065 (874). **Remedies of railroad companies.**—Where all the preliminary steps requisite to the valid issue of bonds or the collection of the money voted in aid of a railroad company have been taken, and nothing remains but the ministerial duty to issue the bonds, levy the taxes, or make the collection, the company, having performed all necessary conditions on its part, may compel the performance of such duty by mandamus.<sup>98</sup> It has been

<sup>95</sup> *Madison Co. v. Paxton*, 57 Miss. 701.

<sup>96</sup> *Farnham v. Benedict*, 107 N. Y. 159, 13 N. E. 784. So where the company unlawfully and fraudulently negotiates the bonds. *Plainview v. Winona &c. R. Co.*, 36 Minn. 505, 517, 32 N. W. 745.

<sup>97</sup> *Missouri River &c. R. Co. v. Miami Co.*, 12 Kans. 230. See also *Midland v. County Board*, 37 Nebr. 582, 56 N. W. 317.

<sup>98</sup> *Cherokee County v. Wilson*, 109 U. S. 621, 3 Sup. Ct. 352, 27 L. ed. 1054; *United States v. Clark County*, 96 U. S. 211, 24 L. ed. 628; *California &c. R. Co. v. Butte Co.*, 18 Cal. 671; *Napa Valley R. Co. v. Napa Co.*, 30 Cal. 435; *Columbia Co. v. King*, 13 Fla. 451; *Chicago*

*&c. R. Co. v. St. Anne*, 101 Ill. 151; *People v. Getzendaner*, 137 Ill. 234, 34 N. E. 297; *Jager v. Doherty*, 61 Ind. 528; *Augusta v. Maysville &c. R. Co.*, 97 Ky. 145, 30 S. W. 1; *Duncan v. Mayor*, 8 Bush (Ky.) 98; *People v. Allen*, 52 N. Y. 538; *People v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480; *Raleigh &c. R. Co. v. Jenkins*, 68 N. Car. 502; *Commonwealth v. Pittsburgh*, 34 Pa. St. 496; *Louisville &c. R. Co. v. Davidson Co.*, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424. Mandamus will lie to compel the proper officers to promulgate the result of an election to determine whether a tax shall be levied in aid of a railroad. *State v. Monroe*, 46 La. Ann. 1276, 15 So. 625.

held, however, that, unless the law makes it the duty of the municipality or its proper officers to make the subscription or issue bonds,<sup>99</sup> so that they have no discretion in the matter, the mere fact that an election has resulted in favor of making such subscription or issuing the bonds creates no contract with the company, and mandamus will not lie.<sup>1</sup> But when the subscription has once been legally made, mandamus will lie, upon tender of the stock, to compel the municipality to issue bonds<sup>2</sup> or take steps to raise the money to pay the subscription in accordance with the statute.<sup>3</sup> If, however, the aid is unauthorized,<sup>4</sup> or necessary conditions have not been complied with,<sup>5</sup> the writ will be refused. But mere delay on the part of the railroad company in enforcing its rights, where no one is injured thereby, has been held insufficient to prevent it from afterwards enforcing them by mandamus.<sup>6</sup> It has been held that, where a perpetual injunction

<sup>99</sup> *People v. Dutcher*, 56 Ill. 144; *People v. Logan Co.*, 63 Ill. 374; *People v. Holden*, 91 Ill. 446.

<sup>1</sup> *Land Grant R. &c. Co. v. Davis Co.*, 6 Kans. 256; *State v. Roscoe*, 25 Minn. 445; *People v. Fort Edward*, 70 N. Y. 28. See also *Chicago &c. R. Co. v. St. Anne*, 101 Ill. 151; *Crawford Co. v. Louisville &c. R. Co.*, 39 Ind. 192; *Chicago &c. R. Co. v. Olmstead*, 46 Iowa 316; *Cumberland &c. R. Co. v. Barren Co.*, 10 Bush (Ky.) 604; *State v. Garoutte*, 67 Mo. 445; *State v. Board*, 166 Ind. 162, 76 N. E. 986.

<sup>2</sup> *Selma &c. R. Co., Ex parte*, 45 Ala. 696, 6 Am. Rep. 722. *Atchison &c. R. Co. v. Jefferson Co.*, 12 Kans. 127; *State v. Lake City*, 25 Minn. 404; *State v. Jennings*, 48 Wis. 549.

<sup>3</sup> *Clark Co. v. Paris &c. Co.*, 11 B. Mon. (Ky.) 143; *Osage Valley &c. R. Co. v. Morgan Co.*, 53 Mo. 156; *Cincinnati &c. R. Co. v. Clinton Co.*, 1 Ohio St. 77. See also

*Fowler v. Oakdale*, 158 Ky. 603, 166 S. W. 195.

<sup>4</sup> *Norton v. Dyersburg*, 127 U. S. 160, 8 Sup. Ct. 1111, 32 L. ed. 85; *State v. Highland*, 25 Minn. 355; *State v. Minneapolis*, 32 Minn. 501, 21 N. W. 722; *State v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622. See also *Clay County v. McAleer*, 115 U. S. 616, 6 Sup. Ct. 199, 29 L. ed. 482; *United States v. Macon County*, 99 U. S. 582, 25 L. ed. 331; *Supervisors v. United States*, 18 Wall. (U. S.) 71, 21 L. ed. 771; *Brownsville v. Loague*, 129 U. S. 493, 9 Sup. Ct. 327, 32 L. ed. 780; *People v. Logan Co.*, 63 Ill. 374; *State v. Rainey*, 74 Mo. 229.

<sup>5</sup> *People v. Waynesville*, 88 Ill. 469; *People v. Holden*, 91 Ill. 446; *People v. Glann*, 70 Ill. 232; *Essex Co. R. Co. v. Luneburgh*, 49 Vt. 143. See *Casady v. Lawry*, 49 Iowa 523.

<sup>6</sup> *State v. Jennings*, 48 Wis. 549, 4 N. W. 641. See also *Merrill v. Marshall Co.*, 74 Iowa 24, 36 N. W.

has been granted prohibiting the officers from making a subscription, mandamus will not afterwards lie at the suit of the railroad company to compel them to do so,<sup>7</sup> and so, on the other hand, it has been held that, if a mandamus has first been awarded, injunction will not lie to prevent them from doing what they have been ordered to do by the mandate of the court.<sup>8</sup> The mere pendency of quo warranto proceedings against the company or the individuals composing it is not, however, a good defense to mandamus proceedings instituted by the company to compel the municipality to issue its bonds in a proper case.<sup>9</sup> Other remedies may doubtless be resorted to in some cases, but mandamus is usually the most desirable remedy, and is frequently the only remedy of the railroad company.<sup>10</sup>

**§ 1066 (874a). Remedies of railroad companies—Continued.**

—In a proceeding to enforce a tax in aid of a railroad, it has been held sufficient to aver as a fact that the railroad company has been permanently located in the township without alleging that this fact has been judicially determined.<sup>11</sup> It has also been held that a proper record of the county board appropriating money to aid a railroad company, and showing all the facts necessary to give jurisdiction, is sufficient evidence of the appropriation and the corporate existence of the railroad company seeking the relief,<sup>12</sup> and can not be collaterally attacked.<sup>13</sup> But this might not be true in all jurisdictions and under all statutes. It is clear,

778; *Merrill v. Welsher*, 50 Iowa 61.

<sup>7</sup> *Ohio &c. R. Co. v. Commissioners*, 7 Ohio St. 278. See also *Fleming*, Ex parte, 4 Hill (N. Y.) 581; *State v. Board*, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984. But compare *Knox County v. Aspinwall*, 24 How. (U. S.) 376, 16 L. ed. 735.

<sup>8</sup> *Cumberland &c. R. Co. v. Judge*, 10 Bush (Ky.) 564. But see *Brownsville v. Loague*, 129 U. S. 493, 9 Sup. Ct. 327, 32 L. ed. 780; *McKinney v. Frankfort &c. R. Co.*,

140 Ind. 95, 38 N. E. 170, 39 N. E. 500, with which compare, however, *State v. Board*, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984.

<sup>9</sup> *Oroville &c. R. Co. v. Plumas Co.*, 37 Cal. 354.

<sup>10</sup> See *Smith v. Bourbon County*, 127 U. S. 105, 8 Sup. Ct. 1034, 32 L. ed. 73, 22 Am. & Eng. Corp. Cas. 74, 78.

<sup>11</sup> *Caffyn v. State*, 91 Ind. 324.

<sup>12</sup> *Caffyn v. State*, 91 Ind. 324. See also *Nixon v. Campbell*, 106 Ind. 47, 4 N. E. 296, 7 N. E. 258.

<sup>13</sup> *Board v. Montgomery*, 106 Ind.



however, that, in a petition for mandamus to enforce the levy of a railroad tax, it is not necessary to state every detail of the election; and in a recent case in Louisiana it is held that all that is necessary is to give the requisite particulars serving as a basis for the mandamus, as that, on a certain day, the authorities of the defendant town held an election to take the sense of the taxpayers of the town touching the imposition of a tax of so many mills for so many years in aid of the construction of the plaintiff railroad, and that the result of the election was duly ascertained and proclaimed by the authorities of the town, and was favorable to the tax, and that the railroad has been duly completed according to agreement, and the tax earned.<sup>14</sup> The fact that a township is not made a defendant in a suit to enjoin a board of county commissioners and county officers from enforcing a railroad aid tax voted by the township, in Indiana, does not render the injunction decree void as to those who were made parties and duly served with process, and mandamus will not lie to compel the board to order the collection of the tax where such board had already been enjoined from so doing and the personnel of the board has since changed.<sup>15</sup>

517, 6 N. E. 915. See also *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124.

<sup>14</sup> *Arkansas So. R. Co. v. Wilson*, 118 La. 395, 42 So. 976. It is also held in this case that "the assignment by the railroad company to private individuals of the right to the avails of such a tax will not operate an abandonment of the tax, where the right to assign the tax has been unconditionally granted to

the railroad. A private individual may be the beneficiary of such a tax as well as a corporation, where he becomes so by assignment; and it is no concern of the town, or of the taxpayers, whether such assignment has been with or without consideration."

<sup>15</sup> *State v. Board*, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984. See also *State v. Board*, 166 Ind. 162, 76 N. E. 986.

## CHAPTER XXXV.

### MUNICIPAL AID BONDS

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§ 1070 (875). **Power to issue aid bonds.**—The power of a municipality to aid a railroad company, as we have elsewhere shown, is not an ordinary or implied corporate power, but exists only in cases where it is clearly granted by statute.<sup>1</sup> The whole subject of granting aid is a statutory one, and it is always necessary to look to the statute to ascertain the nature and extent of the power.<sup>2</sup> The rule which is, as we believe, supported

<sup>1</sup> Ante, §§ 1011, 1015.

<sup>2</sup> See *United States v. Clark County*, 96 U. S. 211, 24 L. ed. 628; *United States v. Macon County*, 99 U. S. 582, 25 L. ed. 331; *Columbus v. Dennison*, 69 Fed. 58; *Hutchinson v. Self*, 153 Ill. 542, 39 N. E. 27; *State v. Macon Co.*, 41 Mo. 453; *State v. Shortridge*, 56 Mo. 126. It has been held that general authority to subscribe to the stock of a railroad company or to make a donation of money to aid in the construction of its road, carries with it by necessary implication the power to borrow money for that purpose, and to issue bonds and sell them as a means to that end. *Seybert v. Pittsburg*, 1 Wall. (U.

S.) 272, 17 L. ed. 553; *United States v. New Orleans*, 98 U. S. 381, 25 L. ed. 225; *United States v. Macon County*, 99 U. S. 582, 25 L. ed. 331; *Hancock v. Chicot Co.*, 32 Ark. 575; *Thompson v. Peru*, 29 Ind. 305; *Nichol v. Nashville*, 9 Humph. (Tenn.) 252. Authority "to obtain money on loan on the faith and credit of the city for the purpose of contributing to works of internal improvement," was held to confer upon the city the power to guarantee payment of the bonds of a railroad company. *Savannah v. Kelly*, 108 U. S. 184, 2 Sup. Ct. 468, 27 L. ed. 696. And it was held that an act which authorized a town to subscribe for shares in the

by principle, and sanctioned by authority, is that there is no power to issue bonds to aid a railroad company unless the power is clearly conferred by statute.<sup>3</sup> A municipal corporation is in no sense a business or trading corporation, but is a governmental instrumentality, so that the true and just view is, that it has no power to issue bonds to aid in the construction of a railroad, unless the power is expressly, or at least by necessary implication, conferred by statute.<sup>4</sup> The power to issue negotiable bonds is a high and important one, and there is strong reason for holding that, unless expressly conferred, it does not exist. Some of the cases take a different view of the general question, but, in our opinion, they are not well decided. Authority to issue bonds to

capital stock of a railroad company, and to raise by loans or taxes the money required to pay the installments of the subscription, conferred on the town by implication the power to issue bonds. *Commonwealth v. Williamstown*, 156 Mass. 70, 30 N. E. 472. But it has also been held that power to levy a tax, and make a donation to a railroad, or purchase its stock, confers no authority to issue bonds in anticipation of the tax. *Middleport v. Aetna Life Ins. Co.*, 82 Ill. 562; *Lippincott v. Pana*, 92 Ill. 24; *Concord v. Robinson*, 121 U. S. 165, 7 Sup. Ct. 937, 30 L. ed. 885; *Wells v. Supervisors*, 102 U. S. 625, 26 L. ed. 122; *Katzenberger v. Aberdeen*, 121 U. S. 172, 7 Sup. Ct. 947, 30 L. ed. 911; *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. 1101, 32 L. ed. 77; *Leavenworth &c. R. Co. v. Commissioners of Douglas Co.*, 18 Kans. 169; *Daviess Co. v. Howard*, 13 Bush (Ky.) 101; *Wellsborough v. New York &c. R. Co.*, 76 N. Y. 182; *Winston v. Tennessee &c. R. Co.*, 1 Baxt. (Tenn.) 60.

<sup>3</sup> Ante. § 1026.

<sup>4</sup> Ante, § 1026. The rule that is best sustained by authority is thus stated by the supreme court of the United States: "It is well-settled that a municipal corporation, in order to exercise the power of becoming a stockholder in a railroad corporation, must have such power expressly conferred upon it by a grant from the legislature; and that even the power to subscribe for such stock does not carry with it the power to issue negotiable bonds in payment for the subscription, unless the power to issue such bonds is expressly or by necessary implication conferred by statute." *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. 1101, 32 L. ed. 77, citing *Pulaski v. Gilmore*, 21 Fed. 870; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676, 19 L. ed. 1040; *Wells v. Supervisors*, 102 U. S. 625, 26 L. ed. 122; *Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. 361, 27 L. ed. 669; *Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. ed. 1026; *Tax Payers v. Tennessee Central R. Co.*, 11 Lea

aid in the construction of a railroad may, however, give power to make the bonds negotiable, being such as are usually issued in such cases.<sup>5</sup>

§ 1071 (876). **Legislative authority requisite.**—There is no power, as elsewhere demonstrated, to issue bonds to aid a railroad company except where it is conferred by express statute.<sup>6</sup> Thus, a mere voluntary vote of the people of a city under a city ordinance, and without any authority from the legislature, will not confer any rights upon the city to extend aid to a railroad.<sup>7</sup> Authority to issue bonds to pay debts or to borrow money for

(Tenn.) 329. See also *Swanson v. Ottumwa*, 131 Iowa 540, 106 N. W. 9, 5 L. R. A. (N. S.) 860; *Brown v. Newburyport*, 209 Mass. 259, 95 N. E. 504; *Weil v. Newbern*, 126 Tenn. 223, 148 S. W. 680, Ann. Cas. 1913N, 25, and other authorities cited in note; *Elliott Const.*, § 616. The grant of power to a municipality to subscribe for stock in a railroad does not imply the power to issue bonds therefor. *Norton v. Dyersburg*, 127 U. S. 160, 8 Sup. Ct. 1111, 32 L. ed. 85; *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. 562, 33 L. ed. 887. Under a Kansas statute which provides that no bonds except for the erection and furnishing of school houses shall be voted for and issued by any county or township within one year after the organization of such new county, a newly organized county can not legally vote for and issue bonds in aid of a railroad company within one year after the county has been organized. *State v. Haskell Co.*, 40 Kans. 65, 9 Pac. 362.

<sup>5</sup> *Jefferson v. Jennings B. & C. Co.*, 35 Tex. Civ. App. 74, 79 S. W. 876. And it is held in this case that they may be issued to a vender of land

to be used as a railroad depot.

<sup>6</sup> *Ante*, §§ 1013, 1026; *Young v. Clarendon Tp.*, 132 U. S. 340, 10 Sup. Ct. 107, 33 L. ed. 356; *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. 110, 32 L. ed. 77; *Concord v. Robinson*, 121 U. S. 165, 7 Sup. Ct. 937, 30 L. ed. 885; *Norton v. Dyersburg*, 127 U. S. 160, 8 Sup. Ct. 1111, 32 L. ed. 85; *Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. ed. 1026; *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. 562, 33 L. ed. 887; *Wells v. Supervisors*, 102 U. S. 625, 26 L. ed. 122. See *Savannah v. Kelly*, 108 U. S. 184, 2 Sup. Ct. 468, 27 L. ed. 696; *Ottawa v. Carey*, 108 U. S. 110, 12 Sup. Ct. 861, 27 L. ed. 669; *People v. Coon*, 25 Cal. 635; *Lafayette v. Cox*, 5 Ind. 38; *Jeffries v. Lawrence*, 42 Iowa 498; *Clay v. Nicholas County*, 4 Bush (Ky.) 154; *Pennsylvania R. Co. v. Philadelphia*, 47 Pa. St. 189; *Milan v. Tennessee & C. R. Co.*, 11 Lea (Tenn.) 329; *Justices v. Knoxville & C. R. Co.*, 6 Coldw. (Tenn.) 598; *Fisk v. Kenosha*, 26 Wis. 23.

<sup>7</sup> *Quincy & C. R. Co. v. Morris*, 84 Ill. 410.

municipal purposes does not confer power to issue bonds as a donation to a railroad.<sup>8</sup> It may be said generally that, if no power to issue the bonds existed at the time they were issued, they are void in whatever or whosoever hands they may be.<sup>9</sup> But a general statute, granting authority to cities to issue such bonds, applies, and gives authority to cities incorporated thereafter as well as before.<sup>10</sup>

**§ 1072 (877). Constitutional questions—Completed road.**—The decisions which support the doctrine that a municipal corporation may be empowered to aid in the construction of a

<sup>8</sup> *Ryan v. Lynch*, 68 Ill. 160. A city was duly authorized, by a popular vote, to subscribe \$100,000 to the stock of a railroad company, and to issue its bonds to an equal amount in payment therefor. Afterward the city council passed a resolution binding the city to sell to the company all this stock for \$5,000, to be paid by a return of its bonds to that amount. The bonds were issued, and by direction of the council placed in escrow, to be delivered to the company upon the performance of certain conditions, the depositary being authorized and directed, upon receipt of the stock, to sell the same to the railroad company for \$5,000 of the city bonds. There was nothing to show that the railroad company had agreed to purchase the stock, but, after the stock and bonds were duly exchanged, the stock was sold in the manner proposed. The court held that this transaction did not convert the "subscription," which was authorized by the statute, into an unauthorized donation of \$95,000, and, if any wrong was done by the council in thus disposing of the

stock, it did not vitiate the bonds in the hands of a bona fide purchaser. *Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 803, 37 L. ed. 673. See ante, § 1028.

<sup>9</sup> *Anthony v. Jasper County*, 101 U. S. 693, 25 L. ed. 1005; *McClure v. Oxford*, 94 U. S. 429, 24 L. ed. 129; *Elmwood v. Marcy*, 92 U. S. 289, 23 L. ed. 710; *Thomas v. Richmond*, 12 Wall. (U. S.) 349, 20 L. ed. 453; *Marsh v. Fulton Co.*, 10 Wall. (U. S.) 676, 19 L. ed. 1040; *Hancock v. Chicot Co.*, 32 Ark. 575; *Williams v. Roberts*, 88 Ill. 11; *Lippincott v. Pana*, 92 Ill. 24; *Delaware Co. v. McClintock*, 51 Ind. 325; *Williamson v. Keokuk*, 44 Iowa 88; *Missouri River &c. R. Co. v. Miami Co.*, 12 Kans. 230; *Woodruff v. Okolona*, 57 Miss. 806; *Steines v. Franklin Co.*, 48 Mo. 167, 8 Am. Rep. 87; *Hamlin v. Meadville*, 6 Nebr. 227; *Weismer v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *State v. Union*, 15 Ohio St. 437; *Hopple v. Hipple*, 33 Ohio St. 116; *Burhop v. Milwaukee*, 21 Wis. 257.

<sup>10</sup> *Schmitz v. Zeh*, 91 Minn. 290, 97 N. W. 1049.

railroad proceed upon the theory that the road will be a benefit to the local community. It is doubtful whether the principle can apply where the road has been completed and all the benefit that can accrue has been secured.<sup>11</sup> But a railroad is not regarded as complete unless equipped with depots and side-tracks and hence a municipality authorized to aid in the construction of a railroad may vote bonds to aid in the construction of these accessories though the railroad proper is built and in operation.<sup>12</sup> It is, at all events, quite clear that bonds cannot be issued to an insolvent company which has completed its road in order to enable it to pay claims of creditors, since that would be to authorize the levy of a tax for a private purpose, and this the constitution will not permit.<sup>13</sup>

**§ 1073 (878). Governmental subdivisions may be authorized to issue bonds.**—The power of the legislature over the subject of taxation is very broad and comprehensive, and it may organize taxing districts. Upon the same principle it may, where there is no constitutional interdiction, provide for the formation of districts for the purpose of aiding railroad companies. Thus it has been held that “magisterial precincts” may be authorized to subscribe to the stock of railroad companies and to issue bonds to pay such subscriptions.<sup>14</sup>

<sup>11</sup> *Baltimore &c. R. Co. v. Spring*, 80 Md. 510, 31 Atl. 208; 27 L. R. A. 72. But compare *Napa Valley R. Co. v. Napa County*, 30 Cal. 435. In *Water &c. Co. v. Hutchinson Interurban R. Co.*, 74 Kans. 661, 87 Pac. 883, it was held that the statute should be strictly construed and that it did not authorize aid bonds for a company whose entire line was within the city.

<sup>12</sup> *Rock Creek v. Strong*, 96 U. S. 271, 24 L. ed. 815.

<sup>13</sup> *Baltimore &c. R. Co. v. Spring*, 80 Md. 510, 31 Atl. 208, 27 L. R. A. 72. The decision in the case referred to asserts, as we believe, a

just conclusion, but we are inclined to think some of the statements of the opinion go too far. It seems to us that the court trenches somewhat upon the rule that where a question is a legislative one the decision of the legislature is conclusive. There is reason for affirming that the legislature has power to decide what railroad companies may receive aid, and if the power exists it is not subject to judicial surveillance or control.

<sup>14</sup> *Breckinridge Co. v. McCracken*, 61 Fed. 191, 194, citing *Lexington v. McQuillan*, 9 Dana (Ky.) 513, 35 Am. Dec. 159; *County Judge*

§ 1074 (879). **Execution of the power to issue aid bonds—Generally.**—In our opinion the true rule is that the power to issue railroad aid bonds must be as strictly pursued as any part of the power to extend aid to a railroad enterprise,<sup>15</sup> and in cases where the statute has not been substantially followed in making the subscription or in issuing bonds, such bonds will be invalid.<sup>16</sup> We do not mean to say that there may not be cases where the statutory provisions are so clearly directory that a failure to comply with them may be justly regarded as unimportant, nor do we mean to say that there may not be instances where a deviation from a mandatory provision may be so plainly immaterial as to be justly held not to affect the validity of the bonds, but we do mean to say that such cases and instances form exceptions to

v. Shelby R. Co., 5 Bush (Ky.) 225; Kreiger v. Shelby R. Co., 84 Ky. 66; Carter County v. Sinton, 120 U. S. 517, 7 Sup. Ct. 650, 30 L. ed. 701; Hancock v. Louisville &c. R. Co., 145 U. S. 409, 12 Sup. Ct. 969, 36 L. ed. 755. See also Cunningham v. Kee Shan, 110 Ark. 99, 161 S. W. 170. But as a rule it is only governmental corporations that can be authorized to grant aid to railroad companies. Ante, § 1034. But see Wilson v. Sanitary Dist., 133 Ill. 443, 27 N. E. 203; Kennebec Water Dist. v. Waterville, 96 Maine 234, 52 Atl. 774.

<sup>15</sup> Cairo &c. R. Co. v. Sparta, 77 Ill. 505; Kokomo v. State, 57 Ind. 152, 163; Madison v. Smith, 83 Ind. 502; Wheatland v. Taylor, 29 Hun (N. Y.) 70. It is not necessary that the commissioners to sell the bonds should act personally in selling them and investing the proceeds, but they may do so through the medium of a broker. Brownell v. Greenwich, 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685, and note. Where the act authorizing a city

to issue bonds is silent as to the kind of currency in which such negotiable bonds shall be paid, the city has power to make them payable "in gold coin of the United States of the present standard weight and fineness." Judson v. Bessemer, 87 Ala. 240, 6 So. 267, 4 L. R. A. 742. See also Moore v. Walla Walla, 60 Fed. 961; Farson v. Comrs., 97 Ky. 119, 30 S. W. 17; Winston v. Ft. Worth (Tex. Civ. App.), 47 S. W. 740; Packard v. Kittitas County, 15 Wash. 88, 55 Am. St. 875. But compare Woodruff v. State, 66 Miss. 298, 6 So. 235; Burnett v. Maloney, 97 Tenn. 697, 37 S. W. 689, 34 L. R. A. 541; D'Esterre v. New York, 104 Fed. 605 (failure to comply with mere directory provision as to form does not vitiate).

<sup>16</sup> Williams v. Roberts, 88 Ill. 11; People v. Santa Anna, 67 Ill. 57; Sinnett v. Moles, 38 Iowa 25; People v. Smith, 45 N. Y. 772; People v. Huriburt, 46 N. Y. 110; Horton v. Thompson, 71 N. Y. 513.



the general rule, for, as we believe, the general rule is that the provisions of such statutes are mandatory unless the context clearly shows the contrary, and must be substantially pursued. We may add, to prevent misunderstanding, that we are here considering the question entirely independent of the doctrine of estoppel.

§ 1075 (880). **Execution of the power to issue aid bonds—Implied powers.**—It is very seldom that the enabling act goes into detail, for in almost all cases power to issue bonds is granted in general terms. It is sometimes provided that bonds shall run for a designated length of time, or shall be of a particular tenure, and, where this is so, and there is no effective estoppel, a material departure from the statute may be cause for refusing to enforce the bonds. But as a general rule, the power is a general one, and matters of detail are left to the municipality, and, where this is so, there are, necessarily, implied powers conferred upon the municipality. Such a general power will, as a rule, authorize the bonds to be made payable at any place within or without the state.<sup>17</sup> So, too, such a general power will authorize the municipi-

<sup>17</sup> *Meyer v. Muscatine*, 1 Wall. (U. S.) 384, 17 L. ed. 564; *Evansville &c. R. Co. v. Evansville*, 15 Ind. 395, 412; *Maddox v. Graham*, 2 Metc. (Ky.) 56; *Skinker v. Butler Co.*, 112 Mo. 332, 20 S. W. 613; *Kunz v. School Dist.*, 11 S. Dak. 578, 79 N. W. 844; *Austin v. Gulf &c. R. Co.*, 45 Tex. 236. It is held in Illinois, under the provisions of an act which authorizes the interest on such bonds to be made payable at any place which the county court may direct, that the principal be made payable only at the office of the treasurer. *Prettyman v. Tazewell Co.*, 19 Ill. 406, 71 Am. Dec. 230; *Pekin v. Reynolds*, 31 Ill. 529, 83 Am. Dec. 244. But it is held that a provision making them payable at another place will

not invalidate the bonds, although the provision will be void. *Sherlock v. Winnetka*, 68 Ill. 530. Nor will it affect their negotiable character. *Enfield v. Jordan*, 119 U.S. 680, 7 Sup. Ct. 358, 30 L. ed. 523. Municipal bonds in the absence of any provisions as to the place of payment, are payable at the treasury of the municipality. *Friend v. Pittsburgh*, 131 Pa. 305, 18 Atl. 1060, 6 L. R. A. 636, 17 Am. St. 811; *Skinker v. Butler Co.*, 112 Mo. 332, 20 S. W. 613. The fact that the act authorized the bonds to be issued, bearing interest at the legal rate where they were payable, which is in another state, where the legal rate is larger than in Tennessee, did not render them void for usury. *Nelson v. Haywood Co.*,

pality to determine the form and tenure of the bonds, provided the municipality does not, in executing the bonds, go beyond the general power conferred upon it. And where this power exists and is exercised, and bonds payable at a particular place are issued and sold, neither the legislature nor the municipality can change the place of payment without the consent of the holders of the bonds.<sup>18</sup>

§ 1076 (881.) **Formal execution of bonds.**—So far as concerns the mere formal parts of bonds, the courts are very liberal in upholding the rights of bona fide holders, and will not allow those rights to be defeated because of formal defects. Thus, in one case the municipality was enjoined from setting up the defense that the corporate seal was not affixed to the bonds.<sup>19</sup> Bonds should be executed by the proper officers of the municipality, however, and, if there is no estoppel, bonds executed by other representatives are not enforceable.<sup>20</sup> It is held that where the

3 Pick. (Tenn.) 781. Where the statute fixes the rate of interest that the bonds shall bear, the municipal officers can not contract to pay a greater rate. *English v. Smock*, 34 Ind. 115, 7 Am. Rep. 215.

<sup>18</sup> *Dillingham v. Hook*, 32 Kans. 185, 4 Pac. 166.

<sup>19</sup> *Bernards Tp. v. Stebbins*, 109 U. S. 341, 3 Sup. Ct. 252, 27 L. ed. 956. See also *D'Esterre v. New York*, 104 Fed. 605; *Smythe v. New Providence*, 158 Fed. 213; *Catron v. Lafayette County*, 106 Mo. 659, 17 S. W. 577.

<sup>20</sup> *Walnut v. Wade*, 103 U. S. 683, 26 L. ed. 526; *Coler v. Cleburne*, 131 U. S. 162, 9 Sup. Ct. 720, 33 L. ed. 146; *Edwards v. Bates County*, 117 Fed. 526; *Douglas v. Niantic &c. Bank*, 97 Ill. 228; *People v. Smith*, 45 N. Y. 772; *Danville v. Montpelier &c. R. Co.*, 43

Vt. 144. See *First National Bank v. Arlington*, 16 Blatchf. (U. S.) 57; *Wetumpka v. Winter*, 29 Ala. 651; *Potter v. Lamhart*, 44 Fla. 647, 33 So. 251; *Mercer Co. v. Pittsburgh &c. R. Co.*, 27 Pa. St. 389; *Bank of Statesville v. Statesville*, 84 N. Car. 169. As to what officers may execute. *Kankakee County v. Aetna Life Ins. Co.*, 106 U. S. 668, 2 Sup. Ct. 80, 27 L. ed. 309. As to bona fide holders, it is sufficient if bonds are signed by officers de facto. *Ralls County v. Douglass*, 105 U. S. 728, 26 L. ed. 957. See *Middleton v. Mullica Tp.*, 112 U. S. 433, 5 Sup. Ct. 198, 28 L. ed. 785; *Weyauwega v. Ayling*, 99 U. S. 112, 25 L. ed. 470; *Waite v. Santa Cruz*, 89 Fed. 619; *Sauerhering v. Iron Ridge &c. R. Co.*, 25 Wis. 447.

statute specifically provides what the denomination of the bonds shall be it must be obeyed.<sup>21</sup>

§ 1077 (881a). **Execution of bonds—Delivery.**—A valid delivery of a bond is essential to its existence. Although drawn and signed, so long as it is undelivered, it is a nullity; not only does it take effect only by delivery, but also only on delivery.<sup>22</sup> A premature delivery may be enjoined, and this is a proper remedy where the bonds are not to be delivered until the railroad is completed and it is proposed to issue and sell the bonds in advance of the proper time for delivery, though the funds realized are to be held by the municipality until the conditions are complied with by the railroad company.<sup>23</sup> But, in a case where a town had ample authority for issuing its bonds to a railroad company, and the bonds were executed in proper form and made payable to the proper company, but were not delivered to such company but to an officer of a new company, and there was nothing pertaining to them or that could have been ascertained from the record indicating this misdelivery, it was held that they could be enforced in the hands of an innocent purchaser.<sup>24</sup>

§ 1078 (882). **Nature of municipal aid bonds.**—It is competent for the legislature to provide that aid bonds shall not be negotiable. This it may do by directly declaring that they shall not be negotiable, or by clearly making them payable out of specific fund and no other.<sup>25</sup> Ordinarily, municipal bonds issued in aid of a railroad are commercial paper, and bona fide holders for

<sup>21</sup> *Greene Co. v. Daniel*, 102 U. S. 187, 26 L. ed. 99; *Livingston v. School Dist.*, 9 S. Dak. 345, 69 N. W. 15; *Milan v. Tennessee Cent. R. Co.*, 11 Lea (Tenn.) 329. So as to time of payment. *Davis v. Yuba Co.*, 75 Cal. 452, 13 Pac. 874, 17 Pac. 533; *Alpena Co. v. Simmons*, 104 Mich. 305, 62 N. W. 292. See also *Rochester v. Quintard*, 136 N. Y. 221, 32 N. E. 760. But compare *Singer Mfg. Co. v. Elizabeth*, 42

N. J. L. 249; *Hoag v. Greenwich*, 133 N. Y. 152, 30 N. E. 842.

<sup>22</sup> *Young v. Clarendon*, 132 U. S. 340, 10 Sup. Ct. 107, 33 L. ed. 356; *Portsmouth Sav. Bank v. Ashley*, 91 Mich. 670, 52 N. W. 74, 30 Am. St. 511; *Satterlee v. Strider*, 31 W. Va. 781, 8 S. E. 552.

<sup>23</sup> *Neale v. Co. Court of Wood Co.*, 43 W. Va. 90, 27 S. E. 370.

<sup>24</sup> *Prairie v. Lloyd*, 97 Ill. 179.

<sup>25</sup> *Blackman v. Lehman*, 63 Ala. 547, 35 Am. Rep. 57.

value take them freed from all equities of which they do not have notice.<sup>26</sup> Being commercial paper, they are not within the rule of *lis pendens*.<sup>27</sup> But, of course, where there is actual notice to the purchaser, he is not protected as a bona fide holder of commercial paper. It has been held that, even where a subscription to the capital stock cannot legally be made until after the railroad corporation is organized, bonds may be valid in the hands of bona fide holders,<sup>28</sup> and it is also held that the fact that the popular vote authorizing the subscription was taken before the organiza-

<sup>26</sup> *Mercer Co. v. Hackett*, 1 Wall. (U. S.) 83, 17 L. ed. 548; *Cass County v. Gillett*, 100 U. S. 585, 25 L. ed. 585; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195, 96 U. S. 51, 24 L. ed. 681; *Tucker v. New Hampshire Sav. Bank*, 58 N. H. 83, 42 Am. Rep. 580; *State v. Union*, 8 Ohio St. 394; *Board v. Texas &c. R. Co.*, 46 Tex. 316; *Arents v. Commonwealth*, 18 Grat. (Va.) 750. See generally *Lindsey v. Rottaken*, 32 Ark. 619; *Society &c. v. New London*, 29 Conn. 174; *Aurora v. West*, 22 Ind. 88, 85 Am. Dec. 413; *Clapp v. Cedar Co.*, 5 Iowa 15, 68 Am. Dec. 678, and note; *Consolidated Association &c. v. Avegno*, 28 La. Ann. 552; *Hannibal &c. R. Co. v. Marion Co.*, 36 Mo. 294; *Barrett v. Schuyler Co.*, 44 Mo. 197; *Elizabeth v. Force*, 29 N. J. Eq. 587. It will be presumed, in the absence of proof, that members of a railroad commission not present at a meeting at which bonds were ordered to be issued had notice that the meeting was to be held in accordance with the statute, authorizing a majority to act at any meeting of which all had notice. *Hill v. Peekskill Sav. Bank*, 46 Hun (N. Y.) 180. Though all the bonds were dated on the same

day, and payable twenty years from date, while the amendatory act provided that but ten per cent. of them should mature during any one year, they would not be invalid as to plaintiff, who was not shown to have knowledge of the irregularity, or that any other bonds were issued besides those he purchased. *Brownell v. Greenwich*, 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685, and note. The fact that a vote of the people of a town for the issuing of railroad aid bonds, pursuant to lawful authority, was upon the condition that the road build its shops in the town, will not invalidate the bonds, the purpose for which they were issued not being changed by such condition. *Casey v. People*, 132 Ill. 546, 24 N. E. 570.

<sup>27</sup> *Warren County v. Marcy*, 97 U. S. 96, 24 L. ed. 977; *Cass County v. Gillett*, 100 U. S. 585, 25 L. ed. 585; *Winston v. Westfeldt*, 22 Ala. 760, 58 Am. Dec. 278; *Tucker v. New Hampshire Sav. Bank*, 58 N. H. 83, 42 Am. Rep. 580; *Leitch v. Wells*, 48 N. Y. 586; *Stone v. Elliott*, 11 Ohio St. 252; *Kieffer v. Ehler*, 18 Pa. St. 388; *Board v. Texas &c. R. Co.*, 46 Tex. 316.

<sup>28</sup> *Rubey v. Shain*, 54 Mo. 207.

tion was completed will not be a defense to an action by an innocent holder upon bonds issued after its completion.<sup>29</sup>

**§ 1079 (883). Proceedings of municipal officers must conform to the statute.**—Where there is no estoppel the rule is that the officers of the municipality must in all material respects obey the requirements of the enabling act.<sup>30</sup> Thus the provisions of the act in respect to elections, petitions, and the like, must be complied with, but unimportant deviations from the act will not invalidate the bonds.<sup>31</sup> But it is to be kept in mind that where, as is generally true, third persons have purchased the bonds, the question as to whether there has been a compliance with the provisions of the statute is seldom of practical importance, since the doctrine of estoppel often cuts off inquiry.

**§ 1080 (884). Want of power—Definition.**—Confusion has arisen from a failure to discriminate between a want of power and an irregular or defective exercise of power. In considering the doctrine of ultra vires we pointed out the distinction between

<sup>29</sup> *Davies County v. Huidekoper*, 98 U. S. 98, 25 L. ed. 112. Where there is an entire absence of power to issue bonds recitals therein will not estop the municipality. *Hancock v. Chicot Co.*, 32 Ark. 575; *Anthony v. Jasper Co.*, 4 Dill. (U. S.) 136.

<sup>30</sup> Ante, § 1046.

<sup>31</sup> Ante, §§ 1048, 1049. As to elections, see *Claybrook v. Board*, 114 N. Car. 453, 19 S. E. 593; *Sampson v. People*, 141 Ill. 17, 30 N. E. 781; *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. 562, 33 L. ed. 887; *Norton v. Brownville*, 129 U. S. 479, 9 Sup. Ct. 322, 32 L. ed. 774. As to specifying place of hearing petition, *Andes v. Ely*, 158 U. S. 312, 15 Sup. Ct. 954, 39 L. ed. 996. Presumptions as to notice of elections, *Knox County v. New York*

*Ninth Nat. Bank*, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. ed. 93; citing *United States Bank v. Dandridge*, 12 Wheat. (U. S.) 64, 70, 6 L. ed. 552. See generally *Dallas County v. McKenzie*, 110 U. S. 686, 4 Sup. Ct. 184, 28 L. ed. 285; *Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. 124, 30 L. ed. 323; *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. ed. 517; *Gilson v. Dayton*, 123 U. S. 59, 8 Sup. Ct. 66, 31 L. ed. 74; *Grenada County v. Brogden*, 112 U. S. 261, 5 Sup. Ct. 125, 28 L. ed. 704; *German Ins. Co. v. Manning*, 95 Fed. 597; *Bolles v. Perry Co.*, 92 Fed. 479; *Mason v. Shawneetown*, 77 Ill. 533; *Jacksonville &c. R. Co. v. Virden*, 104 Ill. 339; *Elyria Gas &c. Co. v. Elyria*, 57 Ohio St. 374, 49 N. E. 335.

a want of power and a defective or irregular exercise of power conferred by statute. It is difficult to precisely define the meaning of the term "want of power," as used in relation to the rights of bona fide holders of municipal bonds. Judge Dillon, whose learning and ability always command respect, says that the term means "the want of legislative power, under any circumstances or conditions to do the particular act in question."<sup>32</sup> This definition is, perhaps, as good as can be framed, but it is, we venture to say with great deference, somewhat broader than the decisions warrant. It is unquestionably true, however, that there are cases holding that there is a "want of power," although there is a general statute conferring authority. The definition we have quoted will not always apply, nor can any general definition be formulated upon which it will be safe to act in all cases.

§ 1081 (885). **Conflict of authority.**—Upon the question as to what shall be deemed "want of authority" there is much conflict of opinion. There is, it is evident, a failure on the part of some of the courts to discriminate between an entire absence of power and a defective exercise of a power conferred by statute. The decisions of many of the state courts are not in harmony with those of the United States courts above cited, for the reason that a failure to observe the precedent conditions imposed, which the latter hold to be a defective exercise of an existing power, is, in many cases, held by the former to prevent such power from vesting in the municipality or its officers.<sup>33</sup> Some of the decisions referred to in the note confuse the want of power with a defective exercise of power, and the courts have fallen into error.

<sup>32</sup> Dillon *Munic. Corp.* (5th ed.) § 951.

<sup>33</sup> *Hancock v. Chicot Co.*, 32 Ark. 575; *Marshall County v. Cook*, 38 Ill. 44, 87 Am. Dec. 282; *Aurora v. West*, 22 Ind. 88, 85 Am. Dec. 413; *St. Louis v. Alexander*, 23 Mo. 483; *State v. Goshen Tp.*, 14 Ohio St. 569; *Mercer Co. v. Pittsburgh &c. R. Co.*, 27 Pa. St. 389; *Veeder v. Lima*, 19 Wis. 280. In *Williams*

*v. People*, 132 Ill. 574, the court, in an opinion holding that bonds issued by authority of an election held without proper notice are void even in the hands of innocent purchasers, says: "Persons purchasing such bonds are bound to take notice of the provisions of acts of the legislature authorizing the election and the subscription, and of the proceedings on record in the

**§ 1082 (886). Consolidation does not take away right to bonds.**—The general rule that a consolidated company succeeds to the rights of the constituent companies requires the conclusion that aid bonds voted to one of the constituent companies belong to the consolidated company. It is necessary, of course, for the consolidated company to possess the substantial rights of the constituent company to which it is voted to the extent, at least, that it may build and operate the line of road for which the aid was granted. The authorities are in substantial agreement upon the general question,<sup>34</sup> but there are cases which hold that, under

county court in relation thereto, and of the requirements of the fundamental law upon the subject.” See, also, as to being bound to take notice of the statutory provisions. *Ogden v. Daviess County*, 102 U. S. 634, 26 L. ed. 263; *Barnett v. Denison*, 145 U. S. 135, 12 Sup. Ct. 819, 36 L. ed. 652; *Rathbone v. Kiowa Co.*, 73 Fed. 395. And as to municipal records, see *Crow v. Oxford Tp.*, 119 U. S. 215, 7 Sup. Ct. 180, 30 L. ed. 388.

<sup>34</sup> *Nugent v. Supervisors*, 19 Wall (U. S.) 241, 22 L. ed. 83; *Scotland County v. Thomas*, 94 U. S. 682, 24 L. ed. 219; *East Lincoln v. Davenport*, 94 U. S. 801, 24 L. ed. 322; *Henry County v. Nicolay*, 95 U. S. 619, 24 L. ed. 394; *Bates County v. Winters*, 97 U. S. 83, 24 L. ed. 933; *Wilson v. Salamanca*, 99 U. S. 499, 25 L. ed. 330; *Empire v. Darlington*, 101 U. S. 87, 25 L. ed. 878; *Menasha v. Hazard*, 102 U. S. 81, 26 L. ed. 85; *Tipton County v. Locomotive Works*, 103 U. S. 523, 26 L. ed. 340; *Harter v. Kernochan*, 103 U. S. 562, 26 L. ed. 411; *New Buffalo v. Iron & Co.*, 105 U. S. 73, 26 L. ed. 1024; *Livingston County v. Portsmouth First Nat. Bank*, 128 U. S. 102, 9 Sup. Ct. 18, 32 L.

ed. 359; *Columbus v. Dennison*, 69 Fed. 58; *Mt. Vernon v. Hovey*, 52 Ind. 563; *Scott v. Hansheer*, 94 Ind. 1; *Jussen v. Board*, 95 Ind. 567; *Atchison & C. R. Co. v. Phillips Co.*, 25 Kans. 261; *State v. Greene Co.*, 54 Mo. 540. It has been held that a company which purchases the road of the company to which the aid is granted can not secure bonds. *Board of Comrs. v. State*, 115 Ind. 64, 4 N. E. 589, 17 N. E. 855. See *Bishop v. Brainerd*, 28 Conn. 289; *Terre Haute & C. R. Co. v. Earp*, 21 Ill. 291; *Illinois & C. R. Co. v. Beers*, 27 Ill. 185; *Sparrow v. Evansville & C. R. Co.*, 7 Ind. 369; *Cantillon v. Dubuque & C. R. Co.*, 78 Iowa 48, 35 N. W. 620, 5 L. R. A. 726, and note; *Manning v. Mathews*, 66 Iowa 675, 24 N. W. 271; *Barthel v. Meader*, 72 Iowa 125, 33 N. W. 446; *Chicago & C. Co. v. Shea*, 67 Iowa 728, 25 N. W. 901; *Southern Kansas R. Co. v. Towner*, 41 Kans. 72, 21 Pac. 221; *Fry v. Lexington*, 2 Met. (Ky.) 314; *South Bay & C. Co. v. Gray*, 30 Maine 547; *Agricultural & C. R. Co. v. Winchester*, 13 Allen (Mass.) 29; *Pacific & C. R. Co. v. Renshaw*, 18 Mo. 210; *Schenectady & C. Co. v. Thatcher*, 11 N. Y. 102; *Buffalo & C. Co. v.*

peculiar statutes, the consolidated company is not entitled to the bonds.<sup>35</sup> There are other cases which hold that a consolidation which works such a fundamental change as to release stockholders will deprive the consolidated company of a right to the bonds.<sup>36</sup>

**§ 1083 (887). Purchasers of aid bonds—Duty to ascertain that power to issue bonds exists.**—As we shall hereafter show, the doctrine of estoppel exerts an important influence upon the rights of holders of municipal aid bonds, but this doctrine will not protect such holders where there is an entire want of power to issue the bonds. It is the duty of persons who are about to become purchasers of municipal aid bonds to ascertain whether the municipality had power to issue them.<sup>37</sup> It is obvious that,

Dudley, 14 N. Y. 336; *Nelson v. Haywood County*, 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648; *Noyes v. Spaulding*, 27 Vt. 420. See as to power to aid consolidated company, *Board v. Travelers' Ins. Co.*, 128 Fed. 817.

<sup>35</sup> *Harshman v. Bates Co.*, 92 U. S. 569, 23 L. ed. 747; *Bates County v. Winters*, 97 U. S. 83, 24 L. ed. 933. See *Marsh v. Fulton County*, 10 Wall. (U. S.) 676, 19 L. ed. 1040.

<sup>36</sup> *Lynch v. Eastern &c. R. Co.*, 57 Wis. 430, 15 N. W. 734, 825. It is upon this principle that it is held that where a company sells all of its property the right to aid bonds is lost. *Cantillon v. Dubuque &c. R. Co.*, 78 Iowa 48, 35 N. W. 620, 5 L. R. A. 726, and note. But where there is nothing more than a mere change of name the right to the bonds is not impaired. *Society &c. v. New London*, 29 Conn. 174. See also *Howard County v. Booneville Central Nat. Bank*, 108 U. S. 314, 27 L. ed. 738; *Lewis v. Clarendon*, 5 Dill. (U. S.) 329;

*Chickaming v. Carpenter*, 106 U. S. 663, 1 Sup. Ct. 620, 27 L. ed. 307; *Muscatine &c. R. Co. v. Horton*, 38 Iowa 33; *Chicago &c. R. Co. v. Putnam*, 36 Kans. 121, 12 Pac. 593; *Rochester &c. R. Co. v. Cuyler*, 7 Lans. (N. Y.) 431; *Commonwealth v. Pittsburgh*, 41 Pa. St. 278; *Taylor v. Board*, 86 Va. 506, 10 S. E. 433.

<sup>37</sup> *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. ed. 360; *Coloma v. Eaves*, 92 U. S. 484, 490, 23 L. ed. 581; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676, 19 L. ed. 1040; *Toledo Northern Nat. Bank v. Porter Township*, 110 U. S. 608, 615, 4 Sup. Ct. 524, 28 L. ed. 258; *Anthony v. Jasper County*, 101 U. S. 693, 697, 25 L. ed. 1005; *McClure v. Oxford*, 94 U. S. 429, 24 L. ed. 129. See also *Board v. Blodgett*, 155 Ill. 441, 40 N. E. 1025, 46 Am. St. 348; *Schmidt v. Defiance*, 117 Fed. 702, *affd.* in 123 Fed. 1; *St. Lawrence Tp. v. Furman*, 171 Fed. 400; 1 *Elliott Cont.* §§ 615-617, 620.



as the question of power or no power depends upon the decision of the question whether there was a valid statute authorizing the issue of the bonds, the purchaser must, at his peril, ascertain whether there is or is not such a statute.

**§ 1084 (888). Bonds issued in excess of the limits prescribed by the constitution.**—Some of the authorities make a distinction between cases where bonds to an amount beyond that limited by the constitution are issued and cases where the limit prescribed by statute is exceeded. The rule in relation to bonds issued beyond the constitutional limit is that they are void even in the hands of a bona fide holder. The rule has been carried further, and it is denied that there can be an estoppel in cases where the limit prescribed by the constitution is exceeded.<sup>38</sup> We believe the rule to rest on solid principle, but it is somewhat difficult to perceive why the same rule should not apply where the bonds exceed the limits prescribed by statute. Where aid bonds are issued in violation of the constitution, there can be no recovery against the municipality upon an implied contract.<sup>39</sup> The advantages derived from the construction of the railroad do not constitute an equitable consideration as will entitle the bondholders to relief.

**§ 1085 (889). Limitation of amount—Construction of statute.**—Where the constitution limits the amount of aid which may be granted, it is, of course, controlling, and bonds issued in excess of

<sup>38</sup> *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. 71, 37 L. ed. 1044, 9 Am. R. & Corp. Rep. 520; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Hedges v. Dixon Co.*, 37 Fed. 304; *Risley v. Howell*, 57 Fed. 544; *Quaker City Nat. Bank v. Nolan Co.*, 59 Fed. 660; *Millsaps v. Terrell*, 60 Fed. 193. See *State v. Columbia*, 111 Mo. 365, 20 S. W. 90. See also *Gunnison County v. Rollins*, 173 U. S. 255, 19 Sup. Ct. 395, 43 L. ed. 689; *Lake County v. Dudley*, 173 U. S. 243, 19 Sup. Ct.

398, 43 L. ed. 684; *Holliday v. Hilderbrandt*, 97 Iowa 177, 66 N. W. 89. But compare *Sioux City & C. R. Co. v. Osceola Co.*, 45 Iowa 168.  
<sup>39</sup> *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. 71, 37 L. ed. 1044, citing *Magniac v. Thomson*, 15 How. (U. S.) 281, 14 L. ed. 696; *Aetna Life Insurance Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. ed. 537; *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. ed. 132.

the amount fixed by the constitution cannot be enforced. The legislative power is limited by such a constitutional provision, and, as everyone knows, if the legislature assumes to transgress the provisions of the constitution its enactments are void;<sup>40</sup> but where a statute can be so construed as to prevent its being brought into conflict with the constitution, the courts will so construe it, provided the construction be at all reasonable.<sup>41</sup> This general doctrine supports the ruling in the case wherein it was held that where the constitution limited the amount of aid to a designated per cent. of the taxable property a statute providing that aid "to any amount" might be granted was not invalid, inasmuch as the courts must construe the statute to mean any amount within the constitutional limitation.<sup>42</sup>

**§ 1086 (890). Bonds in excess of the limit prescribed by statute.**—As we have said, a distinction is made, at least in some of the decisions, between bonds issued in excess of the constitutional limit and bonds issued beyond the limit prescribed by statute, and it is held in the one case that there can be no estoppel, but that there may be in the other. Yet, where bonds are issued in excess of the amount limited by statute, and there is no estoppel, the bonds are void, although purchased before

<sup>40</sup> See *East Moline v. Pope*, 224 Ill. 386, 79 N. E. 587.

<sup>41</sup> *Ferguson v. Stamford*, 60 Conn. 432; *Jamieson v. Indiana &c. Co.*, 128 Ind. 555, 569, 28 N. E. 76, 12 L. R. A. 652; *Dow v. Norris*, 4 N. H. 16, 18, 17 Am. Dec. 400.

<sup>42</sup> *Atlantic &c. Co. v. Darlington*, 63 Fed. 76, 82. In the course of the opinion it was said: "Is it in conflict with section 17, article 9, because no limit is fixed as to the amount of aid to be given to railroads? The constitution and the act must be read in *pari materia*. The legislature must be presumed to have enacted the act in view of the constitution. It cannot be as-

sumed that the legislature went in the teeth of the constitution. Such a construction must be put on this act as will reconcile it with the constitution. 'Ut res magis valeat quam pereat.' We must hold it to mean, 'may issue bonds in any amount within the constitutional limitation.' As a conclusion of law, the act is not in conflict with section 17, article 9, in this respect." The judgment in the case from which we have quoted was affirmed in *Darlington v. Atlantic &c. Co.*, 68 Fed. 849, where the cases of *State v. Neely*, 30 S. Car. 587, 9 S. E. 664, 3 L. R. A. 672; *Floyd v. Perrin*, 30 S. Car. 1, 8 S. E. 14, 2

maturity and for a valuable consideration.<sup>43</sup> The prevailing rule is that all of the bonds are void where there is no estoppel and they are beyond the limit fixed by law.<sup>44</sup> It is held, however, that, if the municipality authorizes an issue of the proper amount, but the officers wrongfully issue a greater amount than that authorized, the bonds are not all void.<sup>45</sup>

L. R. A. 242, and *State v. Whitesides*, 30 S. Car. 579, 9 S. E. 661, 3 L. R. A. 777, and note, are reviewed. It is held in the case first cited that bonds may be exchanged for stock notwithstanding a provision that they shall not be issued for less than par, also in *Germania Sav. Bank v. Darlington*, 50 S. Car. 337, 27 S. E. 846. But, in New York such a provision has been held to require their sale for par in cash. *People v. Batchelor*, 53 N. Y. 128, 13 Am. Rep. 480; *Horton v. Thompson*, 71 N. Y. 513. As to how the valuation of taxables is to be determined and at what time, see *Colburn v. McDonald*, 72 Nebr. 431, 100 N. W. 961; *Rathbun v. Board*, 83 Fed. 125; *Kent v. Dana*, 100 Fed. 56; *Municipal Trust Co. v. Johnson City*, 116 Fed. 468; *Coe v. Caledonian &c. R. Co.*, 27 Minn. 197, 6 N. W. 621; *Falconer v. Buffalo &c. R. Co.*, 69 N. Y. 495; *Bound v. Wisconsin Cent. R. Co.*, 45 Wis. 543; 1 Elliott Cont. § 622, et seq.

<sup>43</sup> *Merchants' Bank v. Bergen County*, 115 U. S. 384, 6 Sup. Ct. 88, 29 L. ed. 430; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. ed. 360; *Lake County v. Graham*, 130 U. S. 674, 9 Sup. Ct. 654, 32 L. ed. 1065; *Cumins v. Lawrence Co.*, 1 S. Dak. 158, 46 N. W. 182; *Gould*

*v. Paris*, 68 Tex. 511, 17 Am. & Eng. Corp. Cas. 340. See also 1 Elliott Cont. § 620.

<sup>44</sup> *Hedges v. Dixon Co.*, 37 Fed. 304; *Reineman v. Covington &c. R. Co.*, 7 Nebr. 310. See *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. 71, 37 L. ed. 1044, 9 Am. R. & Corp. Rep. 520; *McPherson v. Foster*, 43 Iowa 48, 22 Am. Rep. 215; *Iola v. Merriman*, 46 Kans. 49, 26 Pac. 485; *Reynolds &c. Co. v. Police Jury*, 44 La. Ann. 863, 11 So. 236; *Millerstown v. Frederick*, 114 Pa. St. 435; *Perrin v. New London*, 67 Wis. 416.

<sup>45</sup> In *Hedges v. Dixon Co.*, 37 Fed. 304, it was said: "Counsel cites the case of *Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. ed. 1026, in which the county having authority to issue bonds to the amount of \$250,000, the county officers issued \$320,000, and the county was held liable for the \$250,000, but the cases were not all parallel. In that the principal had proposed a valid contract. It had done that which it had a right to do, and the wrong or misconduct of its agents, the county officers, was held not to invalidate that which the county had lawfully authorized. In this there is no breach of duty charged upon the county officers. The agents have not departed from their instructions. The trouble lies in the

§ 1087 (891). **Bonds running beyond time prescribed.**—The highest tribunal of the nation has held that, where the enabling act provides that bonds shall be payable in a designated number of years, the municipality has no power to issue bonds payable after a longer period, and that the bonds are void.<sup>46</sup> The reasoning of the court is that the limitation is a restriction upon the power of the municipality, and so operates to invalidate the bonds. We believe this doctrine to be sound, but it is difficult to harmonize it with some of the rules declared in other cases.

action of the principal itself. Its act was unauthorized, and, being without warrant of law, or rather in defiance of law, created no valid obligation." In the case of *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. 71, 37 L. ed. 1044, affirming judgment below, the cases of *Louisiana v. Wood*, 102 U. S. 294, 26 L. ed. 153; *Read v. Plattsmouth*, 107 U. S. 568, 2 Sup. Ct. 208, 27 L. ed. 414; *Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. ed. 1026, were distinguished, and the court said: "Recitals in bonds issued under legislative authority may estop the municipality from disputing their authority, as against a bona fide holder for value, but when the municipal bonds are issued in violation of a constitutional provision no such estoppel can arise by reason of any recitals contained in the bonds." *Lake County v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. ed. 1060; *Lake County v. Graham*, 130 U. S. 674, 9 Sup. Ct. 654, 32 L. ed. 1065; *Sutliff v. Lake County*, 147 U. S. 230, 13 Sup. Ct. 318, 37 L. ed. 145. To the effect that where there is authority but an excessive issue the bonds are valid in the hands of bona fide holders to the extent

that they are not in excess of the authorized issue, see *Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. ed. 1026; *Columbus v. Woonsocket Inst.*, 114 Fed. 162; *Aetna Life Ins. Co. v. Lyon Co.*, 95 Fed. 325; *Culbertson v. Fulton*, 127 Ill. 30, 18 N. E. 781; *McPherson v. Foster*, 43 Iowa 48, 22 Am. Rep. 215; *Nolan Co. v. State*, 83 Tex. 182, 17 S. W. 823; *Schmitz v. Zeh*, 91 Minn. 290, 97 N. W. 1049, and additional authorities there cited. See also *Winamac v. Hess*, 151 Ind. 229, 238, 239, 50 N. E. 81.

<sup>46</sup> *Barnum v. Okolona*, 148 U. S. 393, 13 Sup. Ct. 638, 37 L. ed. 495. In the case cited it was said: "That municipal corporations have no power to issue bonds in aid of a railroad except by legislative permission; that the legislature, in granting permission to a municipality to issue its bonds in aid of a railroad, may impose such conditions as it may choose; and that such legislative permission does not carry with it authority to execute negotiable bonds except subject to the restrictions and conditions of the enabling act—are propositions so well settled by frequent decisions of this court that we need

**§ 1088 (892). Bonds payable out of a specific fund.**—Where a specific fund is provided by statute for the payment of the bonds, and the bonds on their face convey notice of the purpose for which they were issued and of the statute under which they are issued, purchasers are bound to take notice of the provisions of the statute, and cannot treat the bonds as the general obligations of the municipality. But it is not of itself sufficient to take from the bonds the character of general obligations of the municipal corporation that they show on their face that they were issued for a special purpose.<sup>47</sup> If, however, the purpose for which the bonds are issued appears on their face, and the statute under which they are issued is referred to, and that statute expressly provides that they shall be payable out of a special fund, and limits the power to tax to particular persons or property, they cannot be enforced as general obligations of the municipality.<sup>48</sup>

not pause to consider them. *Sheboygan Co. v. Parker*, 3 Wall. (U. S.) 93, 96, 18 L. ed. 33; *Wells v. Supervisors*, 102 U. S. 625, 26 L. ed. 122; *Claiborne County v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. ed. 470; *Young v. Clarendon Twp.*, 132 U. S. 340, 10 Sup. Ct. 107, 33 L. ed. 356. Accordingly, if in the present instance, the legislature of Mississippi, in authorizing the town of Okolona to subscribe for stock in a railroad company and to pay for the same by an issue of bonds, prescribed that such bonds should not extend beyond ten years from the date of issuance, such limitation must be regarded as in the nature of a restriction on the power to issue bonds. *Norton v. Dyersburg*, 127 U. S. 160, 8 Sup. Ct. 1111, 32 L. ed. 85; *Brenham v. German-American Bank*, 144 U. S. 173, 12 Sup. Ct. 559, 36 L. ed. 390.”

<sup>47</sup> *Olcott v. Supervisors*, 16 Wall. (U. S.) 678, 21 L. ed. 382; *United*

*States v. Clark County*, 95 U. S. 769, 24 L. ed. 545, 96 U. S. 211, 24 L. ed. 628; *Supervisors v. United States*, 18 Wall. (U. S.) 71, 21 L. ed. 771; *Macon County v. Huidekoper*, 99 U. S. 592, 25 L. ed. 333, note; *Knox County Ct. v. Harshman*, 109 U. S. 229, 3 Sup. Ct. 131, 27 L. ed. 914.

<sup>48</sup> *United States v. Macon County*, 99 U. S. 582, 25 L. ed. 331. But see *Kimball v. Board*, 21 Fed. 145; *United States v. Macon Co.*, 35 Fed. 483; *Braun v. Board*, 66 Fed. 476, 70 Fed. 369; *Strieb v. Cox*, 111 Ind. 299, 12 N. E. 481; *Quill v. Indianapolis*, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681; *Swanson v. Ottumwa*, 118 Iowa 161, 91 N. W. 1048, 59 L. R. A. 620; *Adams v. Ashland*, 26 Ky. L. 184, 80 S. W. 1105; *State v. Macon Co.*, 68 Mo. 29; *State v. Fayette Co.*, 37 Ohio St. 526; *Austin v. Seattle*, 2 Wash. St. 667, 27 Pac. 557; *Fowler v. Superior*, 85 Wis. 411, 54 N. W. 800.

§ 1089 (893). **Performance of conditions.**—We have elsewhere shown that the conditions imposed by the enabling act must be substantially performed.<sup>49</sup> It is evident that, as the authority of the municipality depends upon the enabling act, the requirements of the act must be obeyed. The authority is not, as we have repeatedly said, general, but is an express statutory authority. It is generally held that, if the preliminary conditions necessary to give jurisdiction to issue the bonds have not been fully performed, their issue may be enjoined at the suit of a taxpayer,<sup>50</sup> provided there are no facts creating an estoppel. So it is held that payment of such bonds may be enjoined after their issue at the suit of one or more of the taxpayers, if the suit is brought while the bonds remain in the hands of the railroad company to which they were originally issued.<sup>51</sup> But even as to the railroad company the doctrine of estoppel may often be available. Yet the enforcement of the bonds may sometimes be enjoined while they are in the hands of a purchaser with notice.<sup>52</sup>

<sup>49</sup> Ante, §§ 1046, 1048, 1049.

<sup>50</sup> *Wright v. Bishop*, 88 Ill. 302; *Daviess Co. v. Howard*, 13 Bush (Ky.) 101; *Wagner v. Meety*, 69 Mo. 150; *Wellsborough v. New York &c. R. Co.*, 76 N. Y. 182; *Redd v. Henry Co.*, 31 Grat. (Va.) 695; *Lawson v. Schnellen*, 33 Wis. 288. See *Board v. Chesapeake &c. R. Co.*, 94 Ky. 377, 22 S. W. 609; *State v. Morristown*, 93 Tenn. 239, 24 S. W. 13. There may be acts creating an effective estoppel, and there may also be a conclusive adjudication upon jurisdictional facts which will repel a collateral attack. Ante, §§ 1056, 1062.

<sup>51</sup> *New Orleans &c. R. Co. v. Dunn*, 51 Ala. 128; *Campbell v. Paris &c. R. Co.*, 71 Ill. 611; *Nefzger v. Davenport &c. R. Co.*, 36 Iowa 642; *Mercer County v. Pittsburgh &c. R. Co.*, 27 Pa. St. 389; *Winston v. Tennessee &c. R. Co.*,

1 Baxt. (Tenn.) 60; *Redd v. Henry Co.*, 31 Grat. (Va.) 695. Where, under the law of its organization, a railroad company becomes extinct for failure to begin construction, municipal bonds issued in its aid become void in the hands of itself and its agent, at the date of its extinction. *Farnham v. Benedict*, 107 N. Y. 159, 13 N. E. 784. Where no part of the road was built in the township as required by the enabling act it was held that the railroad company was not entitled to the bonds. *Midland v. County Board*, 37 Nebr. 582, 56 N. W. 582. See *State v. Morristown*, 93 Tenn. 239, 24 S. W. 13; *Echols v. Bristol*, 90 Va. 165, 17 S. E. 943.

<sup>52</sup> A town for which railroad aid bonds have been issued may sue in equity to restrain the payment of interest, and to require them to be surrendered and canceled, and

**§ 1090 (893a). Right of railroad company to money or bonds on stock subscription.**—Where the people have determined at the election to take stock in a railroad company, the company is bound by this condition, and cannot successfully demand that money to an amount equal to the stock shall be paid over to it as a donation.<sup>53</sup> A provision in the charter that a certain per cent. of its stock shall be paid in cash is without application to aid extended by municipalities in the construction of railroads by an exchange of the bonds of the municipality for stock.<sup>54</sup>

**§ 1091 (894). Ratification of bonds irregularly issued.**—The weight of authority is that the municipality may, where it has power to issue bonds, ratify them by subsequent action, although the proceedings were irregular or defective. But, where a vote of the inhabitants is required in order to authorize the execution of bonds, the municipal officers cannot, of their own motion, validate bonds issued in cases where the proceedings prior to the election were substantially defective. There may, however, be such acts on the part of the representatives of the municipality as will constitute an estoppel.<sup>55</sup> Acts of the municipality or its

the town need not await a suit on the bonds in order to deny their validity. *Cherry Creek v. Becker*, 50 Hun 601, 2 N. Y. S. 514. The court will, in a proper case, decree the cancellation of bonds, illegally issued. *Springport v. Teutonia Savings Bank*, 75 N. Y. 397. But an injunction to restrain payment of bonds after they have been issued will not be granted unless the municipality has a valid defense to them. *Wilkinson v. City of Peru*, 61 Ind. 1. Where, by the statute, a tax-payer is authorized to sue to prevent the payment of certain railroad aid bonds, it is no defense to the suit that the objection set up as a ground for canceling the bonds might be shown as a defense in a suit on the bonds. *Strang v. Cook*,

47 Hun (N. Y.) 46. Where the statute provides that the president of the company shall give bond to secure the application of the avails of bonds issued by a municipal corporation, the fact that the president does not execute such a bond does not invalidate the aid bonds where the road is completed before their delivery. *Breckinridge Co. v. McCracken*, 61 Fed. 191.

<sup>53</sup> *Bittering v. Bell*, 65 Ind. 445; *Citing Faris v. Reynolds*, 70 Ind. 359; *Brokaw v. Board*, 73 Ind. 543; *Irwin v. Lowe*, 89 Ind. 540; *Hamilton Co. v. State*, 115 Ind. 64, 4 N. E. 589, 17 N. E. 855.

<sup>54</sup> *Austin v. Gulf &c. R. Co.*, 45 Tex. 234.

<sup>55</sup> Ante, §§ 1030, 1031, 1032; *Treadway v. Schnauber*, 1 Dak.

officers, when invested with authority,<sup>56</sup> or of the legislature, ratifying and making valid a municipal subscription, may validate the bonds issued in payment thereof.<sup>57</sup>

236, 46 N. W. 464; *Andes v. Ely*, 158 U. S. 312, 15 Sup. Ct. 954, 39 L. ed. 996, citing *Williams v. Duaneburgh*, 66 N. Y. 129; *Horton v. Thompson*, 71 N. Y. 513; *Rogers v. Stephens*, 86 N. Y. 623. See also *Brown v. Milliken Co. Clerk*, 42 Kans. 769, 23 Pac. 167; *Schmitz v. Zeh*, 91 Minn. 290, 97 N. W. 1049; *Brown v. Bon Homme Co.*, 1 S. Dak. 216, 46 N. W. 173.

<sup>56</sup> *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. ed. 748; *Converse v. Fort Scott*, 92 U. S. 503, 23 L. ed. 621; *Randolph County v. Post*, 93 U. S. 502, 23 L. ed. 957; *Orleans v. Platt*, 99 U. S. 676, 25 L. ed. 404; *Gause v. Clarksville*, 1 Fed. 353; *McGill-viray v. School Dist.*, 112 Wis. 354, 88 N. W. 310, 58 L. R. A. 100, 88 Am. St. 969. See also *Barrett v. Schuyler Co. Ct.*, 44 Mo. 197; *Brown v. Bon Homme Co.*, 1 S. Dak. 216, 46 N. W. 173; and note to *Weil & Co. v. Newbern*, 126 Tenn. 223, in L. R. A. 1915A, 1009.

<sup>57</sup> *Bates County v. Winters*, 97 U. S. 83, 24 L. ed. 933; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154; *St. Joseph Tp. v. Rogers*, 16 Wall. (U. S.) 644, 21 L. ed. 328; *Otoe County v. Baldwin*, 111 U. S. 1, 4 Sup. Ct. 265, 28 L. ed. 331; *Utter v. Franklin Tp.*, 172 U. S. 416, 19 Sup. Ct. 183, 43 L. ed. 498; *January v. Johnson Co.*, 3 Dill. (U. S.) 392; *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Keithsburg v. Frick*, 34 Ill. 405; *Shelby Co. Ct. v. Cumberland &c. R. Co.*, 8 Bush (Ky.) 209; *Sykes v. Colum-*

*bus*, 55 Miss. 115; *Alexander v. McDowell Co.*, 79 N. Car. 208. Where railroad aid bonds were issued after the adoption of the Illinois constitution of 1870, which forbade the issuance of such bonds except where they had been authorized before such adoption by a vote of the people under "existing laws," but such bonds were authorized at an election irregularly held, which, however, was ratified by the legislature before the adoption of the constitution, such ratification does not validate the bonds issued after the constitution was adopted, since the "existing laws" referred to in the constitution are the laws in force when the election was held. *Williams v. People*, 132 Ill. 574, 24 N. E. 647, disapproving *Jonesboro City v. Cairo &c. R. Co.*, 110 U. S. 192, 4 Sup. Ct. 67, 28 L. ed. 116. But an act which declares the aid proposed to be given to be a debt on the township, and provides for its payment, but does not validate the bonds illegally issued under a void vote to give such aid, and does not legalize the proceedings by which such bonds were issued, will not entitle the railroad company to a writ of mandamus to compel the township officers to sign a certificate of the completion of the road by means of which the company may obtain delivery of the bonds. *State v. Whitesides*, 30 S. Car. 579, 9 S. E. 661, 3 L. R. A. 777, and note; *State v. Harper*, 30 S. Car. 586, 9 S. E. 664.



**§ 1092 (894a). Ratification of invalid bonds.**—Where negotiable railway aid bonds issued by a city are void for want of authority in the city to issue the same, the mere fact that the city is authorized by statute to refund its indebtedness and can issue its warrants for the particular purpose for which the bonds were issued will not operate to validate the bonds in the absence of some act by the city in the direction of a refundment in the manner indicated. It is not the law that an unauthorized act, which may be ratified, is binding whether ratified or not.<sup>58</sup>

**§ 1093 (895). When bonds are void.**—We have heretofore shown that bonds issued in cases where there is an entire absence of power can not be enforced, even by one who has bought them in good faith, and this is substantially equivalent to saying that they are void, but we do not mean to say that bonds issued without statutory authority are incapable of ratification by an effective curative statute. We employ the term "void" in this connection in the sense in which it is often used, although the term "voidable" would, perhaps, be the more accurate one. We think that, where there is legislative power to authorize a municipality to issue bonds, but the bonds are issued without a statutory grant of power, they are not absolutely void, that is to say, they are not "a mere nothing incapable of ratification" by legislative enactment. Bonds issued without statutory authority,<sup>59</sup> or by

<sup>58</sup> Swanson v. Ottumwa (Iowa), 106 N. W. 9, 5 L. R. A. (N. S.) 860. And municipal ratification will not validate where there is no power. Doon Tp. v. Cummins, 142 U. S. 366, 12 Sup. Ct. 220, 35 L. ed. 1044; Comrs. of Sinking Fund v. Zimmerman, 101 Ky. 432, 41 S. W. 428; 4 Elliott Cont. § 3572; note in L. R. A. 1915A, 1009.

<sup>59</sup> German Savings Bank v. Franklin County, 128 U. S. 526, 9 Sup. Ct. 159, 32 L. ed. 519; Purdy v. Lansing, 128 U. S. 557, 9 Sup. Ct. 172, 32 L. ed. 531; Ottawa v. Ca-

rey, 108 U. S. 110, 2 Sup. Ct. 361, 27 L. ed. 669; Citizens' &c. Loan Assn. v. Topeka, 20 Wall. (U. S.) 655, 22 L. ed. 455; St. Joseph Tp. v. Rogers, 16 Wall. (U. S.) 644, 21 L. ed. 328; Aspinwall v. Daviess County, 22 How. (U. S.) 364, 16 L. ed. 296; Eddy v. People, 127 Ill. 428; Williamson v. Keokuk, 44 Iowa 88; Agawam Nat. Bank v. South Hadley, 128 Mass. 503; Sykes v. Columbus, 55 Miss. 115; Duke v. Brown, 96 N. Car. 127, 1 S. E. 873; Millerstown v. Frederick, 114 Pa. St. 435, 7 Atl. 156.

authority of an unconstitutional statute,<sup>60</sup> are often said to be void, even in the hands of bona fide purchasers,<sup>61</sup> and it is said that no recitals which they contain can so estop the municipality as to give them validity. We say, to avoid possible misunderstanding, that bonds which can be ratified are not, in the strict sense, void, but bonds that cannot be ratified by legislative enactment are absolutely void. It is, therefore, strictly accurate to say that bonds issued in violation of the constitution are absolutely void. Upon the principle that an act which violates the constitution is entirely destitute of force, the federal courts hold that an issue of bonds in excess of the limit of indebtedness prescribed by the state constitution is void, and that no acts of the municipality, nor any recitals which may appear in the bonds,

<sup>60</sup> *Harshman v. Bates County*, 92 U. S. 569, 23 L. ed. 747; *Wells v. Supervisors*, 102 U. S. 625, 26 L. ed. 122; *Ogden v. Daviess County*, 102 U. S. 634, 26 L. ed. 263; *Allen v. Louisiana*, 103 U. S. 80, 26 L. ed. 318; *Jarrolt v. Moberly*, 103 U. S. 580, 26 L. ed. 492; *Howard Co. v. Paddock*, 110 U. S. 384, 4 Sup. Ct. 24, 28 L. ed. 171. Since the constitution of Missouri requires the consent of two-thirds of the qualified voters before a municipality can grant aid to a railroad, a statute is void which assumes to give authority to issue bonds without any vote. *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. 562, 33 L. ed. 887. The United States courts have held the "Township Aid Act" of Missouri of March 23, 1868, to be constitutional and that bonds issued by authority of that act are valid. *Cass County v. Johnston*, 95 U. S. 360, 24 L. ed. 416. And this decision was adhered to after the supreme court of Missouri in *State v. Brassfield*, 67 Mo. 331, had held the act unconstitutional. *Foote v.*

*Johnson County*, 5 Dill. (U. S.) 281; *State v. Hannibal & c. R. Co.*, 101 Mo. 136.

<sup>61</sup> A distinction is taken between an entire absence of power to issue bonds and a defective execution of an existing power, acts done under the latter being held to bind the corporation in certain cases, while acts done in the absence of power to perform them never do. *German Savings Bank v. Franklin County*, 128 U. S. 526, 9 Sup. Ct. 159, 32 L. ed. 519; *St. Joseph Tp. v. Rogers*, 16 Wall. (U. S.) 644, 21 L. ed. 328, and cases cited *supra*. In *Toledo Northern Bank v. Porter Tp.*, 110 U. S. 608, 4 Sup. Ct. 254, 28 L. ed. 258, the court says: "The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company can not be concluded by mere recitals; but, the power existing, the municipality may be estopped by the recitals to prove irregularity in the exercise of that power."

can give such bonds any validity.<sup>62</sup> The distinction which is made between such a case and the cases where an issue of bonds is allowed only upon certain conditions prescribed by statute has been thus stated: "In this case the standard of validity is created by the constitution. . . . These being the exactions of the constitution itself, it is not within the power of the legislature to dispense with them, either directly or indirectly, by the creation of a ministerial commission whose finding shall be taken in lieu of the facts."<sup>63</sup>

<sup>62</sup> *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. ed. 360; *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. ed. 132; *Katzenberger v. Aberdeen*, 121 U. S. 172, 30 L. ed. 911; *Lake County v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. ed. 1060. Where an issue of county bonds for donation to a railroad has been adjudged void because in excess of the constitutional limit of indebtedness, equity has no power to reduce the issue to the limit, and enforce it against the county, the contract being indivisible, and void in toto, and there being no executed consideration to support an implied promise. *Hedges v. Dixon Co.*, 37 Fed. 304. See also *Balch v. Beach*, 119 Wis. 77, 95 N. W. 132.

<sup>63</sup> *Lake County v. Graham*, 130 U. S. 674, 9 Sup. Ct. 654, 32 L. ed. 1065. The reasons here assigned would seem to cover a failure to observe any other precedent conditions prescribed by the constitution, such as a failure to hold a required election, etc. See *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. 562, 33 L. ed. 887. An agreement entered into between a railway company and the authorities of a

town, upon petition of a majority of the tax-payers in pursuance of the laws of Minnesota, for the issuance of the bonds of such town, but which was not submitted to a vote as required by a section of the law, is invalid, and imposes no legal obligation upon the town, by reason of the unconstitutionality of the statute; and the town in its corporate capacity, is not estopped to resist the enforcement of bonds so issued by the completion of a line of railroad under the agreement by such company. *Plainview v. Winona &c. R. Co.*, 36 Minn. 505, 32 N. W. 745; *Elgin v. Winona &c. R. Co.*, 36 Minn. 517, 32 N. W. 749; *Harrington v. Plainview*, 27 Minn. 224, 6 N. W. 777. Under the law of Mississippi, which declares that the legislature shall not authorize any county, city, or town to aid any corporation, unless two-thirds of the qualified voters of such municipality shall assent thereto at a special election, it was held railroad aid bonds were not invalidated in the hands of innocent purchasers by the fact that less than such majority voted for them, where more than two-thirds of the votes cast were in favor of issuing the bonds. *Madison County v. Priestly*, 42 Fed. 817.

§ 1094 (895a). **Form of bonds—To whom payable.**—A statute under which bonds of a county were issued required that they should be made payable to a railroad company “and their successor and assigns,” but they were drawn payable to the company or bearer. It was contended that this variance from the prescribed formula was a fatal defect, but the court held that the requirement was only directory, and that, the irregularity having been committed by the servant of the city, the latter was in no position to take advantage of it.<sup>64</sup>

§ 1095 (895b). **Form of bonds—Lack of seal.**—Bonds regularly issued by a municipal corporation, and otherwise legal, will not be rendered invalid by the omission of the corporate seal.<sup>65</sup> In a case involving this question it was said: “It is apparent from the law that the substantial thing authorized to be done on behalf of the town was to pledge the credit of the town in aid of the railroad company in the construction of its road, by subscribing to its capital stock and issuing the obligations of the town in payment thereof. The technical form of the obligation was a matter of form rather than of substance. The issue of bonds under seal, as contradistinguished from bonds or obligations without seal, was merely a directory requirement.”<sup>66</sup>

§ 1096 (896). **Bona fide holders of aid bonds.**—The courts have gone very far in protecting bona fide holders of aid bonds. They have extended the doctrine of estoppel to great lengths for the protection of that class of persons. They have also liberally

<sup>64</sup> Calhoun County v. Galbraith, 99 U. S. 214, 25 L. ed. 410. See also West Plains Twp. v. Sage, 69 Fed. 943; Indianapolis &c. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898; Rock Creek Tp. v. Strong, 96 U. S. 271, 24 L. ed. 815. And see generally as to whom bonds should be made payable and effect of using the term “holder” or “bearer,” or leaving blank, 4 Elliott Cont. § 3567; Bargate v. Shortridge, 5 H. L. Cas. 297.

<sup>65</sup> Draper v. Springport, 104 U. S. 501, 26 L. ed. 812; San Antonio v. Mehaffy, 96 U. S. 312, 24 L. ed. 816; Bernards Tp. v. Stebbins, 109 U. S. 341, 3 Sup. Ct. 252, 27 L. ed. 956. See also Smythe v. New Providence, 158 Fed. 213; Schmidt v. Defiance, 117 Fed. 702, affirmed in 123 Fed. 1.

<sup>66</sup> Draper v. Springport, 104 U. S. 501, 26 L. ed. 812.

construed statutes in order to give validity to bonds in the hands of bona fide holders, and the federal courts have held that, where a state court gives a construction to a statute which upholds the bonds, it will not be allowed to change its decision so as to invalidate the bonds in the hands of a bona fide holder who had acquired the bonds while the earlier decision was in force,<sup>67</sup> or at least that the federal courts will sustain the contract as legal in such cases.<sup>68</sup> "To be a bona fide holder, one must be himself a purchaser for value without notice, or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained with reasonable diligence. Every dealer in municipal bonds, which upon their face refer to the statute under which they are issued, is bound to take notice of the statute and its requirements."<sup>69</sup> The general rule is that

<sup>67</sup> *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175, 17 L. ed. 520; *Taylor v. Ypsilanti*, 105 U. S. 60, 26 L. ed. 1008; *Ohio Life Ins. &c. Co. v. De Bolt*, 16 How. (U. S.) 416, 14 L. ed. 997; *Anderson v. Santa Anna*, 116 U. S. 356, 6 Sup. Ct. 413, 29 L. ed. 633; *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 20 Sup. Ct. 739, 44 L. ed. 886. See also *Oliver Co. v. Louisville Realty Co.*, 161 S. W. 570, 156 Ky. 628; *Stallcup v. Tacoma*, 13 Wash. 141, 42 Pac. 541, 52 Am. St. 25; *Union Bank v. Oxford*, 90 Fed. 7; *Muhlker v. New York &c. R. Co.*, 197 U. S. 544, 25 Sup. Ct. 522, 49 L. ed. 872; *Thomas v. State*, 76 Ohio St. 341, 81 N. E. 437, 118 Am. St. 884.

<sup>68</sup> It seems that the obligation of a contract is not impaired within the constitutional prohibition by a mere judicial decision. *Central Land Co. v. Laidley*, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. ed. 91. See

also *National Mut. Bld'ng &c. Assn. v. Brahan*, 193 U. S. 635, 24 Sup. Ct. 532, 48 L. ed. 823; *Swanson v. Ottumwa*, 131 Iowa 540, 106 N. W. 9, 5 L. R. A. (N. S.) 860; *Crigler v. Shepler*, 79 Kans. 834, 101 Pac. 619, 23 L. R. A. (N. S.) 500; *Storrie v. Cortes*, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666. And see explanation in *Loeb v. Columbia Tp.*, 179 U. S. 472, 21 Sup. Ct. 174, 45 L. ed. 280.

<sup>69</sup> *McClure v. Oxford*, 94 U. S. 429, 24 L. ed. 129. In the case cited the purchaser of bonds was held bound to take notice of the time the enabling act went into force. In the course of the opinion it was said: "The statute under which the bonds now in question were issued, and which is referred to in the bonds, though passed and approved March 1, 1872, was not by its terms to go into effect until after its publication in the 'Kansas Weekly Commonwealth.' Of this every pur-

no one can claim to be a bona fide holder when the bonds themselves contain recitals showing that they were not issued in accordance with any existing law.<sup>70</sup> Thus, where the bonds recited that they were issued under a statute which had been declared to be void, it was held that such a recital was notice to the purchaser of their invalidity.<sup>71</sup> But such a recital will not prevent the holder of the bonds from showing that they were really

chaser of the bonds had notice, because it was part of the statute he was bound to take notice of. A purchaser would, therefore, be put upon inquiry as to the time of the publication, and by reasonable diligence could have ascertained that this did not take place until March 21. This being the case, the law charges him with knowledge that the statute did not go into effect until that date." See generally as to making inquiry, *Cromwell v. Sac County*, 96 U. S. 51, 24 L. ed. 681; *Francis v. Howard Co.*, 54 Fed. 487; *Ball v. Presidio Co.*, 88 Tex. 60, 29 S. W. 1042.

<sup>70</sup> *Harshman v. Bates County*, 92 U. S. 569, 23 L. ed. 747; *McClure v. Oxford*, 94 U. S. 429, 24 L. ed. 129; *Bates County v. Winters*, 97 U. S. 83, 24 L. ed. 933; *Anthony v. Jasper County*, 101 U. S. 693, 25 L. ed. 1005; *Barnes v. Lacon*, 84 Ill. 461; *Johnson v. Butler*, 31 La. Ann. 770; *Woodruff v. Okolona*, 57 Miss. 806; *Dodge v. Platte Co.*, 82 N. Y. 218. A purchaser of bonds is bound to take notice of all recitals therein. *Kohn v. Sacramento Elec. &c. R. Co.*, 168 Cal. 1, 141 Pac. 626.

<sup>71</sup> *Gilson v. Dayton*, 123 U. S. 59, 8 Sup. Ct. 66, 31 L. ed. 74; *Crow v. Oxford*, 119 U. S. 215, 7 Sup. Ct. 180, 30 L. ed. 388. In this latter

case it is held that the certificate of the state auditor, as to matters which he was not authorized by the statute under which the bonds were issued to certify, is of no avail against the municipality, although it procured such certificate to be indorsed upon the bonds. The New York act of 1869 was amended in 1871, so as to authorize the issuance of railroad aid bonds upon the petition of a majority of the tax-payers "who are taxed or assessed for property, not including those taxed for dogs or highway tax only, upon the last preceding assessment roll, . . . and who . . . represent a majority of the taxable property." It was held, in a suit to enforce bonds issued after the amended act was passed, that a petition, after the enactment of the later statute which followed the language of the act of 1869, and did not show that petitioners were a majority of the tax-payers exclusive of those "taxed for dogs or highways only," conferred no power on the county judge, and an adjudication thereon which was similarly defective, and bonds issued on it, which recited that they were issued under the act of 1869, were void. *Rich v. Mentz Tp.*, 134 U. S. 632, 10 Sup. Ct. 610, 33 L. ed. 1074.

issued by authority of a different act than the one referred to, in which case they may be valid.<sup>72</sup> It has also been held that purchasers of county bonds issued under statutory authority to aid in the completion of any railroad in which the citizens of the county have an interest, are not entitled to assume, for the purpose of sustaining the validity of the bonds, that the railroad had been begun before the adoption of a provision of the constitution antedating the charter of the company, but that a recital in the bonds that they were issued under the authority of such statute entitled bona fide purchasers to assume that the condition of the road as to construction, and the interest of the county therein, were such as were required by such statute to exist before the bonds could be lawfully issued.<sup>73</sup>

**§ 1097 (897). Estoppel by recitals in bonds—General doctrine.**—The courts regard with favor bona fide holders of aid bonds, and liberally apply the doctrine of estoppel, in order to protect such holders. Recitals are given great force and effect. It is an established rule in the United States courts, where most of the litigation involving the validity of such bonds is carried on, that, where power exists to issue bonds upon certain conditions, and the question of compliance with those conditions is left by the statute to the officers issuing the bonds for decision, or, it seems, where the existence of the facts warranting an exercise of the power is peculiarly within the knowledge of such officers, the municipality will be bound by the recital of the bonds as to such matters.<sup>74</sup> The rule has been thus stated: "Where

<sup>72</sup> *Anderson County v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. ed. 966; *Knox County v. New York Ninth National Bank*, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. ed. 93. Compare *Inhabitants of Harmony v. Truman*, 212 Fed. 4; *Ninth Nat. Bank v. Knox Co.*, 37 Fed. 75.

<sup>73</sup> *Stanly County v. Coler*, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. ed. 1126.

<sup>74</sup> *New Providence v. Halsey*, 117

U. S. 336, 6 Sup. Ct. 764, 29 L. ed. 904; *Menasha v. Hazard*, 102 U. S. 81, 26 L. ed. 85; *Pompton v. Cooper Union*, 101 U. S. 196, 25 L. ed. 803; *Hackett v. Ottawa*, 99 U. S. 86, 25 L. ed. 363; *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. ed. 416; *Block v. Commissioners*, 99 U. S. 686, 25 L. ed. 491; *Daviess County v. Huidekoper*, 98 U. S. 98, 25 L. ed. 112; *Warren County v. Marcy*, 97 U. S. 96, 24 L. ed. 977; *San An-*

legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with powers to decide whether the condition has been complied with, their recital that it has been made in the bonds issued by them, and held by a bona fide purchaser, is conclusive of the fact and binding upon the municipality, for the recital itself is a decision of the fact by the appointed tribunal."<sup>75</sup> The doctrine of the federal

tonio v. Mehaffy, 96 U. S. 312, 24 L. ed. 816; Douglas County v. Bolles, 94 U. S. 104, 24 L. ed. 46; Johnson County v. January, 94 U. S. 202, 24 L. ed. 110; Marion County v. Clark, 94 U. S. 278, 24 L. ed. 59; Coloma v. Eaves, 92 U. S. 484, 23 L. ed. 579; Moran v. Miami County, 2 Black (U. S.) 722, 17 L. ed. 342; Columbus v. Dennison, 69 Fed. 58. See also Waite v. Santa Cruz, 184 U. S. 302, 22 Sup. Ct. 327, 46 L. ed. 552; Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. ed. 689; Chaffee County v. Potter, 142 U. S. 355, 12 Sup. Ct. 1040, 35 L. ed. 1040; Kent v. Dana, 100 Fed. 56; Clapp v. Marice City, 111 Fed. 103; Municipal Trust Co. v. Johnson City, 116 Fed. 458; Fairfield v. Rural Independent School Dist., 116 Fed. 838; Independent School Dist. v. Rew, 111 Fed. 1, and numerous authorities there cited; Town of Aurora v. Gates, 208 Fed. 101, L. R. A. 1915A, 910, and cases cited in opinion and note.

<sup>75</sup> Coloma v. Eaves, 92 U. S. 484, 23 L. ed. 579; Buchanan v. Litchfield, 102 U. S. 278, 26 L. ed. 138;

Toledo Northern Bank v. Porter Tp., 110 U. S. 608, 4 Sup. Ct. 254, 28 L. ed. 258; Dixon County v. Field, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. ed. 360; Anderson County v. Beal, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. ed. 966; Phelps v. Lewiston, 15 Blatchf. (U. S.) 131; Irwin v. Ontario, 3 Fed. 49; Platt v. Hitchcock County, 139 Fed. 929. See also Town of Aurora v. Gates, 208 Fed. 101, L. R. A. 1915A, 910; Truman v. Inhabitants of Harmony, 205 Fed. 549, reversed in 212 Fed. 4; Quinlan v. Green County, 205 U. S. 410, 27 Sup. Ct. 505, 51 L. ed. 860; Presidio County v. Noel-Young Bond &c. Co., 212 U. S. 58, 29 Sup. Ct. 237, 53 L. ed. 402. Where the county court has been designated by the statute as the proper authority to determine the existence of the conditions necessary to authorize the subscription by the township to the railroad company's stock, and the consequent issuance of bonds, the fact of the issue thereof by the county court under its seal, with the recital that all the necessary steps have been taken, together with the



tribunals is very generally adopted and asserted by the state courts.<sup>76</sup>

**§ 1098 (898). Estoppel by recitals in bonds—Illustrative cases.**—In a recent case it was held that a recital in aid bonds estopped the municipality from questioning the qualifications of the county judge,<sup>77</sup> and from questioning the corporate exist-

fact that the county has for several years paid interest on the bonds, estop it from setting up, as against a bona fide holder, any mere irregularity in making the subscription or issuing the bonds. *Livingston County v. Portsmouth First Nat. Bank*, 128 U. S. 102, 9 Sup. Ct. 18, 32 L. ed. 359; *Hopper v. Covington*, 8 Fed. 777; *Carrier v. Shawangunk*, 10 Fed. 220; *Lane v. Embden*, 72 Maine 354; *Anderson Co. v. Houston &c. R. Co.*, 52 Tex. 228.

<sup>76</sup> *New Haven &c. R. Co. v. Chatham*, 42 Conn. 465; *Jefferson Co. v. Lewis*, 20 Fla. 980; *Johnson v. Stark Co.*, 24 Ill. 75; *Clarke v. Hancock Co.*, 27 Ill. 305; *Williams v. Roberts*, 88 Ill. 11; *Burlington &c. R. Co. v. Stewart*, 39 Iowa 267; *Lamb v. Burlington &c. R. Co.*, 39 Iowa 333; *Chicago &c. R. Co. v. Shea*, 67 Iowa 728, 25 N. W. 901; *Leavenworth &c. R. Co. v. Douglass Co.*, 18 Kans. 169; *Kansas City &c. R. Co. v. Rich*, 45 Kans. 275, 25 Pac. 595; *South Hutchinson v. Bowman*, 63 Kans. 872, 66 Pac. 1035; *Mutual Benefit &c. Ins. Co. v. Elizabeth*, 42 N. J. L. 235; *State v. Columbia*, 12 S. Car. 370; *Chicago &c. R. Co. v. Commissioners*, 49 Kans. 399, 30 Pac. 456; *Lane v. Embden*, 72 Maine 354; *Dodge v. Platte Co.*, 16 Hun (N. Y.) 285; *Gould v. Sterling*, 23 N. Y. 456; *Kerr v. Corry*, 105 Pa. St. 282;

*Clark v. Janesville*, 10 Wis. 136; *Sauerhering v. Iron Ridge &c. R. Co.*, 25 Wis. 447. But see *Cagwin v. Hancock*, 84 N. Y. 532. See generally *Lindsey v. Rottaken*, 32 Ark. 619; *Gaddis v. Richland Co.*, 92 Ill. 119; *Lippincott v. Pana*, 92 Ill. 24; *State v. School Dist.*, 10 Nebr. 544, 7 N. W. 315; *State v. Commissioners*, 37 Ohio St. 526; *Shelby Co. v. Jarnagin* (Tenn.), 16 S. W. 1040.

<sup>77</sup> *Andes v. Ely*, 158 U. S. 312, 15 Sup. Ct. 954, 39 L. ed. 996. It was said in the opinion in the case cited. "But further, in view of the recitals on the bonds, are these questions open for inquiry? Ample authority was given by the statutes of the state referred to. Whether the various steps were taken, which, in this particular case, justified the issue of the bonds, was a question of fact; and when the bonds, on their face, recite that those steps have been taken, it is the settled rule of this court that in an action brought by a bona fide holder, the municipality is estopped from showing the contrary. See the multitude of cases commencing with *Knox County, Indiana, v. Aspinwall*, 21 How. (U. S.) 539, 16 L. ed. 208, and ending with *Citizens' Sav. &c. Assn. v. Perry County*, 156 U. S. 692, 15 Sup. Ct. 547, 39 L. ed. 585.

ence of the railroad company.<sup>78</sup> In the case referred to the court carried the doctrine of estoppel very far, holding that the municipality was estopped, although the bonds were signed by commissioners appointed by the county judge and not by the regular municipal officers.<sup>79</sup> We cannot escape the conclusion that the case referred to is an extreme one, and that its doctrine should be limited rather than extended. It seems to us that, where the statute provides that a municipality shall be represented by officers selected by its electors, a county judge has no authority to appoint agents to execute negotiable bonds in its behalf. It

<sup>78</sup>In the case referred to in the preceding note the court cited, upon the point that a party contracting with a corporation is estopped to aver that it is not a corporation *de jure*, the cases of *Leavenworth County v. Barnes*, 94 U. S. 70, 24 L. ed. 63; *Douglas County v. Bolles*, 94 U. S. 104, 24 L. ed. 46; *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168; *Chubb v. Upton*, 95 U. S. 665, 24 L. ed. 523. See also *Municipal Trust Co. v. Johnson City*, 116 Fed. 458. As to the effect of legislative recognition, the court cited *Comanche County v. Lewis*, 133 U. S. 198, 10 Sup. Ct. 286, 33 L. ed. 604; *State v. Commissioners*, 12 Kans. 426; *State v. Hamilton*, 40 Kans. 323, 19 Pac. 723. See also *Macon County v. Shores*, 97 U. S. 272, 276, 24 L. ed. 889; *Dallas Co. v. Huidekoper*, 154 U. S. 655, 14 Sup. Ct. 1190, 25 L. ed. 974; *Smith v. Clark Co.*, 54 Mo. 58.

<sup>79</sup>*Andes v. Ely*, 158 U. S. 312, 15 Sup. Ct. 954, 39 L. ed. 996. It was said in the opinion that. "It may be said that those decisions are not wholly in point, inasmuch as these bonds were signed, not by regular officers, but by commissioners specially appointed, and that, before a

recital made by them can be held to conclude the town, it must appear that they were duly appointed, and thus had authority to act. Doubtless this distinction is not without significance. Yet they were acting commissioners, and their authority was recognized, for each bond was registered in the office of the county clerk and attested by the signature of the county clerk with the seal of the county; and if we go back of that to the records of the county judge—the appointing power—there appears a separate order in due form, appointing them commissioners, which order recites a prior adjudication of all the essential facts. Giving full force to the distinction which exists between the action of general and special officers, there must be even in respect to the latter, some point in the line of inquiry, back of which a party dealing in bonds of a municipality is not bound to go in his investigations as to their authority to represent the municipality, and that point, it would seem, was reached when there is found an appointment, in due form, made by the appointing tribunal named in the statute."

may, perhaps, be true that, if the municipality secures the benefit of the bonds in tangible property or money, it should be held liable therefor, but we cannot believe that the bonds can be considered as the obligations of the public corporation, unless executed by the officers constituted by law the representatives of the public corporation. If there is power to appoint corporate agents, and to delegate to them authority to execute negotiable bonds in behalf of the municipality, then it may well be held that bonds executed by such agents are the obligations of the municipality. It is held that a municipality is estopped to dispute its liability upon bonds in the hands of bona fide holders, upon the ground that the election authorizing their issue was not properly conducted,<sup>80</sup> or that the persons giving their written assent did not constitute two-thirds of the resident taxpayers,<sup>81</sup> or that the required proportion of the voters had not signed the necessary petition,<sup>82</sup> or that the amount of bonds issued was a greater per cent. of the taxable valuation of the municipality than it was empowered to issue,<sup>83</sup> or that the proper recommendation of the

<sup>80</sup> *Knox County, Indiana, v. Aspinwall*, 21 How. (U. S.) 539, 16 L. ed. 208; *Mercer County v. Hackett*, 1 Wall. (U. S.) 83, 17 L. ed. 548; *Supervisors v. Schenck*, 5 Wall. (U. S.) 772, 18 L. ed. 556; *Lynde v. The County*, 16 Wall. (U. S.) 6, 21 L. ed. 272; *Coloma v. Eaves*, 92 U. S. 484, 23 L. ed. 579; *Leavenworth County v. Barnes*, 94 U. S. 70, 24 L. ed. 63; *Cass County v. Johnston*, 95 U. S. 360, 24 L. ed. 416; *Hackett v. Ottawa*, 99 U. S. 86, 25 L. ed. 363; *Anthony v. Jasper County*, 101 U. S. 693, 25 L. ed. 1005; *Toledo Northern Bank v. Porter Tp.*, 110 U. S. 608, 4 Sup. Ct. 254, 28 L. ed. 258; *Webb v. Commissioners of Herne Bay*, L. R. 5 Q. B. 642. A recital in a bond issued in payment of a subscription to railway stock, that it is authorized by a certain statute, will

not estop the municipal corporation from asserting that the issue was not authorized by a proper vote, as required by law. *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. ed. 517. But see *Knox County, Indiana, v. Aspinwall*, 21 How. (U. S.) 539, 16 L. ed. 208.

<sup>81</sup> *Venice v. Murdock*, 92 U. S. 494, 23 L. ed. 583.

<sup>82</sup> *Bissell v. Jeffersonville*, 24 How. (U. S.) 287, 16 L. ed. 664.

<sup>83</sup> *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. ed. 748; *Humboldt Tp. v. Long*, 92 U. S. 642, 23 L. ed. 752; *New Providence v. Halsey*, 117 U. S. 336, 6 Sup. Ct. 764, 29 L. ed. 904; *Chaffee County v. Potter*, 142 U. S. 355, 12 Sup. Ct. 216, 35 L. ed. 1040; *Coler v. Board of Commissioners*, 6 N. Mex. 88, 27 Pac. 619. But where the amount to be issued

grand jury as to the amount of bonds to be issued was not had,<sup>84</sup> where the bonds, as issued, contained a recital that such prerequisite conditions had been observed.<sup>85</sup> It has been held that, where the bonds contained a recital that they had been issued in pursuance of a subscription to the capital stock of a railroad company, made under the authority of a certain statute, the corporation was estopped from setting up the fact that the subscription was made after the authority to make it had expired, as a defense

was limited to a certain fixed sum, bonds containing no recitals, issued in excess of that sum, were held void for lack of power to issue them, even in the hands of bona fide holders. *Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. ed. 1026; *Merchants' Bank v. Bergen County*, 115 U. S. 384, 29 L. ed. 430.

<sup>84</sup> *Mercer County v. Hackett*, 1 Wall. (U. S.) 83, 17 L. ed. 548.

<sup>85</sup> *Toledo Northern Bank v. Porter Tp.*, 110 U. S. 608, 4 Sup. Ct. 254, 28 L. ed. 258; *Ottawa v. National Bank*, 105 U. S. 342, 26 L. ed. 1127; *Menasha v. Hazard*, 102 U. S. 81, 26 L. ed. 85; *Foote v. Pike County*, 101 U. S. 688, note, 25 L. ed. 972; *Douglass v. Pike Co.*, 101 U. S. 677, 25 L. ed. 968; *Pompton v. Cooper Union*, 101 U. S. 196, 25 L. ed. 803; *Roberts v. Bolles*, 101 U. S. 119, 25 L. ed. 880; *Anthony v. Jasper County*, 101 U. S. 693, 25 L. ed. 1005; *Lyons v. Munson*, 99 U. S. 684, 25 L. ed. 451; *Block v. Commissioners*, 99 U. S. 686, 25 L. ed. 491; *Orleans v. Platt*, 99 U. S. 676, 25 L. ed. 404; *Wilson v. Salamanca*, 99 U. S. 499, 25 L. ed. 330; *Supervisors v. Galbraith*, 99 U. S. 214, 25 L. ed. 410; *Hackett v. Ottawa*, 99 U. S. 86, 25 L. ed. 363; *Daviess County v. Huideko-*

*per*, 98 U. S. 98, 25 L. ed. 112; *Macon County v. Shores*, 97 U. S. 272, 279, 24 L. ed. 889; *Warren County v. Marcy*, 97 U. S. 96, 24 L. ed. 977; *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. ed. 816; *Rock Creek v. Strong*, 96 U. S. 271, 24 L. ed. 815; *Cass County v. Johnston*, 95 U. S. 360, 24 L. ed. 416; *Douglas County v. Bolles*, 94 U. S. 104, 24 L. ed. 46; *Randolph County v. Post*, 93 U. S. 502, 52 L. ed. 957; *Venice v. Murdock*, 92 U. S. 494, 23 L. ed. 583; *Coloma v. Eaves*, 92 U. S. 484, 23 L. ed. 579; *Pendleton County v. Amy*, 13 Wall. (U. S.) 297, 20 L. ed. 579; *St. Joseph Tp. v. Rogers*, 16 Wall. (U. S.) 644, 21 L. ed. 328; *Kenicott v. Supervisors*, 16 Wall. (U. S.) 452, 21 L. ed. 319; *Lynde v. The County*, 16 Wall. (U. S.) 6, 21 L. ed. 272; *Grand Chute v. Winegar*, 15 Wall. (U. S.) 355, 21 L. ed. 170; *Lexington v. Butler*, 14 Wall. (U. S.) 282, 20 L. ed. 809; *Supervisors v. Schenck*, 5 Wall. (U. S.) 772, 18 L. ed. 556; *Cincinnati v. Morgan*, 3 Wall. (U. S.) 275, 18 L. ed. 146; *Meyer v. Muscatine*, 1 Wall. (U. S.) 384, 393, 17 L. ed. 564; *Van Hostrup v. Madison*, 1 Wall. (U. S.) 291, 17 L. ed. 538; *Mercer Co. v. Hackett*, 1 Wall. (U. S.) 83, 17 L. ed. 548; *Bissell v. Jeffersonville*,

to a suit by a bona fide holder of such bonds.<sup>86</sup> In the case referred to three of the members of the court dissented, and, as it seems to us, with good reason, for we believe that the question was one of power to be determined by an examination of public laws. Bonds were held valid in a case where the subscription was made upon conditions which the municipality had power to impose, and bonds were issued reciting that such conditions had been performed, when, in fact, they had not; and it was held that the application of the rule was not affected by the fact that the statute declared that such bonds should not be binding until after the performance of the prescribed conditions.<sup>87</sup> And the purchaser is held not to be charged with constructive notice of anything in the public records of the municipality, which would show that such recitals are really false.<sup>88</sup> But where the statute makes an accessible public record the test, a recital contradicting it is held not to constitute an estoppel.<sup>89</sup>

24 How. (U. S.) 287, 16 L. ed. 664; Knox County, Indiana, v. Aspinwall, 21 How. (U. S.) 539, 16 L. ed. 208; Nicolay v. St. Clair Co., 3 Dill. (U. S.) 163; Mygatt v. Green Bay, 1 Biss. (U. S.) 292; Moran v. Miami County, 2 Black (U. S.) 722, 17 L. ed. 342; Woods v. Lawrence County, 1 Black (U. S.) 386, 17 L. ed. 122; Third Nat. Bank v. Seneca Falls, 15 Fed. 783; Cary v. Ottawa, 8 Fed. 199; Shorter v. Rome, 52 Ga. 621; Wilkinson v. Peru, 61 Ind. 1; St. Louis v. Shields, 62 Mo. 247; Smith v. County of Clark, 54 Mo. 58, 81; Bargate v. Shortridge, 5 H. L. Cas. 297; Imperial Land Co., In re, L. R. 11 Eq. 478; Webb v. Commissioners of Herne Bay, L. R. 5 Q. B. 642; Royal British Bank v. Turquand, 6 El. & Bl. 325.

<sup>86</sup> Moultrie County v. Rockingham Ten-Cent Sav. Bank, 92 U. S. 631, 23 L. ed. 631. The court dis-

criminates the case before it from that of Concord v. Portsmouth Savings Bank, 92 U. S. 625, 23 L. ed. 628, but it seems to us that the principle is the same in both cases.

<sup>87</sup> Insurance Co. v. Bruce, 105 U. S. 328, 28 L. ed. 1121.

<sup>88</sup> Marcy v. Oswego, 92 U. S. 637, 23 L. ed. 748; Humboldt Tp. v. Long, 92 U. S. 642, 23 L. ed. 752. See also Stanly County v. Coler, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. ed. 1126. Compare Truman v. Inhabitants of Harmony, 205 Fed. 549, reversed in 212 Fed. 4.

<sup>89</sup> Sutliff v. Lake County, 147 U. S. 230, 13 Sup. Ct. 318, 37 L. ed. 145; Dixon County v. Field, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. ed. 360; Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. ed. 689. See also Sutro v. Rhodes, 92 Cal. 117, 28 Pac. 98; Evans v. McFarland, 186 Mo. 703, 85 S. W. 873, citing

§ 1099 (899). **Recitals in bonds not always conclusive.**—As we have elsewhere seen, recitals in bonds or statements in certificates of officers are not conclusive where the municipality has no power to issue bonds, but there are also other cases in which they are held not to be effective as an estoppel. Where there is notice of defects, and no change of position, made in good faith, and no laches or acquiescence, there can be no estoppel, notwithstanding the recitals in the bonds. Where the enabling act expressly requires that the bonds shall be registered, and provides that, if not registered, they shall be void, the certificate of the officer is held not to estop the municipality from showing that the provisions of the enabling act were not complied with.<sup>90</sup> In other cases bonds have been held void and the doctrine of estoppel denied application.<sup>91</sup>

Thornburg v. School Dist., 175 Mo. 12, 75 S. W. 81; Gardner v. School Dist., 34 Okla. 716, 126 Pac. 1018; National L. Ins. Co. v. Mead, 13 S. Dak. 37, 342, 82 N. W. 78, 48 L. R. A. 785, 79 Am. St. 876; Citizens' Bank v. Terrell, 78 Tex. 450, 14 S. W. 1003. So, where the constitution contains an absolute limitation or prohibition it is held that a ministerial board or officer can not determine the matter to the contrary so as to create an estoppel by recitals. Hedges v. Dixon County, 150 U. S. 182, 14 Sup. Ct. 71, 37 L. ed. 1044; Lake County v. Dudley, 173 U. S. 243, 19 Sup. Ct. 398, 43 L. ed. 684; Shaw v. Independent School Dist., 77 Fed. 277. See also First Nat. Bank v. District Tp., 86 Iowa 330, 53 N. W. 301, 41 Am. St. 489.

<sup>90</sup> In German Savings Bank v. Franklin County, 128 U. S. 526, 9 Sup. Ct. 159, 32 L. ed. 519, the case was distinguished from Lewis v. Commissioners, 105 U. S. 739, 26 L. ed. 993, and it was said, "The

registration of the bonds by the state auditor has nothing to do with any of the terms or conditions on which the stock was voted and subscribed. Neither the registration nor the certificate of registry covers or certifies any fact as to compliance with the conditions prescribed in the vote, on which alone the bonds were to be issued. The recital in the bonds does not contain any reference to the act of April 16, 1869, or certify any compliance with the provisions of that act; and the certificate of registry merely certifies that the bond has been registered in the auditor's office pursuant to the provisions of the act of April 16, 1869. The statute does not require that the auditor shall determine or certify that the bonds have been regularly or legally issued."

<sup>91</sup> Randolph County v. Post, 93 U. S. 502, 23 L. ed. 957; Concord v. Robinson, 121 U. S. 165, 7 Sup. Ct. 937, 30 L. ed. 885. In German Savings Bank v. Franklin County,

§ 1100 (900). **Official certificates — Conclusiveness of.** — Where the law imposes upon a municipal officer the duty of certifying that certain facts exist, or that certain proceedings have been had, or invests him with authority to make such a certificate, the general rule is that, as to bona fide purchasers of bonds, the certificate is conclusive.<sup>92</sup> In order that a certificate shall be conclusive in itself, it is essential that it should be made by an officer or agent invested with authority, since the certificate of a person having no authority whatever to make such a certificate is, of itself, of no force or effect.<sup>93</sup> It is important to bear in mind, in applying the rule stated, that it applies only in cases of persons who acquire rights without notice of defects in the proceedings. It is evident that it cannot apply in any case where there is an entire absence of power to issue bonds.<sup>94</sup> Where there

128 U. S. 526, 9 Sup. Ct. 739, 32 L. ed. 519, the cases of *Insurance Co. v. Bruce*, 105 U. S. 328, 26 L. ed. 1121; *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. 704, 27 L. ed. 424, and *Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. 124, 30 L. ed. 323, are reviewed and their effect defined. See also generally as to effect of recitals, notes in L. R. A. 1915A, 904, 910; 1917B, 1019.

<sup>92</sup> *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175, 17 L. ed. 520; *Block v. Commissioners*, 99 U. S. 686, 25 L. ed. 491; *Hannibal v. Fauntleroy*, 105 U. S. 408, 26 L. ed. 1103; *Humboldt Tp. v. Long*, 92 U. S. 642, 23 L. ed. 752; *Hannibal & C. R. Co. v. Marion Co.*, 36 Mo. 294; *Ontario v. Hill*, 99 N. Y. 324; *Bank of Rome v. Rome*, 19 N. Y. 20, 75 Am. Dec. 272; *State v. Hancock Co.*, 12 Ohio St. 596; *San Antonio v. Lane*, 32 Tex. 405. See generally *Wilson v. Salamanca*, 99 U. S. 499, 25 L. ed. 330; *Davis v. Kendallville*, 5 Biss. (U. S.) 280; *Nicolay v. St. Clair Co.*, 3 Dill. (U. S.) 163; *Sherman County v. Simons*, 109 U. S. 735,

27 L. ed. 1093; *Pollard v. Pleasant Hill*, 3 Dill. (U. S.) 195; *Van Host-rup v. Madison*, 1 Wall. (U. S.) 291, 17 L. ed. 538. See also *Independent School Dist. v. Rew*, 111 Fed. 1, 8, 55 L. R. A. 364, where many other authorities are cited, and note to *Town of Aurora v. Gates* in L. R. A. 1915A, 910, already referred to in a preceding section.

<sup>93</sup> *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. ed. 360; *Anthony v. Jasper County*, 101 U. S. 693, 25 L. ed. 1005; *Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. ed. 1026; *Inhabitants of Harmony v. Truman*, 212 Fed. 4; *Jefferson Co. v. Lewis*, 20 Fla. 980; *State v. Commissioners*, 11 Ohio St. 183. See also *Brown v. Ingalls Tp.*, 81 Fed. 485; *Spitzer v. Blanchard*, 82 Mich. 234, 46 N. W. 400; *Wells v. Supervisors*, 102 U. S. 625, 26 L. ed. 122.

<sup>94</sup> *Allen v. Louisiana*, 103 U. S. 80, 26 L. ed. 318; *Wilkes County v. Coler*, 190 U. S. 107, 23 Sup. Ct. 738, 47 L. ed. 971; *Ogden v. Daviess Co.*,

is power to issue bonds the rule is of general application, since a purchaser of bonds is not bound to examine the municipal records in cases where the constitution or statute does not make them the test and the recitals of the bonds show a compliance with the law, or the certificate of an authorized officer or agent recites that the steps required by law have been taken.

**§ 1101 (901). Recitals in bonds to constitute an estoppel must be of facts.**—To constitute an estoppel it would seem that the recitals in bonds must be of matters of fact. Thus it has been held that a recital which amounts to no more than a statement, "that a subscription to the capital stock of the company was authorized by the statutes mentioned, and that the sum mentioned in the bond was part of it," will not constitute an estoppel.<sup>95</sup> It is quite difficult to reconcile the statements found in the opinions delivered in the many cases upon this subject. It may, however, be said that, to be sufficient to work an estoppel, the recitals must always be of matters of fact, but what shall be considered matters of fact it is not easy to determine with accuracy or precision. In one of the cases it was held that estoppels can result only from "matters of fact, which the corporate officers have authority to certify," but it was also held that it is "not necessary that the recital should enumerate each particular fact essential to the existence of the obligation." It

102 U. S. 634, 26 L. ed. 263; *Sherard v. Lafayette Co.*, 3 Dill. (U. S.) 236; *Lippincott v. Pana*, 92 Ill. 24; *People v. Jackson Co.*, 92 Ill. 441; *Chicago &c. R. Co. v. Aurora*, 99 Ill. 205; *State v. School Dist.*, 10 Nebr. 544, 7 N. W. 315; *Clay v. Hawkins Co.*, 5 Lea (Tenn.) 137; *Johnson City v. Charleston &c. R. Co.*, 100 Tenn. 138, 44 S. W. 670; *Phillips v. Albany*, 28 Wis. 340. See *Lincoln v. Iron Co.*, 103 U. S. 412, 26 L. ed. 518; *Cromwell v. Sac County*, 96 U. S. 51, 24 L. ed. 681; *State v. Montgomery*, 74 Ala. 226; *Wich-*

*mann v. Placerville*, 147 Cal. 162, 81 Pac. 537; *Treadway v. Schnauber*, 1 Dak. 236, 46 N. W. 464; *Ryan v. Lynch*, 68 Ill. 160; *Williams v. Roberts*, 88 Ill. 11; *People v. Oldtown*, 88 Ill. 202; *Plainview v. Winona &c. R. Co.*, 36 Minn. 505, 32 N. W. 745; *Harrington v. Plainview*, 27 Minn. 224, 6 N. W. 777; *Cagwin v. Hancock*, 84 N. Y. 532.

<sup>95</sup> *Carroll County v. Smith*, 111 U. S. 566, 4 Sup. Ct. 539, 28 L. ed. 517.



was said in the case referred to that, "A general statement that the bonds have been issued in conformity with the law will suffice so as to embrace every fact which the officers making the statement are authorized to determine and certify."<sup>96</sup> And in many cases a recital that the bonds are issued in pursuance of the statutory authority or in conformity with law has been held to have the effect indicated and to constitute an estoppel.<sup>97</sup>

**§ 1102 (902). No estoppel where the officer ordering bonds to issue had no jurisdiction.**—It has been held that, where it appears that the officers directing bonds to issue had no jurisdiction of the subject, the bonds are void even in the hands of a bona fide holder.<sup>98</sup> It is not easy to reconcile some of the broad

<sup>96</sup> *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. ed. 360. See also *Municipal Trust Co. v. Johnson City*, 116 Fed. 458; *White v. Chatfield*, 116 Minn. 371, 133 N. W. 962; and authorities cited in next following note: The statement copied in the text asserts the rule as generally enforced, but there is some conflict in the cases as to the application of the rule. *Van Hostrup v. Madison City*, 1 Wall. (U. S.) 291, 17 L. ed. 538; *Hayes v. Holly Springs*, 114 U. S. 120, 5 Sup. Ct. 785, 29 L. ed. 81; *Ogden v. Daviess County*, 102 U. S. 634, 26 L. ed. 263; *Knox County of Indiana, v. Aspinwall*, 21 How. (U. S.) 539, 16 L. ed. 208; *Moultrie County v. Rockingham Ten-Cent Savings Bank*, 92 U. S. 631, 23 L. ed. 631; *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. ed. 748; *Coloma v. Eaves*, 92 U. S. 484, 23 L. ed. 579; *School District v. Stone*, 106 U. S. 183, 1 Sup. Ct. 84, 27 L. ed. 90; *Clay County v. Society for Savings*, 104 U. S. 579, 26 L. ed. 856; *Warren County v. Marcy*, 97 U. S. 96, 24

L. ed. 977; *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. 704, 27 L. ed. 424; *Quincy &c. R. Co. v. Morris*, 84 Ill. 410. Ante, § 1100, authorities cited in notes.

<sup>97</sup> *Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. ed. 760; and *Stanly County v. Coler*, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. ed. 1126, are among the latest decisions to such effect. See also *Hayden v. Town of Aurora*, 57 Colo. 389, 142 Pac. 183; *Town of Aurora v. Gates*, 208 Fed. 101, L. R. A. 1915A, 910.

<sup>98</sup> *Rich v. Mentz Tp.*, 134 U. S. 632, 10 Sup. Ct. 610, 33 L. ed. 1074; *Cowdrey v. Caneadea*, 16 Fed. 532; *Rich v. Mentz*, 19 Fed. 725. See also *People v. Smith*, 45 N. Y. 772; *Mentz v. Cook*, 108 N. Y. 504, 15 N. E. 541; *People v. Smith*, 55 N. Y. 135; *Wellsborough v. New York &c. R. Co.*, 76 N. Y. 182; *Metzger v. Attica &c. R. Co.*, 79 N. Y. 171; *Hills v. Peekskill &c. Bank*, 101 N. Y. 490, 5 N. E. 327. In the first case cited, the court declared that it was bound to follow the

statements made in the opinions given in the cases referred to, by the federal courts of original jurisdiction, with some of the statements in other cases, but the conclusion reached is, as we believe, unquestionably correct. We think that dealers in municipal bonds must always ascertain that the power to execute such bonds has been conferred upon municipal officers who assume to issue them,<sup>99</sup> and that the rule protecting such dealers has been in some instances unjustly extended. It is known to every one that municipal officers exercise limited delegated powers,<sup>1</sup> and hence there is reason for requiring persons who purchase municipal bonds to ascertain that the authority assumed to be exercised has been conferred by a valid statute.

§ 1103 (903). **Estoppel otherwise than by recital—Illustrative instances.**—Estoppel may be created by acts which make it against equity and good conscience to permit the municipality to deny the validity of the bonds. It is impossible to lay down accurate general rules, for cases are usually to be determined upon particular facts. We refer to some of the cases upon the general subject. It has been held that the levy by town officers of taxes to pay interest on railroad aid bonds does not of itself estop taxpayers from contesting their validity,<sup>2</sup> but on this point there is an apparent, if not actual, conflict of authority.<sup>3</sup> Payment of

decisions of the state court, and referred to the cases of *Meriwether v. Muhlenburg County Ct.*, 120 U. S. 354, 357, 7 Sup. Ct. 563, 30 L. ed. 653; *Claiborne County v. Brooks*, 111 U. S. 400, 410, 4 Sup. Ct. 489, 28 L. ed. 470.

<sup>99</sup> In *Cowdrey v. Canadea*, 16 Fed. 532, the court said: "Purchasers of municipal bonds, executed by agents, must ascertain at their peril that the delegated authority assumed has been conferred." See also *Gardner v. School Dist.* 34 Okla. 716, 126 Pac. 1018; *In re Manistee Watch Co.*, 197 Fed. 455.

<sup>1</sup> *Union School v. First National*

*Bank*, 102 Ind. 464, 470; *Lowell &c. Bank v. Winchester*, 8 Allen (Mass.) 109; *Dickinson v. Conway*, 12 Allen (Mass.) 487; *Benoit v. Conway*, 10 Allen (Mass.) 528; *Railroad Nat. Bank v. Lowell*, 109 Mass. 214.

<sup>2</sup> *Citizens' Sav. &c. Assn. v. Topoka*, 20 Wall. (U. S.) 655, 22 L. ed. 455; *Cherry Creek v. Becker*, 2 N. Y. S. 514, 50 Hun. 601; *Lippincott v. Pana*, 92 Ill. 24. See also *Town of Aurora v. Hayden*, 23 Colo. App. 1, 126 Pac. 1109; *Clarke v. Northampton*, 120 Fed. 661.

<sup>3</sup> *Cass County v. Gillett*, 100 U. S. 585, 25 L. ed. 585; *Eminence v.*

interest on bonds is not of itself necessarily sufficient to create an estoppel, but the fact that the county has paid interest on such bonds is a circumstance to be considered in deciding whether the acts of the municipality work an estoppel against it.<sup>4</sup> Where interest has been paid for a long period of time it has been held that it will estop the municipality to take advantage of irregularities or defects.<sup>5</sup> Voting as a stockholder has been regarded as sufficient to create an estoppel,<sup>6</sup> but there is authority to the contrary.<sup>7</sup> It has been held that substituting bonds for those originally issued will estop the municipality from setting up as a defense that the original proceedings were defective or irregular.<sup>8</sup>

Grasser, 81 Ky. 52; Moultrie County v. Rockingham Ten-Cent Savings Bank, 92 U. S. 631. See also State v. Scott County, 58 Kans. 491, 49 Pac. 663; Doty v. Garfield Tp., 89 Kans. 719, 133 Pac. 172; Niland v. Bouron, 193 N. Y. 180, 85 N. E. 1012.

<sup>4</sup> Livingston County v. Portsmouth First Nat. Bank, 128 U. S. 102, 9 Sup. Ct. 18, 32 L. ed. 359; Moulton v. Evansville, 25 Fed. 382.

<sup>5</sup> A county which issued bonds containing a recital that they were issued under the act, delivered them to the railroad company and paid interest on them for fifteen years, can not set up an irregularity in the election, as against an innocent purchaser of the bonds. Nelson v. Haywood Co., 3 Pick. (Tenn.) 781, 11 S. W. 885; State v. Anderson Co., 8 Bax. (Tenn.) 249; Portsmouth Savings Bank v. Springfield, 4 Fed. 276; Clay County v. Society for Savings, 104 U. S. 579, 26 L. ed. 856; Atchison Board of Education v. DeKay, 148 U. S. 591, 13 Sup. Ct. 706, 37 L. ed. 573; See also Colburn v. McDonald, 72 Nebr. 431, 100 N. W. 961; Keith

Co. v. Citizens' &c. Co., 116 Fed. 13; Schmitz v. Zeh, 91 Minn. 290, 97 N. W. 1049, 1 Ann. Cas. 322; Nelson v. Haywood Co., 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648.

<sup>6</sup> Cass County v. Gillett, 100 U. S. 585, 25 L. ed. 585.

<sup>7</sup> Supervisors v. Paxton, 57 Miss. 701.

<sup>8</sup> Jasper County v. Ballou, 103 U. S. 745, 26 L. ed. 423; Coolidge v. General Hosp. Soc., 9 Kans. App. 891, 58 Pac. 562. See Gause v. Clarksville, 1 McCr. (U. S.) 78; Marcy v. Oswego Tp., 92 U. S. 637, 23 L. ed. 748; Randolph County v. Post, 93 U. S. 502, 23 L. ed. 957; Douglass County v. Bolles, 94 U. S. 104, 24 L. ed. 46; Warren County v. Marcy, 97 U. S. 96, 24 L. ed. 977; Deyo v. Otoe Co., 37 Fed. 246; Leavenworth &c. R. Co. v. Commissioners, 18 Kans. 169; Plattsmouth v. Fitzgerald, 10 Nebr. 401, 6 N. W. 470; Solon v. Williamsburgh &c. Bank, 114 N. Y. 122, 21 N. E. 168; Hills v. Peekskill &c. Bank, 101 N. Y. 490, 5 N. E. 327; Washington &c. R. Co. v. Cazenove, 83 Va. 744, 3 S. E. 433.

It is to be noted, however, that where there was an entire absence of power to issue the original bonds, and no curative statute or statute authorizing substitution, there can be no effective exchange or substitution of bonds.<sup>9</sup> Where there is an exchange of bonds for stock, or of stock for bonds, and long acquiescence, an estoppel arises.<sup>10</sup> Where there has been no change of position, and no acquiescence, the general rule is that there can be no estoppel.<sup>11</sup> The general rule is that taxpayers who stand by, and, without objection, see expenditures of money made upon the faith that the subscription or bonds are valid and enforceable, are estopped from denying their validity, and we can see no reason why this general doctrine should not apply to the municipality.<sup>12</sup> The tendency of the decisions is to extend the principle of estoppel for the protection of bona fide holders of municipal aid bonds. Circumstances which, in ordinary cases, would hardly be regarded as sufficient to constitute an estoppel, are often held to create an estoppel in favor of bondholders.<sup>13</sup>

<sup>9</sup> *Horton v. Thompson*, 71 N. Y. 513; *McKee v. Vernon Co.*, 3 Dill. (U. S.) 210. The decision in the first of the cases cited is, as elsewhere shown, of doubtful soundness upon some of the questions involved, but as to the immediate point to which it is here cited it is not justly subject to criticism.

<sup>10</sup> *Pendleton County v. Amy*, 13 Wall. (U. S.) 297, 20 L. ed. 579.

<sup>11</sup> *Union &c. R. Co. v. Merrick Co.*, 3 Dill. (U. S.) 359; *Union &c. R. Co. v. Lincoln Co.*, 3 Dill. (U. S.) 300; *Portland &c. R. Co. v. Hartford*, 58 Maine 23.

<sup>12</sup> *Vickery v. Blair*, 134 Ind. 554, 32 N. E. 880; *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124; *Simpson Co. v. Louisville &c. R. Co.*, 14 Ky. 673, 19 S. W. 665; *Planet &c. Co. v. St. Louis &c. R. Co.*, 115 Mo. 613, 22 S. W. 616. See generally *New Orleans &c. R. Co. v. New*

*Orleans*, 44 La. Ann. 748, 11 So. 77, and 44 La. Ann. 728, 11 So. 78; *Seattle v. Columbia &c. R. Co.*, 6 Wash. 379, 33 Pac. 1048, 56 Am. & Eng. R. Cas. 618; *Spokane &c. R. Co. v. Spokane Falls*, 6 Wash. 521, 33 Pac. 1072; *Fort Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294, 14 Sup. Ct. 339, 38 L. ed. 167, 44 Am. & Eng. Corp. Cas. 604; Ante, § 1062.

<sup>13</sup> *Supervisors v. Schenck*, 5 Wall. (U. S.) 772, 18 L. ed. 556. But see *Supervisors v. Cook*, 38 Ill. 44, 87 Am. Dec. 282; *Redd v. Henry Co.*, 31 Grat. (Va.) 695. See also *Ray County v. Van Sycle*, 96 U. S. 675, 24 L. ed. 800; *Whiting v. Potter*, 18 Blatchf. (U. S.) 165; *Luling v. Racine*, 1 Biss. (U. S.) 314; *Beloit v. Morgan*, 7 Wall. (U. S.) 619, 19 L. ed. 205; *New Haven &c. R. Co. v. Chatham*, 42 Conn. 465; *Butler v. Durham*, 27 Ill. 473; *McPherson*

**§ 1104 (904.) Estoppel by retention of stock.**—The doctrine of some of the cases is that, if the stock received for the bonds is retained by the municipality, it is estopped to deny the validity of the bonds. We incline to think this doctrine of doubtful soundness. If there was no power to issue the bonds, then it seems clear that there could be no estoppel, although the municipality might be liable for the value of the stock. We cannot assent to the broad doctrine that, so long as the municipality retains the stock which it received in exchange for bonds, it will be estopped from defending against them on the ground that they are invalid.<sup>14</sup> It seems to us that the doctrine of estoppel cannot apply where there is an entire absence of power, but that it does apply where there is power, although it is improperly or irregularly exercised. There may be circumstances in addition to the retention of the stock which will create an estoppel, but we think that the mere retention of the stock will not, of itself, create an estoppel. It has been held that the corporation will be estopped to deny the validity of the bonds issued in exchange for stock, where it has held the stock for years and exercised the rights of a stockholder by virtue of holding such stock.<sup>15</sup>

**§ 1105 (905). Recitals in bonds—Effect of against bondholders.**—The principle upon which rests the doctrine that recitals in bonds estop the municipality does not apply, in full vigor at least, as against the bondholder. Thus, a recital in a bond that it was issued under a particular statute may estop the municipal-

v. Foster, 43 Iowa 48, 22 Am. Rep. 215; Lane v. Schomp, 20 N. J. Eq. 82; Alvord v. Syracuse &c. Bank, 98 N. Y. 599; Belo v. Commissioners, 76 N. Car. 489; Goshen v. Shoemaker, 12 Ohio St. 624, 80 Am. Dec. 386. See for numerous cases in which it was held that there was an estoppel. Independent School Dist. v. Rew, 111 Fed. 1, 5.

<sup>14</sup> Pendleton County v. Amy, 13 Wall. (U. S.) 297, 20 L. ed. 579; Whiting v. Potter, 2 Fed. 517;

Munson v. Lyons, 12 Blatchf. (U. S.) 539.

<sup>15</sup> Munson v. Lyons, 12 Blatchf. (U. S.) 539; Whiting v. Potter, 2 Fed. 517; Pendleton County v. Amy, 13 Wall. (U. S.) 297, 20 L. ed. 579. Where bonds were exchanged for stock the fact that the stock was worthless was held no defence against a bona fide purchase in Truman v. Inhabitants of Harmony, 205 Fed. 549 (reversed on other points in 212 Fed. 4).

ity, but it does not, according to the adjudged cases, estop the holder of the bond.<sup>16</sup> Where there are two statutes the bondholder may show under which of the two the bonds were issued.<sup>17</sup> It has been held that where there is a valid statute, and the bonds recite that they are issued "in pursuance of an act of the legislature," it will be presumed that the bonds were issued under a valid act and not under an invalid act.<sup>18</sup> It is somewhat difficult to reconcile the doctrine of the cases referred to in the notes with the elementary principle that an estoppel must be reciprocal, but there may possibly be some reason for denying the application of this general principle. The bondholder relies upon the recitals, and may derive benefit from them, and it is not easy to perceive how he can assert an estoppel against the municipality and yet affirm that the recitals do not operate against him. If there is a clear, express and unmistakable identification of a particular statute, we cannot conceive on what ground, except, perhaps, that of fraud or mistake, the purchaser of the bonds can be heard to aver that they were issued by authority of some other statute than that designated.<sup>19</sup> Where there is no specific designation of a statute and a general or indefinite reference to legislative acts, there is reason for permitting the bondholder to show under which of two statutes the bonds were issued.

**§ 1106 (906). Refunding—Substitution.**—Where the statute specifically prescribes how the power to issue bonds shall be exercised, and upon what conditions, it must be substantially complied with, and if there be no element of estoppel, bonds

<sup>16</sup> *Knox County v. New York Ninth National Bank*, 147 U. S. 91, 13 Sup. Ct. 267; *Johnson County v. January*, 94 U. S. 202, 24 L. ed. 110. See also *Beatrice v. Edminson*, 117 Fed. 427.

<sup>17</sup> *Ninth National Bank v. Knox Co.*, 37 Fed. 75, 79, citing *Johnson County v. January*, 94 U. S. 202, 24 L. ed. 110; *Anderson County v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. ed. 966; and distinguishing

*Crow v. Oxford*, 119 U. S. 215, 7 Sup. Ct. 180, 30 L. ed. 388; *Gilson v. Dayton*, 123 U. S. 59, 8 Sup. Ct. 66, 31 L. ed. 74.

<sup>18</sup> *Moulton v. Evansville*, 25 Fed. 382, 387. See also *Municipal Trust Co. v. Johnson City*, 116 Fed. 458.

<sup>19</sup> See *Crow v. Oxford Tp.*, 119 U. S. 215, 7 Sup. Ct. 180, 30 L. ed. 388; *Cass County v. Wilbarger County*, 25 Tex. Civ. App. 52, 60 S. W. 988.

issued in a mode not authorized by the statute are voidable. But where a choice of means and methods is left to the municipality it may adopt such means or methods, within the range of the power conferred, as it may deem best. It has been held that a municipal corporation which has issued legal bonds in aid of a railroad may lawfully take them up and issue others in their stead without any additional grant of authority, where the exchange can be made on terms favorable to the municipality.<sup>20</sup> We can see no reason why there may not be a refunding where the statute does not expressly or impliedly interdict it, but, of course, if the statute, either expressly or by implication, forbids a refunding, then there can be no valid refunding. It has also been held that bonds of the new series may be enforced even though the manner of issuing them as prescribed by law was not followed,<sup>21</sup> but we suppose this doctrine cannot obtain where there has been a substantial departure from the statute unless there is an effective estoppel. We regard statutes granting power to give aid to railroad companies as within the rule that grants of corporate power are to be strictly construed, and for that reason

<sup>20</sup> *Merchants &c. Bank v. Pulas-ki Co.*, 1 McCr. (U. S.) 316; *Gause v. Clarksville*, 5 Dill. (U. S.) 165; *Commonwealth v. Commissioners*, 37 Pa. St. 237; *Rogan v. Watertown*, 30 Wis. 259. When bonds, issued in aid of a railroad, are afterwards replaced by new bonds issued in place of those that had matured, under an act authorizing the issue of the new bonds and declaring them to be a continuation of the former liability, it is not necessary that the question of issuing the new bonds should be submitted to the voters of the county in pursuance of this section having reference to the contracting of debts, and not to antecedent obligations, or the use of the means necessary for their discharge. *Blanton v. Board of Commission-*

*ers*, 101 N. Car. 532, 8 S. E. 162; *Jasper County v. Ballou*, 103 U. S. 745, 26 L. ed. 422; *Little Rock v. National Bank*, 98 U. S. 308, 25 L. ed. 108; *Portland &c. v. Evansville*, 25 Fed. 389; *Sullivan v. Walton*, 20 Fla. 552; *People v. Lippincott*, 81 Ill. 193; *Galena v. Corwith*, 48 Ill. 423, 95 Am. Dec. 557. See also *Board v. Travelers' Ins. Co.*, 128 Fed. 817; *Pierre v. Dunscomb*, 106 Fed. 617; *Hughes Co. v. Livingston*, 104 Fed. 306.

<sup>21</sup> See *McKee v. Vernon Co.*, 3 Dill. (U. S.) 210, where the bonds substituted were engraved instead of being signed as required by law, but the county retained the consideration for which the original bonds were given, and paid interest for two years on the engraved bonds.

we think the doctrine of the case referred to should be limited rather than extended. The power is one of an extraordinary nature, and is liable to great abuse, so that courts are bound to require a substantial compliance with the provisions of the enabling act. Courts move on dangerous ground when they assume to dispense with obedience to such statutes or to adjudge their provisions to be merely directory.

**§ 1107 (907). Discretionary powers and peremptory duty.**—There is, it is obvious, a clear distinction between the exercise of a discretionary power and the performance of a peremptory duty. Courts cannot control the action of officers invested with discretionary powers, but they may compel the performance of a specific duty. The general rule is that, if a discretionary power is conferred upon the officers of a municipality as to whether they will issue bonds in pursuance of the authority contained in a popular vote, they will not be compelled to do so.<sup>22</sup> So, it has been held that they may be given discretionary power as to calling an election.<sup>23</sup> Where the power of determining the course to be pursued is vested in the municipal authorities, they are the judges of what will best promote the interests of the municipality. It has been held that where bonds are issued they may be exchanged directly for stock of the railroad company without any special power in the act authorizing their issue,<sup>24</sup> but this

<sup>22</sup> *People v. Cass Co.*, 77 Ill. 438.

<sup>23</sup> *Weil, Roth & Co. v. Newbern*, 126 Tenn. 223, 148 S. W. 680, L. R. A. 1915A, 1009.

<sup>24</sup> *Evansville &c. R. Co. v. Evansville*, 15 Ind. 395; *Slack v. Maysville &c. R. Co.*, 13 B. Mon. (Ky.) 1; *Commonwealth v. Pittsburgh*, 41 Pa. St. 278; *Meyer v. Muscatine*, 1 Wall. (U. S.) 384, 17 L. ed. 564. Even where there is a doubt as to the right to make the exchange under the strict terms of the statute, the municipality can not deny the validity of the bonds merely upon that account after having re-

ceived full consideration, and after making use of the stock to carry its purposes into effect. *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475. Where a town subscribes for shares in the capital stock of a railroad, and issues bonds for the payment thereof, it is not necessary that the bonds be sold in the market for cash, in order that the money be paid to the railroad company, when the latter is willing to take the bonds at their full value. *Commonwealth v. Williamstown*, 156 Mass. 70, 30 N. E. 472.



doctrine can not prevail where the statute expressly or impliedly forbids such exchange. Where the duty to execute bonds is peremptory, and all the preliminary conditions have been fulfilled, a writ of mandamus will be awarded to compel the municipal officers to act.<sup>25</sup>

§ 1108 (908). **Registration.**—The decisions of the courts place great stress upon provisions in enabling acts requiring bonds to be registered, and hold that such provisions must be strictly obeyed. It seems difficult to harmonize the statements found in the decisions referred to with those made in the many cases broadly asserting and enforcing the doctrine of estoppel by recitals.<sup>26</sup> It is held, where all bonds issued to aid a railroad company were required by law to be registered with the state auditor before being negotiated, and bonds which were not so registered were declared by statute to be void, that bonds issued after the act went into force were void, although they were dated as of a time prior to the passage of the act.<sup>27</sup>

<sup>25</sup> *People v. Cline*, 63 Ill. 394; *People v. Cass. Co.*, 77 Ill. 438.

<sup>26</sup> This is especially true of the case of *German Savings Bank v. Franklin County*, 128 U. S. 526, 9 Sup. Ct. 159, 32 L. ed. 519.

<sup>27</sup> *Anthony v. Jasper County*, 101 U. S. 693, 25 L. ed. 1005, affirming *Anthony v. Jasper Co.*, 4 Dill. (U. S.) 136; *Hoff v. Jasper County*, 110 U. S. 53, 3 Sup. Ct. 476, 28 L. ed. 68; *German Savings Bank v. Franklin County*, 128 U. S. 526, 9 Sup. Ct. 159, 32 L. ed. 519; *Bissell v. Spring Valley Tp.*, 124 U. S. 225, 8 Sup. Ct. 495, 31 L. ed. 411; *Crow v. Oxford*, 119 U. S. 215, 7 Sup. Ct. 180, 30 L. ed. 388; *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. ed. 360; *Eagle v. Kohn*, 84 Ill. 292; *Richeson v. People*, 115 Ill. 450, 5 N. E. 121; *Parker v. Smith*, 3 Bradw. (Ill.) 356. In the case

of *Concord v. Portsmouth Savings Bank*, 92 U. S. 625, 23 L. ed. 628, the opinion is expressed that a recital in the bonds that a subscription had been made before a constitutional provision forbidding such subscriptions took effect, and that the bonds were issued in pursuance of such subscription and in conformity with the provisions of the act under which that subscription purported to have been made, being a recital of matters of fact, peculiarly within the knowledge of the municipal officers, would operate as an estoppel against the municipality which would prevent it from denying its liability upon the bonds. A recovery of the sum actually paid for the bonds was allowed in a case where the public corporation had power to borrow money, and the avails of the bonds

§ 1109 (909). **Rights of bona fide holders not affected by sale of bonds at a less sum than that prescribed by statute.**—A bona fide holder of aid bonds who acquires them in the usual course of business is entitled to enforce them against the municipality, although they were originally sold by the railroad company at a sum less than that prescribed by the enabling act. In one of the cases the statute provided that the railroad company should not sell the bonds “at less than their par value,” but the court held that the fact that the company did sell the bonds for less than their par value did not constitute a defense on the part of the municipality.<sup>28</sup> In another case which arose under a statute similar to that acted upon in the case referred to, the court held that the bonds were enforceable in the hands of a bona fide holder, although the railroad company had sold them for sixty-four cents on the dollar.<sup>29</sup>

§ 1110 (910). **Subrogation of holder of invalid bonds.**—As we have seen, the power to grant aid does not necessarily carry with it the power to issue negotiable bonds, so that there may be power to subscribe to the stock of a railroad company and pay the subscription in money, but no power to issue negotiable bonds in payment of the subscription. The power to issue bonds depends entirely upon the statute, and if there be no power the bonds are void. But where bonds are acquired in good faith, and in the belief that they were valid, the holder may be entitled to be subrogated to the rights of the municipality to the extent of the interest represented by his bonds. The general principles of subrogation authorized this conclusion, for the person who purchases the bonds is not a mere volunteer. In accordance with this general doctrine, it has been justly held that, where there was power to subscribe to the stock of a railroad company, but

were used by the corporation for legitimate corporate purposes. *Wood v. Louisiana*, 5 Dill. (U. S.) 122; *Louisiana v. Wood*, 102 U. S. 294, 26 L. ed. 153, citing *Moses v. McFerlan*, 2 Burr. 1005; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676, 19 L. ed. 1040.

<sup>28</sup> *Woods v. Laurence County*, 1 Black (U. S.) 386, 410, 17 L. ed. 122.

<sup>29</sup> *Richardson v. Lawrence Co.*, 154 U. S. 536, 14 Sup. Ct. 1157, 17 L. ed. 558.

no power to issue bonds, the purchaser of such bonds was entitled to stock.<sup>30</sup> But it has also been held that a purchaser of bonds in the open market is a mere volunteer, and is not entitled to be subrogated to the equity of contractors to whom the bonds were issued for work done by them.<sup>31</sup>

**§ 1111 (911). Liability of municipality to purchaser of invalid bonds.**—It is held that, where a municipality having power to issue bonds disposes of bonds which, by reason of a defective execution of the power it possesses, are invalid, the holder of the bonds may recover back the sum actually paid for them in an action for money had and received.<sup>32</sup> But where the issue of the bonds is positively forbidden by law, as where the municipality is forbidden by the state constitution to incur the debt for which they are issued, the purchaser is without remedy, since the corporation cannot indirectly become liable on an indebtedness which it is forbidden to assume directly.<sup>33</sup>

<sup>30</sup> *Illinois Grand Trunk R. Co. v. Wade*, 140 U. S. 65, 70, 11 Sup. Ct. 709, 35 L. ed. 342. To the point that the bonds were void the court cited *Wade v. Walnut*, 105 U. S. 1, 26 L. ed. 1027.

<sup>31</sup> *O'Brien v. Wheelock*, 78 Fed. 673.

<sup>32</sup> *Wood v. Louisiana*, 5 Dill. (U. S.) 122; *Louisiana v. Wood*, 102 U. S. 294, 26 L. ed. 153; *Paul v. Kenosha*, 22 Wis. 266, 94 Am. Dec. 598; *Gause v. Clarksville*, 5 Dill. (U. S.) 165. See also notes in 27 L. R. A. (N. S.) 1117; 41 L. R. A. (N. S.) 473, and 46 L. R. A. (N. S.) 921, on the general subject of liability of municipalities on implied contract. A municipality which issued bonds in payment of a stock subscription can not, in an action on such bonds, when they have been held void as ultra vires, be

held to liability on the subscription. *Norton v. Dyersburg*, 127 U. S. 160, 8 Sup. Ct. 1111, 32 L. ed. 85.

<sup>33</sup> *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. ed. 132. In this case bonds were sold in excess of the constitutional limit of city indebtedness and the proceeds were used in part payment for a system of water-works which the city erected on land previously acquired. The bonds having been declared void, a suit was brought to have the purchase-price declared a lien in equity against the water-works, but the court held that the city could not render itself or its property liable in any way for the debt which the bonds evidenced. See *Agawam Nat. Bank v. South Hadley*, 128 Mass. 503; *Railroad Nat. Bank v. Lowell*, 109 Mass. 214.

§ 1112 (912). **Right of municipality to recover money paid because of wrongful acts of the railroad company.**—It seems just to hold that where the wrongful acts of the railroad company compel the municipality to pay illegal bonds it may have an action for the recovery of the money it has been compelled to pay. In a case where the railroad company procured negotiable bonds to be illegally issued by the officers of a town, which were in form the obligations of the town, and recited that they were legally issued, and such bonds were negotiated and transferred by it for the full face value thereof, and were subsequently negotiated and sold to the citizens of another state, who, in an action in the circuit court of the United States, brought against the town to recover overdue interest, and tried upon the merits, recovered final judgment therefor, which fixed the liability of the town for the whole amount of such bonds to the holders thereof, it was held that, by reason of such wrongful acts of the company, a cause of action arose in favor of the town, and against the company, for the recovery of the amount of such bonds, with interest.<sup>34</sup> We think that, while there may possibly be cases where money can be recovered from a wrong-doing company, they are very rare. We do not believe that there can be a recovery where the company acts in good faith and the loss is solely attributable to a mistake of law. In a case where an officer of the company, after the corporate existence of an alleged railroad corporation had ceased by failure to comply with the law regulating such corporations, knowing its condition, and having in its hands bonds given by plaintiff village to such corporation, and knowing that such bonds were void, and could not be enforced by such corporation, fraudulently sold them to innocent parties, representing them to be bona fide securities, and valid bonds of plaintiff village, it was held that such officer, by his fraud, became liable to

<sup>34</sup> *Plainview v. Winona &c. R. Co.*, 36 Minn. 505, 32 N. W. 745. As the bonds in this case were issued under a statute which was declared unconstitutional, and the town had received the benefits from the construction of the road,

it is doubtful if this case can be sustained on principle. It seems to us that the case cited carries the doctrine too far, for, as we conceive, there was no actionable wrong, nor anything more than a mere mistake of law.

the village for the value of the bonds negotiated by him, and the fact that he had accounted to his company for the proceeds did not release him.<sup>35</sup> We regard the doctrine of the case referred to as sound, for there was clearly actionable fraud causing damages.

§ 1113 (913). **Defenses to aid bonds.**—It may be said, generally, that the entire absence of power to issue bonds is always a sufficient defense to an action on the bonds, but that, as a rule, the irregular or improper exercise of a power duly conferred does not furnish sufficient grounds for a defense against bonds in the hands of a bona fide holder.<sup>36</sup> Payment of the bonds can not be successfully resisted upon grounds which are insufficient to release the corporation from its subscription, such as the wrongful acts of the corporation or its officers,<sup>37</sup> or any acts done by it in pursuance of a power to lease, consolidate, increase the capital stock, or the like, which existed at the time the bonds were issued.<sup>38</sup> The failure of the officer issuing the bonds to

<sup>35</sup> *Farnham v. Benedict*, 107 N. Y. 159, 13 N. E. 784.

<sup>36</sup> See generally as to defenses. *D'Esterre v. Brooklyn*, 90 Fed. 586 (failure of consideration not); *Anderson County v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. ed. 966, and *Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 803, 37 L. ed. 673 (certain misconduct not); *Cromwell v. Sac County*, 96 U. S. 51, 24 L. ed. 681; *Huron v. Second Ward Sav. Bank*, 86 Fed. 272, 49 L. R. A. 534; *Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887; and *Clapp v. Cedar Co.*, 5 Iowa 15, 68 Am. Dec. 678 (fraud or misapplication of proceeds not). See also elaborate note to *Town of Aurora v. Gates*, 208 Fed. 101, in L. R. A. 1915A, 910. Want of power is, ordinarily at least, the only defense against a bona fide holder relying upon the authorized recitals. *St.*

*Joseph Tp. v. Rogers*, 16 Wall. (U. S.) 644, 21 L. ed. 328; *Brenham v. German-American Bank*, 144 U. S. 173, 12 Sup. Ct. 559, 36 L. ed. 390; *Bissell v. Kankakee*, 64 Ill. 249, 16 Am. Rep. 554.

<sup>37</sup> *Ottawa &c. R. Co. v. Black*, 79 Ill. 262; *Illinois Midland R. Co. v. Barnett*, 85 Ill. 313.

<sup>38</sup> *Menasha v. Hazard*, 102 U. S. 81, 26 L. ed. 85; *Wilson v. Salamanca*, 99 U. S. 499, 25 L. ed. 330; *Henry County v. Nicolay*, 95 U. S. 619, 24 L. ed. 394; *East Lincoln v. Davenport*, 94 U. S. 801, 24 L. ed. 322; *Nugent v. Supervisors*, 19 Wall. (U. S.) 241, 22 L. ed. 83, 3 Biss. (U. S.) 105; *Illinois Midland R. Co. v. Barnett*, 85 Ill. 313; *Edwards v. People*, 88 Ill. 340; *Mt. Vernon v. Hovey*, 52 Ind. 563; *State v. Greene Co.*, 54 Mo. 540. The fact that a railroad company to whom bonds were authorized to

annex to his signature words indicating his official position does not invalidate the bonds, but the fact that he is an officer of the municipality may be proven by extrinsic evidence.<sup>39</sup> And the fact that the officers by whom the bonds were executed were not legally elected will not avail as a defense against a suit to enforce payment, if they were serving as de facto officers with the acquiescence of the municipality. The invalidity of aid bonds, on the ground that the town had no constitutional or statutory authority to issue the same, can be urged as a defense by the town, though it has paid installments on the bonds.<sup>40</sup>

**§ 1114 (914). Bondholders not bound by proceedings to which they are not parties.**—The familiar elementary rule is that no person is bound by a judgment or decree rendered in an action or suit to which he is not a party or privy. It is necessary, therefore, in order to secure a judgment or decree binding a

be issued was consolidated by statute with another, after notice of an election began to run, does not render the bonds void because issued to the consolidated company, where the consolidation act took effect before the election. *Nelson v. Haywood Co.*, 3 Pick. (Tenn.) 781. An agreement by a railroad company, executed after a county had subscribed for its stock, to sell and transfer its road after completion, in order to obtain money for its construction, does not release the county from the payment of its subscription which was payable when the road was completed "and in operation by lease or otherwise." *Southern Kansas R. Co. v. Turner*, 41 Kans. 72, 21 Pac. 221. Under the Missouri act to authorize the consolidation of railroad companies in that state with companies in adjoining states, the consolidated company is entitled to the same

privileges under the laws of Missouri that the Missouri corporation was entitled to at the time of the consolidation, including the privilege of collecting a subscription to stock by a township. *Livingston County v. Portsmouth First Nat. Bank*, 128 U. S. 102, 9 Sup. Ct. 18, 32 L. ed. 359.

<sup>39</sup> *County Commissioners v. King*, 13 Fla. 451. See also *Board of Comrs. of Onslow Co. v. Tollman*, 145 Fed. 753.

<sup>40</sup> *Marsh v. Fulton County*, 10 Wall. (U. S.) 676, 19 L. ed. 1040; *Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. ed. 1026; *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. ed. 178; *Doon Tp. v. Cummins*, 142 U. S. 366, 12 Sup. Ct. 220, 35 L. ed. 1044; *Glenn v. Wray*, 126 N. Car. 730, 36 S. E. 167; *Buncombe v. Payne*, 120 N. Car. 432, 31 S. E. 711.

bondholder, that he should be brought into court. The rule is that the court will not pass upon any questions touching the bonds unless the bondholders are before the court. And it has refused to adjudge bonds fraudulent as between the railroad and the municipality, and to decree that the railroad should pay them, in the absence of those to whom the bonds had been assigned.<sup>41</sup>

§ 1115 (915). **Following state decisions.**—Questions as to the validity of municipal aid bonds very often depend upon the construction given state statutes by the courts of the state by which the statute is enacted. The federal courts, as a rule, follow state decisions, construing state constitutions or statutes, but do not, unless they regard them as sound, follow them upon general questions of law. The Supreme Court of the United States holds itself bound by the settled construction given to a state statute, in so far as it affects the validity of bonds issued after the statute has been so construed,<sup>42</sup> but it holds that it is not concluded by any decisions of the state courts made after the bonds have been negotiated, at least where such decisions are based upon general principles of law. And it will decide the case according to its own rules of construction, where the points raised have never been adjudicated in the state courts.<sup>43</sup>

<sup>41</sup> *Ralls County v. Douglass*, 105 U. S. 728, 26 L. ed. 957. See also *California v. Southern Pac. Co.*, 157 U. S. 229, 15 Sup. Ct. 591, 39 L. ed. 683; *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 22 Sup. Ct. 308, 46 L. ed. 499; *Anthony v. State*, 49 Kans. 246, 30 Pac. 488; *Hoppock v. Chambers*, 96 Mich. 509, 56 N. W. 86; *Grand Trunk R. Co. v. Chicago &c. R. Co.*, 141 Fed. 785; *Mitau v. Roddan*, 149 Cal. 1, 84 Pac. 145.

<sup>42</sup> *Wilkes County v. Coler*, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. ed. 642; *Green County v. Conness*, 109 U. S. 104, 3 Sup. Ct. 69, 27 L. ed.

872; *Folsom v. Township Ninety-six*, 159 U. S. 611, 624, 16 Sup. Ct. 174, 40 L. ed. 278; *Board v. Traveler's Ins. Co.*, 128 Fed. 817; *Board v. Texas &c. R. Co.*, 46 Tex. 316; ante § 1244, notes 66 and 66a; also notes in 40 L. R. A. (N. S.) 396; L. R. A. 1915A, 981.

<sup>43</sup> *German Savings Bank v. Franklin County*, 128 U. S. 526, 538, 9 Sup. Ct. 159, 32 L. ed. 519; *Anderson v. Santa Anna*, 116 U. S. 356, 6 Sup. Ct. 413, 29 L. ed. 633; *Johnson County v. January*, 94 U. S. 202, 24 L. ed. 110; *Green County v. Conness*, 109 U. S. 104, 3 Sup. Ct. 69, 27 L. ed. 872; *Burgess v.*

§ 1116 (916). **Jurisdiction of federal courts.**—It is not our purpose to enter into any extended discussion of the question of the jurisdiction of the federal courts, nor, indeed, to do more than make a very few brief suggestions.<sup>44</sup> It is barely necessary to say that the jurisdiction in suits and actions upon municipal bonds depends upon the same principles as those which prevail in ordinary cases. There is nothing in the nature of a municipal bond that of itself gives federal jurisdiction. Bonds of this character are so generally in the hands of persons living in other states than those authorizing the issue, that, for this reason, and also for the reason that the current of judicial decision of the United States courts is favorable to the bondholders, nearly all the litigation of this character is carried on in those courts. There must, however, in all such cases where relief is sought upon municipal bonds, be diverse citizenship, or the federal courts will not have jurisdiction.<sup>45</sup> The fact that so much of the

Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. ed. 356; *Shelby County v. Union &c. Bank*, 161 U. S. 149, 16 Sup. Ct. 558, 40 L. ed. 650; *Mobile &c. R. Co. v. Tennessee*, 153 U. S. 486, 14 Sup. Ct. 968, 38 L. ed. 793; *Columbia Ave. &c. Co. v. Dawson*, 130 Fed. 152; *Stanly County v. Coler*, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. ed. 1126. See also note in 40 L. R. A. (N. S.) 380. In *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968, the court says: "After a statute has been settled by judicial construction the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself."

<sup>44</sup> *Olcott v. Supervisors*, 16 Wall. (U. S.) 678, 21 L. ed. 382; *Pine Grove Tp. v. Talcott*, 19 Wall. (U. S.) 666, 22 L. ed. 227; *Claiborne County v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. ed. 470. But

possibly the holding would be different if the decision of the state court was based upon the peculiar construction of a local statute and not upon general principles. *Elmwood Tp. v. Marcy*, 92 U. S. 289, 23 L. ed. 710. See *Venice v. Murdock*, 92 U. S. 494, 23 L. ed. 583. In *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175, 17 L. ed. 520, and *City v. Lamson*, 9 Wall. (U. S.) 477, 19 L. ed. 725, the decisions of the court are placed upon the ground that the supreme courts of Iowa and Wisconsin, respectively, had been so vacillating that there was authority for either view of the question that the United States court chose to take.

<sup>45</sup> Federal courts have jurisdiction over a suit brought by an assignee of a municipal bond which is in form a simple acknowledgment of indebtedness and an unconditional promise to pay a cer-



litigation is in the federal courts makes it desirable that the rules established by the Supreme Court of the United States should be accepted as the law by the state courts. The decisions of that court, except as to federal questions, are, it is true, not binding on the state tribunals, but if they were followed much confusion would be avoided.

§ 1117 (917). **Compelling issue of bonds.**—The well-known general rule that, where municipal officers are under an imperative duty to perform an act, mandamus will lie to coerce performance, but will not lie where the duty is purely discretionary, applies to cases where railroad companies or purchasers are entitled to municipal bonds. If there is a mandatory duty resting on the municipal officers to execute and deliver bonds the party entitled to the bonds may compel their delivery by a writ of mandamus.<sup>46</sup> The party who asks the writ must show that there is a duty to issue the bonds, otherwise the writ will be denied.

tain sum at a certain time.' Porter v. Janesville, 3 Fed. 617. But no recovery can be had upon municipal bonds transferred by citizens of the state where the municipality is situated, to a citizen of another state, for the sole purpose of giving jurisdiction to the courts of the United States. New Providence v. Halsey, 117 U. S. 336, 6 Sup. Ct. 764, 29 L. ed. 904. And the same rule applies to assignments of coupons. Farmington v. Pillsbury, 114 U. S. 138, 5 Sup. Ct. 807, 29 L. ed. 114.

<sup>46</sup> Smith v. Bourbon County, 127 U. S. 105, 8 Sup. Ct. 1043, 32 L. ed. 73; Massachusetts &c. Co. v. Cherokee Tp., 42 Fed. 750; Santa Cruz &c. R. Co. v. Board &c. Santa Cruz Co., 62 Cal. 239; People v. Ohio Grove Township, 51 Ill. 191; People v. Oldtown, 88 Ill. 202; Chicago &c. R. Co. v. Mallory, 101 Ill. 583;

State v. Lake City, 25 Minn. 404; People v. Walter, 2 Hun (N. Y.) 385; Humphreys County v. McAdoo, 7 Heisk. (Tenn.) 585; State v. Jennings, 48 Wis. 549, 4 N. W. 641. In Massachusetts &c. Co. v. Cherokee Tp., 42 Fed. 750, it was held that specific performance of the duty to deliver would be decreed, but it seems to us that mandamus is the appropriate remedy where there is a peremptory official duty. Analogous cases support this conclusion. Selma &c. R. Co. Ex parte, 45 Ala. 696, 6 Am. Rep. 722; Pfister v. State, 82 Ind. 382; Carpenter v. County Commissioners, 21 Pick. (Mass.) 258; Osage Valley &c. R. Co. v. County Ct., 53 Mo. 156; Cincinnati &c. R. Co. v. Clinton Co., 1 Ohio St. 77; Commissioners v. Hunt, 33 Ohio St. 169.

Thus, where the notice of the election was insufficient, the writ was refused, although the aid had been voted.<sup>47</sup> But we suppose that the doctrine of the case just referred to cannot apply where there are acts constituting an estoppel, since errors and irregularities in conducting the election cannot be made available to defeat the rights of one who has acted in good faith without notice, and who would suffer loss if the municipality were permitted to take advantage of errors and irregularities.

§ 1118 (918). **Remedies of bondholders.**—Where the bonds are issued by municipal corporations and are the general obligations of the corporations issuing them, the holder may maintain an ordinary action at law and secure judgment. He cannot, according to some of the decisions, resort to mandamus in the first instance in cases where the bonds are general corporate obligations, since he has an adequate remedy at law.<sup>48</sup> Where a judgment is obtained on the bonds, and the municipal officers refuse to levy a tax to pay the judgment, mandamus will lie to compel the municipal officers to make the proper levy.<sup>49</sup> The right of the bondholders to have a tax levied cannot be defeated by the resignation of the municipal officers.<sup>50</sup> It was held by a

<sup>47</sup> *McMahon v. Board &c.*, 46 Cal. 214.

<sup>48</sup> *Sharp v. Mayor &c.*, 40 Barb. (N. Y.) 256; *People v. Hawkins*, 46 N. Y. 9; *Lynch, Ex parte*, 2 Hill (N. Y.) 45.

<sup>49</sup> *Knox County v. Aspinwall*, 24 How. (U. S.) 376, 16 L. ed. 735; *East St. Louis v. Amy*, 120 U. S. 600, 7 Sup. Ct. 739, 30 L. ed. 798; *Louisiana v. St. Martin's Parish*, 111 U. S. 716, 4 Sup. Ct. 648, 28 L. ed. 574; *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. 1101, 32 L. ed. 77; *Norton v. Dyersburg*, 127 U. S. 160, 8 Sup. Ct. 1111, 32 L. ed. 85; *United States v. Jefferson Co.*, 5 Dill. (U. S.) 310; *Robinson v. Butte Co.*, 43 Cal. 353; *State v. Daven-*

*port*, 12 Iowa 335; *Maddox v. Graham*, 2 Metc. (Ky.) 56; *State v. New Orleans*, 34 La. Ann. 477; *Flagg v. Palmyra*, 33 Mo. 440; *Commonwealth v. Pittsburgh*, 88 Pa. St. 66; *Morgan v. Commonwealth*, 55 Pa. St. 456; *Commonwealth v. Pittsburg*, 34 Pa. St. 496; *State v. Gates*, 22 Wis. 210. A return to the alternative writ that the tax has been levied is sufficient. *Bass v. Taft*, 137 U. S. 458, 11 Sup. Ct. 154, 34 L. ed. 752.

<sup>50</sup> *Meriwether v. Muhlenburg County Ct.*, 120 U. S. 354, 7 Sup. Ct. 563, 30 L. ed. 653. But it is difficult to reconcile the doctrine of the case cited with the cases which hold that courts can not

federal circuit court that, where bonds are void, but a judgment by default has been rendered upon the coupons, the municipality will not be allowed to set up as a defense to a mandamus on the judgment that there is no statute requiring the tax to be levied.<sup>51</sup> But the judgment in the case referred to was reversed.<sup>52</sup> Some of the courts will not issue a writ where the liability on the bonds is doubtful and is controverted until a judgment has been obtained on the bonds,<sup>53</sup> nor will the writ issue, except, perhaps, to put the officers in motion, where the municipal officers have a discretionary power as to the mode of payment or the like.<sup>54</sup>

levy taxes. Upon the general subject of compelling by mandamus county officers to levy a tax to pay municipal bonds or subscriptions, see *United States v. Lincoln Co.*, 5 Dill. (U. S.) 184; *United States v. Jefferson Co.*, 1 McC. (U. S.) 356; *Brodie v. McCabe*, 33 Ark. 690; *State v. Johnson Co.*, 12 Iowa 237; *Shelby Co. v. Cumberland &c. R. Co.*, 8 Bush (Ky.) 209; *Moore v. New Orleans*, 32 La. Ann. 726; *McLendon v. Anson Co.*, 71 N. Car. 38; *Commonwealth v. Commissioners*, 32 Pa. St. 218.

<sup>51</sup> *Loague v. Taxing Dist.*, 36 Fed. 149.

<sup>52</sup> *Brownsville v. Loague*, 129 U. S. 493, 9 Sup. Ct. 327, 32 L. ed. 780. See *Harshman v. Knox County*, 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. ed. 1152; *Hill v. Scotland Co.*, 32 Fed. 714; *Ralls County Ct. v. United States*, 105 U. S. 733, 26 L. ed. 1220; *Scotland County v. Hill*, 132 U. S. 107, 10 Sup. Ct. 26, 33 L. ed. 261; *Moore v. Edgefield*, 32 Fed. 498; *Hill v. Scotland Co.*, 32 Fed. 716. As to the rule where the municipal officers have a discretionary power as to the mode of paying a judgment, see *Grand Co. v. King*, 67 Fed. 202. See gen-

erally upon the subject of mandamus to compel levy of taxes, *State v. Yellowstone Co.*, 12 Mont. 503, 31 Pac. 78; *Meyer v. Porter*, 65 Cal. 67; *County Comrs. v. King*, 13 Fla. 451; *Wilkinson v. Cheatham*, 43 Ga. 258; *Bassett v. Barbin*, 11 La. Ann. 672; *Wells v. Commissioners*, 77 Md. 125, 26 Atl. 357, 20 L. R. A. 89; *Wayne County &c. Bank v. Supervisors*, 97 Mich. 630, 56 N. W. 944; *Pegram v. Cleveland Co.*, 64 N. Car. 557; *State v. Beloit*, 20 Wis. 79; *State v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622.

<sup>53</sup> *State Board v. West Point*, 50 Miss. 638; *Commonwealth v. Pittsburgh*, 34 Pa. St. 496; *State v. Mayor &c.*, 52 Wis. 423. See generally *School Dist. v. Bodenhamer*, 43 Ark. 140; *People v. Clark Co.*, 50 Ill. 213; *Coy v. Lyons City*, 17 Iowa 1, 85 Am. Dec. 539, and note; *State v. Clay Co.*, 46 Mo. 231; *Mansfield v. Fuller*, 50 Mo. 338; *Leach v. Fayetteville*, 84 N. Car. 829.

<sup>54</sup> *Board of Commissioners v. King*, 67 Fed. 202. See generally as to the right to exercise an option, *Queen v. Southeastern R. Co.*, 4 H. L. Cas. 471; *State v. Union*, 43 N. J. L. 518. As to the exercise

Where there is a judgment rendered by a court possessing jurisdiction adjudging the bonds to be valid, the municipality cannot set up the invalidity of the bonds as a defense to the action for mandamus.<sup>55</sup> The Supreme Court of the United States has modified, if not denied, the doctrine of some of the earlier cases, for it has held that, where the bondholder goes behind the judgment upon some of the points adjudged, he cannot successfully aver that the judgment conclusively establishes the validity of the bonds.<sup>56</sup> The bondholder entitled to money collected to pay bonds and in the hands of a municipal officer can compel its payment to him by mandamus,<sup>57</sup> for in such a case there is a peremptory duty to pay the money over to the party entitled to it. It is held by the Supreme Court of the United States that, where the specific tax is insufficient to pay the bonds, the holder is entitled to payment out of the general funds of the municipality,<sup>58</sup> but it seems to us this cannot be the rule where the statute under which the bonds are issued clearly and unequivocally confines the right to payment from a specific fund.<sup>59</sup> The right of a bona fide holder of bonds to compel the municipal officers to levy the necessary tax is not defeated by the repeal of the statute under which the bonds were issued.<sup>60</sup> Where the

of discretionary powers, *United States v. Seaman*, 17 How. (U. S.) 225, 15 L. ed. 226; *Heine v. Levee Commissioners*, 19 Wall. (U. S.) 655, 22 L. ed. 223; *United States v. Lamont*, 155 U. S. 303, 15 Sup. Ct. 97, 39 L. ed. 160.

<sup>55</sup> *United States v. New Orleans*, 98 U. S. 381, 25 L. ed. 225; *Ralls County Ct. v. United States*, 105 U. S. 733, 26 L. ed. 1220; *Loague v. Brownsville*, 36 Fed. 149; *State v. Gates*, 22 Wis. 210. See *Boyd v. Alabama*, 94 U. S. 645, 24 L. ed. 302.

<sup>56</sup> *Brownsville v. Loague*, 129 U. S. 493, 9 Sup. Ct. 327, 32 L. ed. 780, citing *Norton v. Brownsville*, 129 U. S. 479, 9 Sup. Ct. 322, 32 L. ed.

774, and distinguishing *Harshman v. Knox County*, 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. ed. 1152.

<sup>57</sup> *State v. Craig*, 69 Mo. 565; *State v. McCrillus*, 4 Kans. 250, 96 Am. Dec. 169.

<sup>58</sup> *United States v. Clark*, 96 U. S. 37, 24 L. ed. 696; *Olcott v. Supervisors*, 16 Wall. (U. S.) 678, 21 L. ed. 382.

<sup>59</sup> *United States v. Macon County*, 99 U. S. 582, 25 L. ed. 331; *Quill v. Indianapolis*, 124 Ind. 292, 299, 23 N. E. 788, 7 L. R. A. 681; *Spidell v. Johnson*, 128 Ind. 235, 238, 239, 25 N. E. 889; ante, § 1088.

<sup>60</sup> *Deere v. Rio Grande County*, 33 Fed. 823. See also *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct.

bonds have been held invalid in a proceeding for writ of mandamus, the judgment concludes the plaintiff from successfully prosecuting an action on the bonds themselves,<sup>61</sup> but the question of the validity of the bonds must be one which was litigated, or which might have been litigated, in the mandamus proceedings, and there must be jurisdiction of the subject matter and of the person in order to make the judgment conclusive.

**§ 1119. Remedies of bondholders—Compelling levy of tax.**—The courts will not attempt to compel municipal officers to do that which they have no power to do under the law.<sup>62</sup> where the power of a municipality is specifically limited to a given percentage on all taxable property, and it is confessed by the demurrer to the answer that the entire sum realized from the tax is required for the proper maintenance of the municipal government, a mandamus will not be awarded.<sup>63</sup> It is held that the court will not itself appoint officers to levy the tax.<sup>64</sup> This doctrine proceeds upon the ground that the duty of levying taxes is not judicial, and cannot be exercised by the courts.<sup>65</sup>

1190, 30 L. ed. 1161; Peoria &c. R. Co. v. People, 116 Ill. 401, 6 N. E. 497.

<sup>61</sup> Block v. Commissioners, 99 U. S. 686, 25 L. ed. 491; Louis v. Brown Tp., 109 U. S. 162, 3 Sup. Ct. 92, 27 L. ed. 892; Corcoran v. Chesapeake &c. Canal Co., 94 U. S. 741, 24 L. ed. 190.

<sup>62</sup> Supervisors v. United States, 18 Wall. (U. S.) 71, 77, 21 L. ed. 771; United States v. Macon County, 99 U. S. 582, 25 L. ed. 331; Macon County v. Huidekoper, 99 U. S. 592, note, 25 L. ed. 333; Brownsville v. Loague, 129 U. S. 493, 9 Sup. Ct. 327, 32 L. ed. 780. See United States v. Clark, 96 U. S. 37, 24 L. ed. 696; Butz v. Muscatine, 8 Wall. (U. S.) 575, 19 L. ed. 490; Board of Commissioners v. King, 67 Fed. 202; 205; State v.

Whitesides, 30 S. Car. 579, 9 S. E. 661, 3 L. R. A. 777, and note.

<sup>63</sup> Clay County v. McAleer, 115 U. S. 616, 6 Sup. Ct. 199, 29 L. ed. 482. See McAleer v. Clay Co., 42 Fed. 665; Board of Commissioners v. King, 67 Fed. 202; United States v. Miller Co., 4 Dill. (U. S.) 233.

<sup>64</sup> Heine v. Levee Commissioners, 19 Wall. (U. S.) 655, 22 L. ed. 223; Rees v. Watertown, 19 Wall. (U. S.) 107, 22 L. ed. 72; Board of Commissioners v. King, 67 Fed. 202, 205; O'Brien v. Wheelock, 78 Fed. 673; Pierce Co. v. Merrill, 19 Wash. 178, 52 Pac. 854.

<sup>65</sup> Thompson v. Allen County, 115 U. S. 550, 6 Sup. Ct. 140, 29 L. ed. 472; Rees v. Watertown, 19 Wall. (U. S.) 107, 124, 22 L. ed. 72; Meriwether v. Garrett, 102 U. S. 472, 518, 26 L. ed. 197. But see

The decisions establish the rule as we have stated it, but it seems to us that courts have power to do complete justice and to make their writs effective, and that, where there is a clear, unquestionable right to relief, they have power to grant it, even though they may be compelled to appoint ministerial agents to perform the duties of municipal officers who refuse to perform the duties enjoined on them by law. The power to "do justice, and that not by halves," is, as we believe, ample foundation for the authority to provide for the assessment and collection of taxes where there is a clear right in the creditor and a peremptory duty resting on the municipality and its officers. The principle which empowers a court to appoint receivers and take control of property, is, as we conceive, broad enough to authorize courts to appoint officers or agents to levy and collect a tax.<sup>66</sup> Where there is no statute authorizing a tax, then, of course, the courts are powerless, but where there is a statute and a refusal to perform official duties required by law, courts ought to have power to award complete relief. Giving force to a state statute, it has been held that, where the municipal officers refuse to act, in obedience to peremptory writ of mandamus, a marshal or commissioner may be appointed to act.<sup>67</sup> This power should, as we have substantially said, reside in the courts, otherwise cases might arise in which payment might be delayed, or possibly avoided by a municipal corporation, and justice defeated. Officers who refuse to obey a writ of mandate may, it is true, be punished as for contempt, but punishment for contempt may not always be an adequate remedy for the enforcement of payment of the bonds. The duty to levy taxes to pay bonds is ordinarily a continuing one, and if one or more levies will not produce a sum sufficient to pay the bonds, the municipal officers may be compelled to make another levy.<sup>68</sup>

*Meriwether v. Muhlenburg County Ct.*, 120 U. S. 354, 7 Sup. Ct. 563, 30 L. ed. 653.

<sup>66</sup> *Garrett v. Memphis*, 5 Fed. 860, and cases cited. See *Thompson v. Allen Co.*, 13 Fed. 97, and authorities cited in the dissenting opinion in *Thompson v. Allen*

*County*, 115 U. S. 550, 6 Sup. Ct. 140, 29 L. ed. 472.

<sup>67</sup> *Supervisors v. Rogers*, 7 Wall. (U. S.) 175, 19 L. ed. 162; *Lansing v. County Treasurer*, 1 Dill. (U. S.) 522.

<sup>68</sup> *Benbow v. Iowa City*, 7 Wall. (U. S.) 313, 19 L. ed. 79; *Robinson*

§ 1120 (918a). **Miscellaneous.**—It is held by the Supreme Court of the United States in a recent case that county auditors and treasurers, being the instruments employed by the state legislature to assess and collect taxes, may be compelled by mandamus to levy a tax to pay a judgment on township bonds notwithstanding the township has been abolished by an amendment to the state constitution, and its corporate agents removed.<sup>69</sup> Such a proceeding is not a suit against the state within the meaning of the inhibition of the Constitution of the United States even though such officers have been forbidden by the state legislature to exercise such power; and the exercise by a state of its right to alter or destroy its municipal corporation is ineffectual to destroy the obligation of valid municipal contracts.<sup>70</sup> Where bonds in aid of a railroad had been issued under an election held valid by the Supreme Court of the state and the county had paid interest thereon for a number of years, it was held that they were valid in the hands of one who had purchased them for

v. Butte Co., 43 Cal. 353; *State v. Madison*, 15 Wis. 30. As to the power of the federal courts, see *Welch v. St. Genevieve*, 1 Dill. (U. S.) 130; *United States v. Muscatine Co.*, 2 Abb. (U. S.) 53; *Riggs v. Johnson County*, 6 Wall. (U. S.) 166, 18 L. ed. 768. As to the necessity of first reducing the claim on the bonds to judgment, see *Greene County v. Daniel*, 102 U. S. 187, 26 L. ed. 99, 3 Am. & Eng. R. Cas. 105. See generally *East St. Louis v. Underwood*, 105 Ill. 308. As to presentation of bonds for allowance, see *Greene Co. v. Daniel*, 102 U. S. 187, 26 L. ed. 99, 3 Am. & Eng. R. Cas. 105; *Commissioners' Court v. Rather*, 48 Ala. 433. Matters of pleading, *People v. Colorado &c. R. Co.*, 42 Fed. 638; *United States v. Elizabeth*, 42 Fed. 45. Actions on bonds, *New Providence v. Halsey*, 117 U. S.

336, 6 Sup. Ct. 764, 29 L. ed. 904; *Ninth National Bank v. Knox Co.*, 37 Fed. 75. Evidence on part of plaintiff, *Hannibal v. Fauntleroy*, 105 U. S. 408, 26 L. ed. 1103; *Massachusetts &c. Co. v. Cherokee*, 42 Fed. 750. See generally *Morgan County v. Allen*, 103 U. S. 498, 26 L. ed. 498; *Smith v. Railroad Co.*, 99 U. S. 398, 25 L. ed. 437; *Houston v. People*, 55 Ill. 398; *People v. Jackson Co.*, 92 Ill. 441; *Lamoille Valley R. Co. v. Fairfield*, 51 Vt. 257.

<sup>69</sup> *Graham v. Folsom*, 200 U. S. 248, 26 Sup. Ct. 245, 50 L. ed. 464.

<sup>70</sup> *Graham v. Folsom*, 200 U. S. 248, 26 Sup. Ct. 245, 50 L. ed. 464. See also *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 25 L. ed. 699; *Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. ed. 620; *Shapleigh v. San Angelo*, 167 U. S. 646, 17 Sup. Ct. 957, 42 L. ed. 310.

value and in good faith, without notice of any defect or illegality, and that taxes levied and collected by the county to pay the interest thereon, in compliance with law, were held by the county treasurer as his trustee, and it was the duty of such treasurer to pay over the same on presentation of the coupon.<sup>71</sup> In another recent case bonds were issued under statutory authority to pay a county subscription for stock of a railroad company and the statute directed an annual levy of taxes sufficient to pay the interest on such bonds, and principal when it should become due, provided that the company should make a preliminary survey of its route within a year after the passage of the statute and should commence work in good faith within the next year and perform each year thereafter one-fifth of the necessary work required to complete the road. It was held that the county's liability to levy the tax did not depend upon the performance of the conditions of such proviso, but on the answer to the inquiry as to whether the bonds had been so issued as to bind the county.<sup>72</sup> It was also held in the same case that as the county judge in Kentucky, was the presiding officer of the fiscal court and general business agent of the county, and the legislature had authorized such court to subscribe for such stock, it was competent for such court, after having determined to make the subscription, to delegate to the county judge the ministerial duties involved; that the fact that the bonds were delivered before any work was done, though in violation of the statute, did not necessarily render them void; and that where the county had appeared and contested the regularity and sufficiency of the proceedings for the issuance of such bonds in a state court in a suit to compel their issuance and then in a federal court in a suit to recover on the coupons, brought by a privy to the plaintiff, and the whole issue was adjudged to be valid, the county was estopped by such decree from thereafter contesting the validity of the bonds in a proceeding to compel the levy of a tax to pay

<sup>71</sup> *Tollman v. Board of Comrs. of Onslow Co.*, 140 Fed. 89, affirmed in 145 Fed. 753. See also *McKee v. Lamon*, 159 U. S. 317, 322, 16

Sup. Ct. 11, 40 L. ed. 165; *Coler v. Board*, 89 Fed. 257, 260.

<sup>72</sup> *Estell Co. v. Embry*, 144 Fed. 913.



them.<sup>73</sup> It has also been held that a board of county commissioners authorized by statute to sue and be sued, to make contracts and hold such personal property as may be necessary in the exercise of their powers, and to make such orders for the disposition or use of their property as the interest of the inhabitants may require, has power to compromise a suit by a railroad company to compel the delivery of county railroad aid bonds by surrendering the right to stock of the railroad company of comparatively little value in consideration of the company's surrender of the right to receive a substantial portion of the bonds which the county had bound itself to deliver.<sup>74</sup>

<sup>73</sup> In *Board of Comrs. of Onslow Co. v. Tollman*, 145 Fed. 753, it was held that the bonds were properly executed by the county's board of commissioners, and that the delivery by such board did not invalidate them although the statute,

which was held merely directory, provided that they should be delivered by a board of trustees therein provided for.

<sup>74</sup> *Board of Comrs. of Onslow Co. v. Tollman*, 145 Fed. 753.

## CHAPTER XXXVI.

### LOCATION OF THE ROAD

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| 1135. Perfecting location—Map of proposed route.                                   |   |

§ 1125 (919). **Choice of location—How determined.**—The legislature may fix the exact location of the road of a company incorporated by special charter,<sup>1</sup> or it may merely define the general route and termini and leave the company to exercise its

<sup>1</sup> *Mississippi &c. R. Co. v. Cross*, 20 Ark. 443; *Coney Island &c. R. Co., In re*, 12 Hun (N. Y.) 451. In *Macon &c. R. Co. v. Gibson*, 85 Ga. 1, 11 S. E. 442, 43 Am. & Eng. R. Cas. 318, 21 Am. St. 135, it was held that, under a reserved power to amend the charter of a railroad company, the legislature could require it to build its road upon a

designated route, by an act passed after the company had exercised the discretion conferred upon it by its original charter, to locate its road, but before it had begun its construction. As to meaning of term "locate" see *Kensington Ry. Co. v. Moore*, 115 Md. 36, 80 Atl. 614, Ann. Cas. 1912C, 1309, and other cases there cited in note.

discretion as to the location of the road between the points named. Indeed, it may even authorize the company to select both the general and particular location and termini of the road. If the charter does not designate the exact route, but gives the company a general authority to build its road between certain points, the company is invested with full discretion as to the location of its road within those limits, and maps or plans that were exhibited to the legislature by which the charter was granted, but which are not referred to in the charter, are not admissible to prove the legislative intent in granting it.<sup>2</sup> Where the route and termini are stated in general terms by the charter its language must be given a reasonable construction with reference to the subject-matter of the grant, and the purposes to be attained.<sup>3</sup> If the road is required to run through several towns, it is not essential that it should pass through them in the order named.<sup>4</sup> And it is held that the requirement that one terminus of the road shall be at or near a certain point leaves a large discretion to be exercised by the railroad company in locating its

<sup>2</sup> *Boston &c. R. Co. v. Midland R. Co.*, 1 Gray (Mass.) 340; *Commonwealth v. Fitchburg R. Co.*, 8 Cush. (Mass.) 240; *Reg. v. Caledonian R. Co.*, 16 Q. B. 19; *North British R. Co. v. Tod*, 5 Bell's App. Cas. (Scotland) 184. The fact that plans and maps are referred to in the charter for one purpose does not make them admissible for another. *Reg. v. Caledonian R. Co.*, 16 Q. B. 19. That the company may determine the route in its discretion, see also *Chicago &c. R. Co. v. Dunbar*, 100 Ill. 110.

<sup>3</sup> *Cleveland &c. R. Co. v. Speer*, 56 Pa. St. 325, 94 Am. Dec. 84. All railroad charters that do not directly express the contrary must be taken to allow the exercise of such a discretion in the location of the route as is incident to an

ordinary practical survey, but not deviating substantially from the course and direction indicated by the charter. *Southern Minnesota R. Co. v. Stoddard*, 6 Minn. 150. The selection made by the officers in the exercise of the discretion given them by the charter should not be disturbed unless they have clearly erred. *Hentz v. Long Island R. Co.*, 13 Barb. (N. Y.) 646. See also *Newcastle &c. R. Co. v. Peru &c. R. Co.*, 3 Ind. 464; *Baldwin v. Hillsborough &c. R. Co.*, 1 Ohio Dec. 532; *Frankford &c. Tp. Co. v. Philadelphia &c. R. Co.*, 54 Pa. 345, 93 Am. Dec. 708. *Pennsylvania R. Co.'s Appeal*, 116 Pa. St. 55, 8 Atl. 914.

<sup>4</sup> *Commonwealth v. Fitchburg &c. R. Co.*, 8 Cush. (Mass.) 240.

road, the exercise of which will not be reviewed unless it has clearly exceeded its just limits or acted in bad faith.<sup>5</sup>

**§ 1126 (919a). Circular or belt road.**—The question has arisen in several cases as to whether a circular or belt road may be organized and located under a statute providing that the points from which and to which it runs should be stated. It is held in Tennessee, under such a statute that such a road, embracing within itself a reasonable area, such as the limits of a city, is authorized, and may be organized and located, although its route is circular, or in the shape of a polygon, and although it begins and ends at the same place, if the several connecting routes and their termini are duly stated.<sup>6</sup> So, it is held in Ohio, under a statute authorizing a road between the points named in the articles of incorporation, commencing at or within, and extending to or into, any city, village, town, or place named as its terminus a road may be organized and located having both of its terminal points within the same city.<sup>7</sup> Other authorities are to the same effect.<sup>8</sup>

**§ 1127 (920). Discretion of company in determining location—How exercised.**—The general laws for the incorporation of railroads that have been passed in most of the states, and in England, give a company incorporated thereunder discretionary power to select its route between charter points, and to appropriate land and establish grades subject to restrictions therein contained.<sup>9</sup> This discretion must be exercised by the company,

<sup>5</sup> Fall River &c. Co. v. Old Colony &c. R. Co., 5 Allen (Mass.) 221; Georgia R. &c. Co. v. Maddox, 42 Ga. 315, 42 S. E. 315, 317 (quoting text). See also Collier v. Union R. Co., 113 Tenn. 96, 83 S. W. 155; Bridwell v. Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624; Pedrick v. Raleigh &c. R. Co., 143 N. Car. 485, 55 S. E. 877. And see Hansen v. Polson Logging Co., 81 Wash. 597, 142 Pac. 1169 (location of road "as near as practicable" to a certain place).

<sup>6</sup> Collier v. Union R. Co., 113 Tenn. 96, 83 S. W. 155.

<sup>7</sup> State v. Union Terminal R. Co., 72 Ohio 455, 74 N. E. 642.

<sup>8</sup> See Bridwell v. Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624; State v. Martin, 51 Kans. 462, 33 Pac. 9; Long Branch Com'rs v. West End. R. Co., 29 N. J. Eq. 566; National Docks R. Co. v. Central R. Co., 32 N. J. Eq. 755.

<sup>9</sup> Chicago &c. R. Co. v. Dunbar, 100 Ill. 110. The railroad company may use its discretion in the loca-

and can not be controlled by previous acts or contracts of its agents.<sup>10</sup> Where the duty of locating the road is imposed by statute upon the president and directors of the company, an exercise of discretion on their part is called for which can not be delegated. And a location made by an executive committee provided for in the by-laws of the company is inoperative, and can not be ratified by the company so as to make it valid as against the rights of another company which have attached to the property in question prior to such ratification.<sup>11</sup> The exercise of this discretion by the company will not be disturbed except where there is a plain case of abuse of it.<sup>12</sup> It may be said generally, however, that a construction of a charter which would give the railroad company absolute discretion, uncontrolled by the courts, to locate its line or stations where its interests or favoritism might suggest, without regard to the public interest, would be contrary to public policy, and should not be

tion of the line where it is not definitely located in the charter. *Tennessee Cent. R. Co. v. Campbell*, 109 Tenn. 655, 73 S. W. 112.

<sup>10</sup> The act of the engineer in making a preliminary survey and staking off the line of the proposed road does not constitute a binding location. *Williamsport &c. R. Co. v. Philadelphia &c. R. Co.*, 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220, and note. See also *Kauffman v. Pittsburgh &c. R. Co.*, 210 Pa. St. 440, 60 Atl. 2. And an agreement between the land-owner and the attorney of the company that the road shall be of a less width than is afterward fixed upon by the directors in making the location does not control the width of the land which the company is authorized to condemn. *Central Mills Co. v. New York &c. R. Co.*, 127 Mass. 537. See generally *Chicago &c. R. Co. v. Dunbar*, 100 Ill. 110; and see

also *Bridwell v. Gate City Terminal Co.*, 127 Ga. 520, 56 S. E. 624, 628 (citing text).

<sup>11</sup> *Weidenfeld v. Sugar Run R. Co.*, 48 Fed. 615. See also *Washington &c. R. Co. v. Coeur D'Alene &c. Nav. Co.*, 160 U. S. 101, 16 Sup. Ct. 239, 40 L. ed. 355; *Golconda Northern Ry. v. Gulf Line &c. R. R.*, 265 Ill. 194, 106 N. E. 818, Ann. Cas. 1916A, 833; *Black v. Chicago &c. R. Co.*, 243 Ill. 534, 90 N. E. 1075.

<sup>12</sup> *Colorado &c. R. Co. v. Union Pac. R. Co.*, 41 Fed. 293; *Fall River Iron Works v. Old Colony R. Co.*, 5 Allen (Mass.) 221; *Southern Minn. R. Co. v. Stoddard*, 6 Minn. 150; *Hentz v. Long Island R. Co.*, 13 Barb. (N. Y.) 646; *People v. New York Central R. Co.*, 74 N. Y. 302; *Walker v. Mad River &c. R. Co.*, 8 Ohio 38; *Cleveland &c. R. Co. v. Speer*, 56 Pa. St. 325, 94 Am. Dec. 84; *Parke's Appeal*, 64 Pa. St.

adopted if any other construction be possible.<sup>13</sup> Where a statute gives the railroad company power to carry its tracks over or under a public highway, "as may be found most expedient," it is held that the railroad company is clothed with authority to determine the expediency of the different modes of crossing; and an indictment against the company for maintaining a nuisance can not be sustained by proof that it erected a bridge to carry the highway over its tracks when it would have been more expedient to carry the railroad tracks over the highway. When the railroad company has, in good faith, determined the question as to the relative expediency of the different modes of crossing, its determination is final, and, even though erroneous, can not be reversed by a jury.<sup>14</sup> And where the line is located upon a direct and convenient route between the termini, the fact that another route is available, for which land could be purchased, does not prove that land sought to be taken by condemnation proceedings is not necessary for the use of the petitioner.<sup>15</sup> A railroad

137; *Struthers v. Dunkirk &c. R. Co.*, 87 Pa. St. 282; *Ford v. Chicago &c. R. Co.*, 14 Wis. 609, 80 Am. Dec. 791. See also *State v. District Court*, 34 Mont. 535, 88 Pac. 44. Where the contract for a right of way releases a strip of land of a certain width through a certain tract of land, and no more definitely, it vests in the railroad company the right to select the particular location. *Burrow v. Terre Haute &c. R. Co.*, 107 Ind. 432, 8 N. E. 167; post, § 1220.

<sup>13</sup> *Northern Pacific R. Co. v. Territory*, 3 Wash. Ter. 303, 13 Pac. 604. See also *Kansas City &c. R. Co. v. State*, 106 Tex. 249, 163 S. W. 582.

<sup>14</sup> *People v. New York &c. R. Co.*, 74 N. Y. 302; *New York &c. Co. v. People*, 12 Hun (N. Y.) 195.

<sup>15</sup> *Colorado Eastern R. Co. v. Union Pac. Co.*, 41 Fed. 293, 44

*Am. & Eng. R. Cas.* 10. In this case the C. E. Co. sought to appropriate for storehouses, switches, turnouts, and the like, land held by the U. P. Co. for its own use at such time as it should be required in caring for its increasing business. It was the only land available for switching purposes along the line of the C. E. Co.'s road as located, but it appeared that by making a detour to the north other suitable lands could be reached. The court held that the location of its road upon these lands was within the discretion given to the C. E. Co. by its charter. See also *State v. District Court*, 34 Mont. 535, 88 Pac. 44. But where the termini are stated in the articles or charter, it is held that there should be a reasonable directness in the route between such points. *Leverett v. Middle*

company can not, however, under a mere general authority to locate its road, acquire any right in lands already acquired by another company, and devoted to public uses, further than is necessary in crossing other roads lying between its termini.<sup>16</sup>

**§ 1128 (920a). Determination of question of necessity and convenience of proposed railroad.**—A New York statute prohibits a railroad corporation from exercising any of the powers conferred by law upon such a corporation until the board of railroad commissioners shall certify that “public convenience and necessity require the construction of the railroad as proposed in the articles of association.” It is given as a reason for the enactment of this statute that “railroad construction was often threatened, and sometimes undertaken, with the view of securing for its promoters tribute from a railroad corporation thus threatened with competition. And again, the interests of the investors in railroad enterprises seem to require that the promoters of such enterprises should not be permitted to undertake the construction of such a work where it was clear that public convenience and necessity did not require. These and other considerations undoubtedly moved the legislators to provide a method by which the question of public convenience and necessity should be judicially determined at the very beginning of the corporate life of a railroad corporation, and to accomplish that result it conferred upon the board of railroad commissioners the power and duty to hear and decide this question in all cases.”<sup>17</sup> Under this

Georgia &c. R. Co., 96 Ga. 385, 24 S. E. 154; *People v. Louisville &c. R. Co.*, 120 Ill. 48, 10 N. E. 657; *Attorney-General v. Erie &c. R. Co.*, 55 Mich. 15, 20 N. W. 696.

<sup>16</sup> *Lake Shore &c. R. Co. v. New York &c. R. Co.*, 8 Fed. 858; *Chicago &c. R. Co. v. Chicago &c. R. Co.*, 112 Ill. 589. See *Winchester &c. R. Co. v. Commonwealth*, 106 Va. 264, 55 S. E. 692. A railroad company, organized under the New York general railroad act of 1850, having filed a map and survey of

its proposed line of road, and having notified all persons to be affected by it, thereby acquires the right to construct its road upon such line, as against all other railroad corporations. *Rochester &c. R. Co. v. New York &c. R. Co.*, 13 Cent. 232, 110 N. Y. 128, 17 N. E. 680.

<sup>17</sup> *People v. Railroad Commissioners*, 160 N. Y. 202, 54 N. E. 697; *Ticonderoga Union Terminal R. Co., In re*, 101 N. Y. S. 107.

statute the commissioners are confined to the approval or disapproval, in whole or in part, on the route specified in the articles of incorporation.<sup>18</sup> It has been held that their decision of the question is final, and cannot be afterwards collaterally questioned in condemnation proceedings.<sup>19</sup> It is not sufficient to justify the issuance of the certificate that the charges of existing railroads are excessive, since this is a matter covered by the existing statutory remedies.<sup>20</sup> In one case the refusal to grant the certificate was sustained where it appeared that the road, when constructed, would cross several city streets at grade. Courts, in reviewing the question of the weight of evidence to support the conclusion of the commissioners, apply the same rules as on motions to set aside ordinary verdicts.<sup>21</sup>

**§ 1129 (921). Conflicting grants — Priority of location.** — Where both companies were organized under the same general law, the prior appropriation of a right of way constitutes a prior grant from the state,<sup>22</sup> and it is the settled rule that, of two conflicting grants of a particular location, the earlier grant must

<sup>18</sup> *People v. Railroad Com.*, 92 App. Div. 126, 87 N. Y. S. 334.

<sup>19</sup> *People v. Railroad Com.*, 160 N. Y. 202, 54 N. E. 697.

<sup>20</sup> *Amsterdam &c. R. Co.*, In re, 86 Hun 578, 33 N. Y. S. 1009.

<sup>21</sup> *New Hamburg &c. R. Co.*, In re, 76 Hun 76, 27 N. Y. S. 664.

<sup>22</sup> *Chicago &c. R. Co. v. Chicago &c. R. Co.*, 112 Ill. 589; *Atchison &c. R. Co. v. Mecklin*, 23 Kans. 167; *Boston &c. R. Co. v. Lowell &c. R. Co.*, 124 Mass. 368; *New Brighton &c. R. Co. v. Pittsburgh &c. R. Co.*, 105 Pa. St. 13. But see *Marion Co. Lumber Co. v. Tilghman Lumber Co.*, 75 S. Car. 220, 55 S. E. 337. In *Morris &c. R. Co. v. Blair*, 9 N. J. Eq. 635, it appeared that two companies had each been authorized in general terms to construct a railroad to

the Delaware river, both acts providing in substantially the same language that "when the route of such road shall have been determined upon, and a survey of such route deposited in the office of the secretary of state, then it shall be lawful for said companies to enter upon," etc. Surveys by the two companies were filed on the same day, showing a conflict between the routes selected through certain passes. One of the companies, which was chartered seven days after the act incorporating the other company was passed, was shown to have been the first to make an actual survey of the route in question, but its rival was the first to make a definite adoption of the route, and also filed its survey with the secretary of state at an



prevail.<sup>23</sup> This rule has been held to apply to the case of a line extending through a mountain pass so narrow that the right of way of the first company occupies the entire pass.<sup>24</sup> But, where explicit authority is given to locate a railroad through a pass already occupied by another road, the grant includes authority to use the right of way of the first if the second cannot be built without it.<sup>25</sup> It has been held that a location, as between rival companies, need not be exact as to the width of the right of way claimed, or other matters of mere detail. If the site intended to be held is substantially shown, the location is sufficient.<sup>26</sup>

**§ 1130 (922). Location of road upon property already devoted to public use.**—The legislature has power to authorize the condemnation of railroad property and franchises,<sup>27</sup> and may

earlier hour of the same day that the other survey was filed. It was held that the company which first adopted the line was entitled to priority. See also *Sixoux City &c. R. Co. v. Chicago &c. R. Co.*, 27 Fed. 770; *Cumberland R. Co. v. Pine Mountain R. Co.*, 28 Ky. 574, 96 S. W. 199; *People v. Adirondack R. Co.*, 160 N. Y. 225, 54 N. E. 689; *Fayetteville St. R. v. Aberdeen &c. R. Co.*, 142 N. Car. 52, 55 S. E. 345; *Pittsburgh &c. R. Co. v. Pittsburgh &c. R. Co.*, 159 Pa. St. 331, 28 Atl. 155; *Barre R. Co. v. Montpelier &c. R. Co.*, 61 Vt. 1, 17 Atl. 923, 4 L. R. A. 785, and note, 15 Am. St. 877; *Kanawha &c. R. Co. v. Glen Jean &c. R. Co.*, 45 W. Va. 119, 30 S. E. 86; *Chesapeake &c. R. Co. v. Deepwater R. Co.*, 57 W. Va. 461, 50 S. E. 890.

<sup>23</sup> *Chesapeake &c. Canal Co. v. Baltimore &c. R. Co.*, 4 Gill & Johns. (Md.) 1; *Boston &c. R. Co. v. Lowell &c. R. Co.*, 124 Mass. 368; *Morris &c. R. Co. v. Blair*, 9 N. J. Eq. 635, 644. See also as to

rights of company against a city subsequently incorporated. *Dowie v. Chicago &c. R. Co.*, 214 Ill. 49, 73 N. E. 354.

<sup>24</sup> *Contra Costa &c. R. Co. v. Moss*, 23 Cal. 323.

<sup>25</sup> *Denver &c. R. Co. v. Denver &c. R. Co.*, 17 Fed. 867; *Anniston &c. R. Co. v. Jacksonville &c. R. Co.*, 82 Ala. 297, 2 So. 710; *Montana Cent. R. Co. v. Helena &c. R. Co.*, 6 Mont. 416, 12 Pac. 916; *Buffalo, Matter of*, 68 N. Y. 167, 173. See also *Railway Co. v. Alling*, 99 U. S. 463, 25 L. ed. 438.

<sup>26</sup> *Chesapeake &c. R. Co. v. Deepwater R. Co.*, 57 W. Va. 641, 50 S. E. 890.

<sup>27</sup> *Richmond &c. R. Co. v. Louisa R. Co.*, 13 How. (U. S.) 71, 14 L. ed. 55; *Union Pac. R. Co. v. Burlington &c. R. Co.*, 1 McCr. (U. S.) 452; *New York R. Co. v. Boston R. Co.*, 36 Conn. 196; *Metropolitan City R. Co. v. Chicago &c. R. Co.*, 87 Ill. 317; *Newcastle &c. R. Co. v. Peru &c. R. Co.*, 3 Ind. 464; *Baltimore &c. Co. v. Union R. Co.*,

authorize one railroad company to use, not only the right of way, but the tracks of another company, upon making due compensation.<sup>28</sup> But no implication in favor of such authority arises from the grant of power to build a second railroad unless there is a necessity so absolute that, without it, the grant itself will be defeated. So, it is said that, "while a public service corporation like a railroad company is bound to render to the public certain services appropriate to its particular functions, it is not bound to permit its property to be subjected to use by a rival corporation, unless by express statutory enactment and by due process of law thereunder."<sup>29</sup> And, where the appropriation of the franchise of a street railroad company by a railroad company was made merely as a matter of economy, and to avoid the purchase of valuable property which the railroad company must have acquired to reach its terminus without interfering with the street railroad,

35 Md. 224, 6 Am. Rep. 397; *Fitchburg &c. R. Co. v. Boston &c. R. Co.*, 3 Cush. (Mass.) 58; *Springfield v. Connecticut River R. Co.*, 4 Cush. (Mass.) 63; *Eastern &c. R. Co. v. Boston &c. R. Co.*, 111 Mass. 125, 15 Am. Rep. 13; *New York Cent. &c. R. Co. v. Metropolitan Gas Light Co.*, 63 N. Y. 326; *Lake Shore &c. R. Co. v. Cincinnati &c. R. Co.*, 30 Ohio St. 604; *Commonwealth v. Pittsburg &c. R. Co.*, 58 Pa. St. 26; *White River Turnp. Co. v. Vermont Cent. R. Co.*, 21 Vt. 590; *Alexandria &c. R. Co. v. Alexandria &c. R. Co.*, 75 Va. 780, 40 Am. Rep. 743, and note; *Tuckahoe Canal Co. v. Tuckahoe &c. R. Co.*, 11 Leigh (Va.) 42, 36 Am. Dec. 374; *Elliott Roads and Streets*, 164, et seq.

<sup>28</sup> *Providence &c. R. Co. v. Norwich &c. R. Co.*, 138 Mass. 277, 22 Am. & Eng. R. Cas. 493; *St. Louis &c. R. Co. v. Southern R. Co.*, 105 Mo. 577, 15 S. W. 1013, 16 S. W. 960; *Sixth Ave. R. Co. v. Kerr*, 45

Barb. (N. Y.) 138; *Kinsman St. R. Co. v. Broadway &c. R. Co.*, 36 Ohio St. 239; *Toledo &c. R. Co. v. Toledo &c. R. Co.* (Ohio), 1 Am. & Eng. R. Cas. (N. S.) 230, and note; *Baltimore &c. R. Co. v. Pittsburgh &c. R. Co.*, 17 W. Va. 812; *North Baltimore &c. R. Co. v. North Ave. R. Co.*, 75 Md. 233, 23 Atl. 466. See also *Ex parte Montgomery Light &c. Co.*, 187 Ala. 376, 65 So. 403. Compare *Pacific R. Co. v. Wade*, 91 Cal. 449, 27 Pac. 768, 13 L. R. A. 754, 25 Am. St. 201, 50 Am. & Eng. R. Cas. 362; *New Orleans &c. R. Co. v. New Orleans*, 44 La. Ann. 728, 11 So. 78, 50 Am. & Eng. R. Cas. 391. So, under Texas statute and order of railroad commission there is a right to condemn land of one company for union depot. *State v. St. Louis &c. Ry. Co.* (Tex. Civ. App.), 165 S. W. 491.

<sup>29</sup> *Evansville &c. Traction Co. v. Henderson Bridge Co.*, 134 Fed. 973, 978 (citing text).

it was held that no such necessity existed.<sup>30</sup> A right to cross an existing railroad or highway may often be implied where a right to take it longitudinally could not be implied.<sup>31</sup> Thus, where authority is granted to locate and construct the road from one specified point to another, the right to cross other railroads and highways lying between the two points is necessarily implied,<sup>32</sup> and authority to cross any "public road or way" has been held to include the right to cross city streets;<sup>33</sup> but the right to take an existing road or highway longitudinally is essentially different, and would not, ordinarily, be implied in such a case. It must be granted expressly or by necessary implication.<sup>34</sup> By Act of Congress it is provided that no company building its road upon or across governmental lands, which shall locate its lines through any canyon, pass, or defile in the mountains, shall prevent any other company from the use or occupancy of the same canyon, pass or defile, for the purpose of its road in common with the road first located. And several of the states have statutes to the same effect. Under this law it is held that, where a canyon is broad enough to enable both roads to proceed without interfer-

<sup>30</sup> Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150, 3 Am. & Eng. R. Cas. 507. See also Elliott Roads and Streets (3d ed.), § 248.

<sup>31</sup> Elliott Roads and Streets (3d ed.), § 248.

<sup>32</sup> Bridgeport v. New York & C. R. Co., 36 Conn. 255, 4 Am. Rep. 63; Lake Erie & C. R. Co. v. Kokomo, 130 Ind. 224, 29 N. E. 780; Ft. Wayne v. Lake Shore & C. R. Co., 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367, and note, 32 Am. St. 277, 283; Providence & C. R. Co. v. Norwich & C. R. Co., 138 Mass. 277; Morris & C. R. Co. v. Central R. Co., 31 N. J. L. 205.

<sup>33</sup> Canton v. Canton & C. Co., 84 Miss. 268, 36 So. 266, 65 L. R. A. 561, 105 Am. St. 428. See also Hamline v. Southern R. Co., 76 Miss. 417, 25 So. 295.

<sup>34</sup> Chattanooga & C. R. Co. v. Felton, 69 Fed. 273, and authorities, p. 280; 41 Cent. L. J. 444; Illinois Cent. R. Co. v. Chicago & C. R. Co., 122 Ill. 473, 13 N. E. 140; Ft. Wayne v. Lake Shore & C. R. Co., 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367, and note, 32 Am. St. 277; Housatonic R. Co. v. Lee & C. R. Co., 118 Mass. 391; Lewis v. Germantown & C. Co., 16 Phila. (Pa.) 608; Alexandria & C. R. Co. v. Alexandria & C. R. Co., 75 Va. 780, 40 Am. Rep. 743, and note; Barre R. Co. v. Montpelier & C. R. Co., 61 Vt. 1, 4 L. R. A. 785, and note, 15 Am. St. 877, and note. Compare also Omaha & C. R. Co. v. Lincoln, 97 Nebr. 122, 149 N. W. 319. But see Chicago v. New York & C. R. Co., 216 Fed. 735.

ing with each other in the construction of their respective roads, the second company should be permitted to put down a track parallel with that of the first company,<sup>35</sup> encroaching upon its right of way only where the character of the surface will not permit it to use adjoining ground.<sup>36</sup> And if, in any portion of the canyon, it is impracticable or impossible to lay down more than one roadbed and track, a court of equity will, upon proper application, make such orders as will secure to the second company the right to use, upon just and equitable terms, the roadbed and track constructed by the first company.<sup>37</sup> A railroad may, under a general grant of power to exercise the right of eminent domain, without special authority, condemn property of another railroad not held or used for the purposes of the road.<sup>38</sup> And where land has been held for five years by a railroad company without being used in any way, the fact that the company anticipates using it at some future time does not exempt it from condemnation by another company which desires to build a railroad across it. The prospective use should yield to the more immediate necessities.<sup>39</sup> It has been held that a location made before the incorporation of a railroad company was ineffective to preserve the location as

<sup>35</sup> *Railway Co. v. Alling*, 99 U. S. 463, 25 L. ed. 438.

<sup>36</sup> *Denver &c. R. Co. v. Denver &c. R. Co.*, 17 Fed. 867, 14 Am. & Eng. R. Cas. 83.

<sup>37</sup> *Railway Co. v. Alling*, 99 U. S. 463, 25 L. ed. 438; *Denver &c. R. Co. v. Denver &c. R. Co.*, 17 Fed. 867. See also *Springfield v. Connecticut River R. Co.*, 4 Cush. (Mass.) 72; *Lowell &c. R. Co. v. Boston &c. R. Co.*, 7 Gray (Mass.) 27; *Western North Carolina R. Co. v. Georgia &c. Co.*, 88 N. Car. 79. A railroad company has a right to construct its track through a canyon, though it is compelled in doing so to run parallel with and in close proximity to an existing highway. *Fares v. Rio Grande West-*

*ern R. Co.*, 28 Utah 132, 77 Pac. 230.

<sup>38</sup> *Sioux City &c. R. Co. v. Chicago &c. R. Co.*, 27 Fed. 770, 25 Am. & Eng. R. Cas. 150. The unnecessary use of land by one railroad company is no defense to condemnation proceedings instituted by another company to take the same land. *Baltimore &c. R. Co. v. Pittsburgh &c. R. Co.*, 17 W. Va. 812. And the fact that land owned by one railroad company is held for public convenience and for purposes of quasi public character, does not protect it from condemnation. *New York &c. R. Co. In re*, 99 N. Y. 12.

<sup>39</sup> *Colorado Eastern R. Co. v. Union Pacific R. Co.*, 41 Fed. 293, 44 Am. & Eng. R. Cas. 10.

against another legally incorporated railroad company afterwards making and adopting the same location. The location was not preserved by ratification after the incorporation of the company.<sup>40</sup>

§ 1131 (922a.) **Location on abandoned right of way.**—A general grant of power to a railroad company to condemn abandoned roadbeds does not authorize a railroad to enter upon and condemn a roadbed abandoned by a former locator, and afterwards located upon by another company which had completed a valid location. Under these circumstances the roadbed was not an abandoned roadbed.<sup>41</sup> The South Carolina case, announcing this rule, held that the first location on the abandoned roadbed was completed when the right of way was clearly defined and staked out, and the route so marked was adopted by the company, and that the entry of an engineer and a survey was not required.<sup>42</sup>

§ 1132 (923). **Branch and lateral roads.**—It has been held that authority to locate and construct a railroad carries by implication the right to construct branches and sidings to carry out the purposes of the company's charter,<sup>43</sup> but, while the right to construct ordinary side-tracks and switches may be included,<sup>44</sup>

<sup>40</sup> *New Brighton &c. R. Co. v. Pittsburgh &c. R. Co.*, 105 Pa. St. 13.

<sup>41</sup> *Fayetteville Street R. Co. v. Aberdeen &c. R. Co.*, 142 N. C. 52, 55 S. E. 345.

<sup>42</sup> *Fayetteville Street R. Co. v. Aberdeen &c. R. Co.*, 142 N. Car. 52, 55 S. E. 345.

<sup>43</sup> *Schofield v. Pennsylvania R. Co.*, 2 Pa. Dist. Ct. 57. But see *Edgewood R. Co.'s Appeal*, 79 Pa. St. 257; *Philadelphia &c. R. Co. v. Philadelphia &c. R. Co.*, 1 Pa. Dist. Ct. 73. Compare *Virginia &c. R. Co. v. Seaboard Air Line R. Co.*, 165 N. Car. 425, 81 S. E. 617.

<sup>44</sup> *Arrington v. Savannah &c. R. Co.*, 95 Ala. 434, 11 So. 7; *Central Branch &c. R. Co. v. Atchison &c. R. Co.*, 26 Kans. 669; *New York Cent. &c. R. Co., Matter of*, 77 N. Y. 248; *People v. Brooklyn &c. R. Co.*, 89 N. Y. 75; *Boston &c. R. Co., Matter of*, 53 N. Y. 574; *Toledo &c. R. Co. v. Daniels*, 16 Ohio St. 390; *Philadelphia &c. R. Co. v. Williams*, 54 Pa. St. 103; *Protzman v. Indianapolis &c. R. Co.*, 9 Ind. 467, 68 Am. Dec. 650. Industrial spur track is distinguished from "branch road" in *Illinois Cent. R. Co. v. East Sioux Falls Quarry Co.*, 33 S. Dak. 63, 144 N. W. 724.

we think authority to locate the road on a certain line does not, ordinarily, carry with it the right to construct branch or lateral roads running in a different direction.<sup>45</sup> These may, however, be authorized for a public purpose;<sup>46</sup> and provision is usually made for locating and constructing them under statutory authority. It has also been held by some of the courts that the legislature may constitutionally authorize them to be constructed so as to connect the main line with manufacturing establishments and mines, and that the power of eminent domain may be exercised for that purpose.<sup>47</sup> But this is denied by other courts.<sup>48</sup>

<sup>45</sup> *Chicago &c. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Illinois Cent. R. Co. v. Chicago*, 138 Ill. 453, 28 N. E. 740. See also *Baltimore &c. R. Co. v. Union R. Co.*, 35 Md. 224, 6 Am. Rep. 397; *Knight v. Carrollton R. Co.*, 9 La. Ann. 284; *Brigham v. Agricultural Branch R. Co.*, 1 Allen (Mass.) 316; *Morris &c. R. Co. v. Central R. Co.*, 31 N. J. L. 205.

<sup>46</sup> *Secombe v. Railroad Co.*, 23 Wall. (U. S.) 108, 23 L. ed. 67; *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. ed. 295; *Howard County v. Booneville Cent. Nat. Bank*, 108 U. S. 314, 2 Sup. Ct. 689, 27 L. ed. 738; *Newhall v. Galena &c. R. Co.*, 14 Ill. 273; *Tyler v. Elizabethtown &c. R. Co.*, 9 Bush (Ky.) 510; *Toledo &c. R. Co. v. East Saginaw*, 72 Mich. 206, 40 N. W. 436; *Beekman v. Saratoga &c. R. Co.*, 3 Paige (N. Y.) 45, 22 Am. Dec. 679, and note; *Union El. R. Co., Matter of*, 113 N. Y. 275, 21 N. E. 81.

<sup>47</sup> *Harvey v. Thomas*, 10 Watts (Pa.) 63, 34 Am. Dec. 141; *Hays v. Risher*, 32 Pa. St. 169; *Getz's Appeal*, 10 W. N. C. (Pa.) 453, 3

*Am. & Eng. R. Cas.* 186; *Slocum's Appeal*, 12 W. N. Cas. (Pa.) 84. See also *Fisher v. Chicago &c. R. Co.*, 104 Ill. 323; *South Chicago R. Co. v. Dix*, 109 Ill. 237; *Phillips v. Watson*, 63 Iowa 28, 18 N. W. 659; *New Cent. &c. Co. v. George's &c. Coal Co.*, 37 Md. 537; *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461, 43 N. W. 469; *Dietrich v. Murdock*, 42 Mo. 279; *Hibernia R. Co. v. DeCamp*, 47 N. J. L. 518, 4 Atl. 318, 54 Am. Rep. 197; *New York &c. R. Co. v. Metropolitan &c. Co.*, 63 N. Y. 326; *Clarke v. Blackmar*, 47 N. Y. 150; *Rudolph v. Pennsylvania &c. Co.*, 166 Pa. St. 430, 31 Atl. 131.

<sup>48</sup> See *Weidenfeld v. Sugar Run R. Co.*, 48 Fed. 615; *People v. Dist. Ct.*, 11 Colo. 147; *Chicago &c. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Mikesell v. Durkee*, 34 Kans. 509, 9 Pac. 278; *Split Rock Cable R. Co., Matter of*, 128 N. Y. 408, 28 N. E. 506; *Rochester &c. R. Co. In re*, 58 Hun 601, 12 N. Y. S. 566; *State v. Railway Co.*, 40 Ohio St. 504; *Railroad Co. v. Iron Works*, 31 W. Va. 710, 2 L. R. A. 680, and note.

This question, however, is considered in another chapter.<sup>49</sup> Where the charter authorizes the company to locate and construct branches or lateral roads it has been held that it may build a branch line running in the same general direction as the main line, and connecting such main line with another railroad.<sup>50</sup> In other words, the branch may be practically an extension of the main line as well as a line running off at an intermediate point. So, there may be a branch from a branch, all having a common stem in the main line.<sup>51</sup> But it has been held that authority to construct "branch roads from the main line to other points or places in the several counties through which said road may pass," does not give the company the right to construct a branch through more than one county; that is, any one branch must begin and end in the same county.<sup>52</sup> A track connecting the line of one railroad with that of another for the purpose of exercising a right of passage over the latter road, as secured by a lease, is neither a relocation of the main line of such road nor the construction of a branch line, but is merely a side-track, the construction of which is included in the general power to build the railroad itself.<sup>53</sup> It has been held that power to construct or extend a line, as the board of directors may determine and designate, includes the power to acquire and use a bridge, a station, and the tracks of another company beyond terminals originally

<sup>49</sup> See post, § 1206.

<sup>50</sup> *Atlantic &c. R. Co. v. St. Louis*, 66 Mo. 228; *Delabole State Co. v. Bangor &c. R. Co.*, 6 North. Co. (Pa.) 337; *McAbey's Appeal*, 107 Pa. St. 548; *Blanton v. Richmond &c. R. Co.*, 86 Va. 618, 10 S. E. 925, 43 Am. & Eng. R. Cas. 617. It may cross another railroad. *Hays v. Briggs*, 74 Pa. St. 373.

<sup>51</sup> *Wheeling &c. R. Co. v. Camden &c. Co.*, 35 W. Va. 205, 13 S. E. 369. See also *Atlantic &c. R. Co. v. St. Louis*, 66 Mo. 228.

<sup>52</sup> *Works v. Junction R. Co.*, 5 McL. (U. S.) 425. See also *Baltimore &c. R. Co. v. Union R. Co.*,

35 Md. 224, 6 Am. Rep. 397; *Currier v. Marietta &c. R. Co.*, 11 Ohio St. 228. It has also been held that power to locate, construct and operate a branch road does not authorize the purchase of a road already constructed. *Gulf &c. R. Co. v. Morris*, 67 Tex. 692, 4 S. W. 156, 35 Am. & Eng. Cas. 94; *Campbell v. Marietta &c. R. Co.*, 23 Ohio St. 168.

<sup>53</sup> *Lake Shore &c. R. Co. v. Baltimore &c. R. Co.*, 149 Ill. 272, 37 N. E. 91.

<sup>54</sup> *Union Pac. R. Co. v. Mason City &c. R. Co.*, 128 Fed. 230, affirming 124 Fed. 409.

selected, and in another state, on the determination of the board of directors, and on compliance with the laws of both states relative to the acquisition and use of property by a corporation therein.<sup>54</sup> Where railroad directors act in good faith in determining the question of the advisability of the construction of a branch line, their decision will generally be regarded as conclusive, and not subject to review by the courts.<sup>55</sup>

§ 1133 (924). **Exempt property.**—In some of the states the general railroad laws forbid a railroad to locate its line so as to take, without the consent of the owners, cemeteries, churches, dwelling-houses,<sup>56</sup> or the yard, kitchen or garden thereunto attached.<sup>57</sup> A dwelling-house has been held to include so much of the yard and curtilage as is necessary for its reasonable enjoyment,<sup>58</sup> though this has been denied where the statute was silent on the subject.<sup>59</sup> Under a charter which provided that the president and directors of the railroad company should have power to determine and locate the route of the railroad, as they might

<sup>55</sup> *Ulmer v. Lime Rock R. Co.*, 98 Maine 579, 57 Atl. 1001, 66 L. R. A. 387; *Price v. Pennsylvania R. Co.*, 209 Pa. St. 81, 58 Atl. 137.

<sup>56</sup> *State v. Troth*, 34 N. J. L. 377; *McConiha v. Guthrie*, 21 W. Va. 134, 17 Am. & Eng. R. Cas. 1. The word "house" has been construed by the English courts to include court yard, office, garden, unfinished houses, and all that is necessary to the enjoyment of the house, if within the same ambit or circuit, whether attached to the main building or not, and though purchased after the main building was erected. *Governors &c. v. Charing Cross &c. R. Co.*, 30 L. J. Ch. 395; *Mason v. London &c. R. Co.*, 37 L. J. Ch. 483; *Dakin v. London &c. R. Co.*, 26 L. J. Ch. 734, note, 3 De Gex & S. 414; *King v. Wycombe R. Co.*, 29 L. J. Ch. 462;

*Cole v. West London &c. R. Co.*, 27 Beav. 242; *Alexander v. West End &c. R. Co.*, 31 L. J. Ch. 500; *Grosvenor v. Hempstead &c. R. Co.*, 26 L. J. Ch. 731, cited in 23 Am. & Eng. R. Cas. 2, note.

<sup>57</sup> See *Richmond &c. R. Co. v. Wicker*, 13 Grat. (Va.) 375.

<sup>58</sup> *Swift's Appeal*, 111 Pa. St. 516, 2 Atl. 539; *Damon's Appeal*, 119 Pa. St. 287, 13 Atl. 217. But it does not include a part of a lot one hundred and twenty-five feet away from the house and not reasonably essential to the use and enjoyment of the house. *Rudolph v. Pennsylvania &c. R. Co.*, 166 Pa. St. 430, 31 Atl. 131. See also *Lyle v. McKeesport &c. R. Co.*, 131 Pa. St. 437, 18 Atl. 1111.

<sup>59</sup> *Wells v. Somerset &c. R. Co.*, 47 Maine 345.



deem expedient, not, however, passing through any burying-ground or place of public worship, or any dwelling-house in the occupancy of the owner without his consent, it was held that a house, to be exempt, must be bona fide the residence of the owner, and that, where the line of a railroad has been surveyed so as to cut through a dwelling-house occupied by a tenant, the owner cannot, by moving into the house for the mere purpose of defeating the proposed improvement, or of extorting excessive compensation, render it "a dwelling-house in the occupancy of the owner," within the meaning of the law, so as to prevent its condemnation.<sup>60</sup> Where the statute prohibited the taking of a dwelling-house, or any space within sixty feet thereof, it was held that the limitation applied only to land belonging to the owner of the dwelling, and that it did not prohibit the location of a road within sixty feet of the land of another.<sup>61</sup> And a billiard saloon attached to a tavern and used for the entertainment of the guests was held to be a part of a dwelling.<sup>62</sup>

§ 1134 (925). **Preliminary survey.**—Railroad companies are given power by the statutes of almost all of the states to enter by their officers or agents upon the land of any person, and cause an examination and survey of their proposed route to be made, subject, however, in some of the states, to liability for actual damages.<sup>63</sup> A preliminary survey for this purpose does not consti-

<sup>60</sup> *Hagner v. Pennsylvania &c. R. Co.*, 154 Pa. St. 475, 25 Atl. 1082, 57 Am. & Eng. R. Cas. 648. See *Stahl v. Pennsylvania R. Co.*, 155 Pa. St. 309, 26 Atl. 437. Houses belonging to a corporation and occupied by its tenants have also been held not to be its dwelling houses so as to exempt the land from condemnation. *Raleigh &c. R. Co. v. Mecklenburg Mfg. Co.*, 166 N. Car. 168, 82 S. E. 5. The exemption must be asked in good faith. It will not apply to a shanty built on the line of a railway, and occupied by some negroes who

were induced to live there for the purpose of enabling the owner to evade the condemnation law. *Morris v. Schallsville &c. R. Co.*, 4 Bush (Ky.) 448; *Carris v. Commissioners of Waterloo*, 2 Hill (N. Y.) 443.

<sup>61</sup> *Richmond &c. R. Co. v. Wicker*, 13 Grat. (Va.) 375.

<sup>62</sup> *State v. Troth*, 36 N. J. L. 422.

<sup>63</sup> They are not trespassers where they enter and make the survey under statutory authority. *Burrow v. Terre Haute &c. R. Co.*, 107 Ind. 432, 8 N. E. 167.

tute a taking in the sense in which that term is used in the law of eminent domain and in the various state constitutions;<sup>64</sup> but where the survey is conducted in an unreasonable manner it may be actionable, and may even constitute a taking where the soil is disturbed and trees are cut down, or the like.<sup>65</sup> The right to make a preliminary survey does not include the right to make experiments upon the land, without compensation, for the purpose of ascertaining whether it is a suitable route.<sup>66</sup>

**§ 1135 (926). Perfecting location—Map of proposed route.—**

A defective location may be perfected by legislative confirmation, since the legislature has the same right to confirm an existing location that it has to authorize a location to be made in the future. But such an act does not relieve the railroad company from the consequences of illegal acts done before its passage.<sup>67</sup> In some states the company is required to submit a map of its proposed route to the railroad commissioners for their approval, while in most of the others such a map must be filed or recorded in each of the counties through which the line extends. In some of the states the statute merely requires the map to be filed before the construction of the road is begun, and permits the right of way to be condemned before such filing.<sup>68</sup> In others the map is filed with the secretary of state after the location of the road. Some states require that the road shall be located and a

<sup>64</sup> *Fox v. Western P. R. Co.*, 31 Cal. 538; *Bonaparte v. Camden &c. R. Co.*, Bald. (U. S. C. C.) 209; *Polly v. Saratoga &c. R. Co.*, 9 Barb. (N. Y.) 449; *Oregonian R. Co. v. Hill*, 9 Ore. 377; *Chambers v. Cincinnati &c. R. Co.*, 69 Ga. 320. See also *Robinson v. Southern Cal. R. Co.*, 129 Cal. 8, 61 Pac. 947; *Duluth &c. R. Co. v. Northern Pac. R. Co.*, 57 Minn. 218, 53 N. W. 366. *Elliott Roads and Streets*, (3rd ed.) § 236.

<sup>65</sup> *Orr v. Quimby*, 54 N. H. 590; *Morris & E. R. Co. v. Hudson &c. Co.*, 25 N. J. Eq. 384.

<sup>66</sup> *People v. Loew*, 102 N. Y. 471; *Ash v. Cummings*, 50 N. H. 591. See also *Davis v. San Lorenzo &c. Co.*, 47 Cal. 517; *California &c. Co. v. Central &c. Co.*, 47 Cal. 528; *Toledo &c. R. Co. v. Loop*, 139 Ind. 542, 39 N. E. 306.

<sup>67</sup> *Salem v. Eastern R. Co.*, 98 Mass. 431, 96 Am. Dec. 650; *Commonwealth v. Old Colony R. Co.*, 80 Mass. (14 Gray.) 93.

<sup>68</sup> *Missouri River &c. R. Co. v. Shepard*, 9 Kans. 647; *Chicago &c. R. Co. v. Grovier*, 41 Kans. 685, 21 Pac. 779; *Detroit &c. R. Co. v. Campbell*, 140 Mich. 384, 103 N. W.

"survey" thereof shall be filed,<sup>69</sup> in which case the survey may be aided by plans and maps filed with it.<sup>70</sup> Similar provisions are frequently found in special charters granted to railroad companies. Such statutes should receive a reasonable construction, such as will substantially protect private rights without needless embarrassment to public improvements.<sup>71</sup> Where a survey, map, or location is required to be filed as a precedent condition to the institution of condemnation proceedings, the particular property to be taken must be clearly pointed out.<sup>72</sup> In New Jersey it is held that the survey of the route of a railroad, filed in the office of the secretary of state, limits the right of condemnation to the lands included in its description. This affords the only evidence of the grant by the state to the corporation, and land not specified in such survey cannot be condemned by the railroad as a right of way.<sup>73</sup> In West Virginia, neither the filing of the map and profile of the proposed line, nor the commencement of condemnation proceedings, is an essential step in making the location. Both may be deferred until after the location is perfected.<sup>74</sup> In New York it is held that the filing of the map vests the railroad

856, 861 (citing text). See *Wheeling Bridge &c. R. Co. v. Camden &c. Co.*, 35 W. Va. 205, 13 S. E. 369, 47 Am. & Eng. R. Cas. 27; also *Northwestern Pac. R. Co. v. Lambert*, 166 Cal. 749, 137 Pac. 1116. The requirement of the North Carolina statute that railroad corporations within a reasonable time file a map and profile of their route and right of way with the corporation commission is held not to require such filing as an essential of a completed location of the right of way as against another company. *Fayetteville St. R. Co. v. Aberdeen &c. R. Co.*, 142 N. Car. 423, 55 S. E. 345.

<sup>69</sup> *United New Jersey R. Co. v. National &c. R. Co.*, 52 N. J. L. 90.

<sup>70</sup> *Grand Junction R. Co. v.*

*County Comrs.*, 14 Gray (Mass.) 553; *Drury v. Midland R. Co.*, 127 Mass. 571; *Portland &c. R. Co. v. County Comrs.*, 65 Maine 292; *Quincy &c. R. Co. v. Kellog*, 54 Mo. 334.

<sup>71</sup> *Lansing v. Caswell*, 4 Paige (N. Y.) 519.

<sup>72</sup> *United New Jersey &c. R. Co. v. National Docks &c. R. Co.*, 52 N. J. L. 90, 18 Atl. 574.

<sup>73</sup> *Rochester &c. R. Co. v. New York &c. R. Co.*, 110 N. Y. 128, 17 N. E. 680, 35 Am. & Eng. R. Cas. 267.

<sup>74</sup> *Chesapeake &c. R. Co. v. Deepwater &c. R. Co.*, 57 W. Va. 641, 50 S. E. 890. The case also holds that a mere survey made by the engineers of the company not adopted or determined upon by the corporation itself by an act of its board

company with a right to the land therein specified as its proposed right of way, subject only to the right of the landowner to have his damages assessed and paid. A map showing but a single line, without anything to indicate whether it is the center or one of the boundary lines of the right of way, and containing no statement of the width of the land taken, has been held not to be a sufficient compliance with the law as to location and to authorize condemnation proceedings where the statute requires a map of the proposed location to be filed before such proceedings are begun.<sup>75</sup> The owner is entitled to information as to the exact property which it is proposed to take.<sup>76</sup> Since the map required to be filed is intended mainly for the purpose of acquiring property necessary to be taken, it is sufficient if it shows the alignment and profile of the proposed road and designates the width of the right of way. It need not show the connections, turnouts and switches.<sup>77</sup> The fact that the map of the route as

of directors as the location of the road is not an appropriation or location giving rights against third persons. *Chesapeake &c. R. Co. v. Deepwater &c. R. Co.*, 57 W. Va. 641, 50 S. E. 890.

<sup>75</sup> *New York &c. R. Co. v. New York &c. R. Co.*, 11 Abb. (N. Y.) N. C. 386. Where the line of the road was indicated in the vote of the directors adopting a location only by reference to the course followed by the center line of the road, without any specification as to the width to be taken, it was held that the location was fatally defective. *New York &c. R. Co. v. New York &c. R. Co.*, 52 Conn. 274, 25 Am. & Eng. R. Cas. 215.

<sup>76</sup> *Housatonic R. Co. v. Lee &c. R. Co.*, 118 Mass. 391; *Vail v. Morris &c. R. Co.*, 21 N. J. L. 189; *Heise v. Pennsylvania R. Co.*, 62 Pa. St. 67; *Strang v. Beloit &c. R. Co.*, 16 Wis. 635. See generally *Co.*, 154 Pa. St. 475, 25 Atl. 1082.

*Wilder v. Boston &c. R. Co.*, 161 Mass. 387, 37 N. E. 380; *Conver's Appeal*, 18 Mich. 459; *People v. Brooklyn &c. R. Co.*, 89 N. Y. 75; *Hetfield v. Central R. Co.*, 29 N. J. L. 571. But he may, by his actions after having received actual knowledge of the proposed route, waive his right to objection to condemnation proceedings upon the grounds of indefiniteness in the location of the road as approved by the railroad commissioners. *New York &c. R. Co. v. New York &c. R. Co.*, 52 Conn. 274; *Denver &c. R. Co. v. Canon City &c. R. Co.*, 99 U. S. 463, 25 L. ed. 438; *Atchison &c. R. Co. v. Mecklim*, 23 Kans. 167; *Drury v. Midland R. Co.*, 127 Mass. 571; *Harding v. Biggss*, 172 Mass. 590, 52 N. E. 1060; *Duck River &c. R. Co. v. Cochrane*, 3 Lea (Tenn.) 478.

<sup>77</sup> *State v. Brooklyn &c. R. Co.*, 89 N. Y. 75.

filed stops short of one of the chartered termini does not work a change in the termini nor amount to an abandonment by the company of a portion of the authorized road, and its right to operate the road throughout its entire length as laid down in the charter can not, on that account, be questioned by the state.<sup>78</sup>

**§ 1136 (927). Effect of location—When location is complete.**—When a proposed line has been regularly located and staked off, and the expense thereof has been paid, the corporation by which it is done has a prior claim to the right of way for a reasonable time, which cannot be defeated by another company that procures voluntary conveyances from the owners before the proceedings in condemnation instituted by the first company have terminated.<sup>79</sup> The first company, in such a case, it has been held, can condemn the right of way in the hands of the purchasing company in the same manner that it might have condemned it in

<sup>78</sup> *People v. Brooklyn &c. R. Co.*, 89 N. Y. 75, 9 Am. & Eng. R. Cas. 454; *Mason v. Brooklyn &c. R. Co.*, 35 Barb. (N. Y.) 373. Compare in *Johnson v. Delaware &c. R. Co.*, 245 Pa. 338, 91 Atl. 618; however, it is held that there must be a preliminary survey with necessary maps and profiles and the adoption of a surveyed line and that the company had not sufficiently complied with such requirement under the facts of the case, but had abandoned the terminus originally contemplated.

<sup>79</sup> *Sioux City &c. R. Co. v. Chicago &c. R. Co.*, 27 Fed. 770, 25 Am. & Eng. R. Cas. 150; *Morris &c. R. Co. v. Blair*, 9 N. J. Eq. 635; *Titusville &c. R. Co. v. Warren &c. R. Co.*, 12 Phila. (Pa.) 642; *Williamsport &c. R. Co. v. Philadelphia &c. R. Co.*, 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220, and note; *Barre R. Co. v. Montpelier &c. R. Co.*, 61 Vt. 1, 17 Atl. 923,

4 L. R. A. 785, and note, 15 Am. St. 877. See *Denver &c. R. Co. v. Canon City &c. R. Co.*, 99 U. S. 463, 25 L. ed. 438; *Boston &c. R. Co. v. Lowell &c. R. Co.*, 124 Mass. 368; *Pittsburgh &c. R. Co. v. Pittsburgh &c. R. Co.*, 159 Pa. St. 331, 28 Atl. 155; *Sulphur Springs &c. R. Co. v. St. Louis &c. R. Co.*, 2 Tex. Civ. App. 650, 22 S. W. 107. The text is quoted with approval in *Kanawha &c. R. Co. v. Glen Jean &c. R. Co.*, 45 W. Va. 119, 30 S. E. 86, 88. See also *Chesapeake &c. Ry. Co. v. Deepwater R. Co.*, 57 W. Va. 641, 50 S. E. 890. But it is otherwise where the conveyance is obtained and recorded before the location is made by the company seeking to condemn. *Elting &c. Co. v. Williams*, 36 Conn. 310. And see *Atlanta &c. R. Co. v. Southern R. Co.*, 131 Fed. 657; *Minneapolis &c. R. Co. v. Chicago &c. R. Co.*, 116 Iowa 681, 88 N. W. 1082.

the hands of the original owners.<sup>80</sup> The location of the road results only from some definite action on the part of the corporation itself. An engineer alone cannot locate a railroad so as to give title to the company that employs him; and a preliminary survey made by an engineer, which has never been reported to or adopted by the company, does not constitute a legal location of the line of the railroad which will give such company priority over another company that has adopted a line covering a portion of the same territory.<sup>81</sup> Where two or more experimental surveys were made in succession, and various resolutions were passed by the directors adopting the different routes surveyed,

<sup>80</sup> *Sioux City &c. R. Co. v. Chicago &c. R. Co.*, 27 Fed. 770. In this case Judge Shiras said: "The injustice and injury to private and public rights alike, which would arise were it held that after a company has duly surveyed and located its line of railway, and is in good faith preparing to carry forward the construction of its road, some other company may, by private purchase, procure the right of way over parts of the located line, and either prevent the construction of the road or extort a heavy and exorbitant payment from the company first locating its line as a condition to the right to build the same as originally located, are strong reasons for holding that the first location, if made in good faith and followed up within a reasonable time, may confer the prior right, even though a rival company may have secured the right of way by purchase from the property-owners after the location, but before the application to the sheriff for the appointment of commissioners." But see this case distinguished in *Minneapolis &c. R. Co.*

*v. Chicago &c. R. Co.*, 116 Iowa 681, 88 N. W. 1082, 1085. Abandonment of a surveyed branch railroad can be asserted only by the state, not by another company attempting to use the right of way. *Pittsburgh &c. R. Co. v. Pittsburgh &c. R. Co.*, 159 Pa. St. 331, 28 Atl. 155.

<sup>81</sup> *Williamsport &c. R. Co. v. Philadelphia &c. R. Co.*, 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220, and note, 47 Am. & Eng. R. Cas. 224. An engineer may make explorations in advance of a location, or he may remark the line or adjust the grades after the adoption of a location, but an engineer alone can not locate a railroad so as to give title to the company that employs him. He is not the company. The right of eminent domain does not reside in him. *Williamsport &c. R. Co. v. Philadelphia &c. R. Co.*, 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220. See also *Northern Pac. R. Co. v. Doherty*, 100 Wis. 39, 75 N. W. 1079; and *Kanawha &c. R. Co. v. Glen Jean &c. R. Co.*, 45 W. Va. 119, 30 S. E. 86, 88 (quoting text).

it was held that the location of the road involved the abandonment of the route previously adopted; and that, where the route first surveyed was abandoned and then re-adopted, the rights of the corporation dated from the passage of the resolution by which it was finally designated as the line of the road, although the preliminary survey had been made several months before.<sup>82</sup> In some of the states, as we have already seen, a map of the proposed route must be filed with a designated public officer of each county through which the proposed road runs, and notice given to the land-owners before the "location" is complete.<sup>83</sup> And this requirement is usually made where grants of public land are made to railroads.<sup>84</sup> But when the required map is filed and notice given, the company acquires a prior right to construct a railroad upon such line, exclusive of all other railroad corporations and free from the interference of any party, and this right ripens into title as soon as the land is purchased or taken and compensation is paid under proper condemnation proceedings.<sup>85</sup> If the statute does not provide for a survey or location, nor require a map, survey or description to be recorded, the company which first institutes proceedings to condemn a particular tract of land will have priority of right to appropriate it,<sup>86</sup> provided

<sup>82</sup> Hagner v. Pennsylvania &c. R. Co., 154 Pa. St. 475, 25 Atl. 1082.

<sup>83</sup> The filing of a map was not essential to the location of a road in North Carolina prior to 1872. Purifoy v. Richmond &c. R. Co., 108 N. Car. 100, 12 S. E. 741, 46 Am. & Eng. R. Cas. 232.

<sup>84</sup> See Baker v. Gee, 1 Wall. (U. S.) 333, 17 L. ed. 563; Western Pac. R. Co. v. Tevis, 41 Cal. 489; Hannibal &c. R. Co. v. Smith, 41 Mo. 310. The filing of the map definitely fixes the location, although no survey has been made. Southern Pac. R. Co. v. United States, 69 Fed. 47; Kansas Pac. R. Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. ed. 1122.

<sup>85</sup> Rochester &c. R. Co. v. New York &c. R. Co., 110 N. Y. 128, 17 N. E. 680, 35 Am. & Eng. R. Cas. 267. The map and profile filed in the clerk's office, with proof of the construction of the road on the line indicated, is sufficient to show such a permanent location as to entitle it to have a tax voted to it put upon the tax-duplicate, under the Indiana statute. Chaffyn v. State, 91 Ind. 324.

<sup>86</sup> Lake Merced Water Co. v. Cowles, 31 Cal. 215. But see Atlanta &c. R. Co. v. Southern R. Co., 131 Fed. 657, 666, in which, however, the text is cited with approval. See also Minneapolis &c. R. Co. v. Chicago &c. R. Co., 116

such proceedings have been lawfully begun.<sup>87</sup> Where the statute does not require a railroad company, after making a location, to keep stakes in position along the proposed line, or to file or record a map of its proposed route, a failure to keep its lines staked out will not imply an abandonment of the location so as to estop the company from denying the right of another company to construct its road thereon.<sup>88</sup> As against the land-owner himself, under the laws of most of the states, the corporation acquires no rights by the act of location except a paramount right of purchase or condemnation for railroad purposes as soon as the value of the land

Iowa 681, 88 N. W. 1082, 1085, also citing text. It should be noted that in these cases the company against which the condemning company was unsuccessfully claiming a prior right was a purchaser, or treated as a purchaser, rather than as an appropriator under the eminent domain, and the statutes were also different from those involved in some of the other cases. We quote from the opinion of the able judge in the federal case, as follows: "The appellant acquired no title or interest in the land by merely commencing a proceeding for its appropriation, nor the landowner any right to require the petitioner to take the land it sought to appropriate. The purpose to appropriate may be abandoned even after the assessment of damages. (Citing a number of authorities.) The only right which can be said to result from mere priority of time in the institution of such a proceeding is an equitable right of priority over a later effort to acquire the same property for a like purpose, whether by a like proceeding or contract with notice, actual or constructive. The case

of *Barre R. Co. v. Montpelier Companies*, 61 Vt. 1, 17 Atl. 923, 4 L. R. A. 785, 15 Am. St. 877, and similar cases therein cited, stands upon the effect of the filing and registering of a definite survey and location made in pursuance of statute law. That case, and those upon which it rests, are placed upon the ground that by the requirement of a definite survey, and its registration, the Legislature intended that thereby a prior right to appropriate the lands pointed out should inure, and that this right is a lien or right of interest in the land, which would ripen into a title upon a purchase or condemnation. Mere priority of right accorded to one petitioner over another, upon the ground of priority in time should not have any retrospective operation, so as to give precedence over an earlier acquisition of the same right of way by contract."

<sup>87</sup> *San Francisco &c. Co. v. Alameda Water Co.*, 36 Cal. 639.

<sup>88</sup> *Pittsburgh &c. R. Co. v. Pittsburgh &c. R. Co.*, 159 Pa. St. 331, 28 Atl. 155, 57 Am. & Eng. R. Cas. 46. In this case it was held that



has been legally ascertained and compensation paid.<sup>89</sup> It can not enter upon the land for the purpose of constructing its road until the damages have been assessed and paid or secured.<sup>90</sup> Where, however, the right to the location has become fixed, the railroad company can not be deprived of its priority by the subsequent incorporation of a city which included the lands through which the railroad was laid out.<sup>91</sup>

§ 1137 (927a.) Construction of "from" and "to"—Terminus "at or near."—The question has often arisen whether a charter granting the right to construct a railroad "from" one named terminus "to" another authorizes the construction of a road into the corporate limits of these cities or towns, or whether it only confers the right to construct the road to the boundaries of the termini. The great weight of authority regards these terms as inclusive, and as giving the railroad company the right to enter the terminus.<sup>92</sup> And the case is especially clear where the rail-

the lapse of five years and two months' time after the location of a branch road, without anything being done toward its construction, is not sufficient evidence of the abandonment of the location. See *New Brighton &c. R. Co. v. Pittsburgh &c. R. Co.*, 105 Pa. St. 13; *Washington &c. R. Co. v. Coeur D'Alene &c. Nav. Co.*, 160 U. S. 77, 16 Sup. Ct. 231, 40 L. ed. 346.

<sup>89</sup> In *Sioux City &c. R. Co. v. Chicago &c. R. Co.*, 27 Fed. 770, Judge Shiras said: "The company does not perfect its right to the use of the land, as against the owner thereof, until it has paid the damages, but as against the railroad company, it may have a prior right and better equity. The right to the use of the way is a public, not a private right. It is, in fact, a grant from the state, and although the payment of the damages to the owner is a necessary prerequisite,

the state may define who shall have the prior right to pay the damages to the owner, and thereby acquire a perfected right to the easement. The owner can not by conveying the right of way to A., thereby prevent the state from granting the right to B. All that the owner can demand is that his damages shall be paid."

<sup>90</sup> When the company locates its line over land it secures a vested right to enter and occupy the lands covered as soon as the damages have been paid or secured. *Lafferty v. Schuylkill &c. R. Co.*, 124 Pa. St. 297, 16 Atl. 869, 3 L. R. A. 124, and note, 10 Am. St. 587, 36 Am. & Eng. R. Cas. 575. *Elliott Roads and Streets* (3rd ed.) § 271. See post § 1248.

<sup>91</sup> *Dowie v. Chicago &c. R. Co.*, 214 Ill. 49, 73 N. E. 354.

<sup>92</sup> *Chicago &c. R. Co. v. Chicago &c. R. Co.*, 112 Ill. 589; *St. Louis*

road company, by its charter, is authorized to bring its road to a city and is also given the right to acquire property within it.<sup>93</sup> But it would seem that a railroad company having built its road to the town named as a terminus under a charter thus limited can not be compelled to run its tracks into and construct depots in the town.<sup>94</sup> The terminus is sometimes indefinitely designated in the charter as "at or near" a specified town. This term will receive a reasonable construction. In one case, where a charter authorized a terminus thus designated, it was held that a location one and one-half miles from the town named was not an abuse of the company's discretion.<sup>95</sup>

§ 1138 (928). **Contracts to influence location.**—Contracts made with the officers of a railroad company, and for their own personal benefit, by which it is sought to influence them to procure the road to be built on a particular location,<sup>96</sup> or to procure the location of a depot at a particular point,<sup>97</sup> are absolutely void. Thus a contract by which the officers of the company are to be

&c. R. Co. v. Hannibal &c. Co., 125 Mo. 82, 28 S. W. 483; Waycross &c. R. Co. v. Offerman &c. R. Co., 109 Ga. 827, 35 S. E. 275; Western Pennsylvania R. Co.'s Appeal, 99 Pa. St. 155; Tennessee &c. R. Co. v. Adams, 40 Tenn. 596; Rio Grande R. Co. v. Brownsville, 45 Tex. 88. See also ante, § 63. But see Northeastern R. Co. v. Payne, 8 Rich. (S. Car.) 177; Commonwealth v. Erie &c. R. Co., 27 Pa. St. 339, 67 Am. Dec. 471, and note. Oregon &c. R. Co. v. Spokane &c. R. Co., 83 Ore. 528, 163 Pac. 600, 989, Ann. Cas. 1918C, 991, 995 (citing text).

<sup>93</sup> Moses v. Pittsburgh &c. R. Co. 21 Ill. 516.

<sup>94</sup> People v. Louisville &c. R. Co., (Ill.), 5 N. E. 379.

<sup>95</sup> Park's Appeal, 64 Pa. St. 137. See also Insley v. Shepard, 31 Fed.

869; Kirkbride v. Lafayette County, 108 U. S. 211, 2 Sup. Ct. 501, 27 L. ed. 705; Boston &c. R. Corp. v. Midland R. Co., 1 Gray (Mass.) 367; Moore v. Maine Cent. R. Co., 106 Maine 297, 76 Atl. 871; Ottawa v. Canada &c. R. Co., 33 Can. Sup. Ct. 376. But compare State v. Old Town Bridge Corp., 85 Maine 28, 26 Atl. 947.

<sup>96</sup> Bestor v. Wathen, 60 Ill. 138; Berryman v. Cincinnati &c. R. Co., 14 Bush (Ky.) 755; Fuller v. Dame, 18 Pick. (Mass.) 472.

<sup>97</sup> Pacific R. Co. v. Seely, 45 Mo. 212, 100 Am. Dec. 369; Holladay v. Patterson, 5 Ore. 177. See also Florida &c. R. Co. v. State, 31 Fla. 482, 13 So. 103, 20 L. R. A. 419, 34 Am. St. 30; Peckham v. Lane, 81 Kans. 489, 106 Pac. 464, 25 L. R. A. (N. S.) 967.

given a share in certain lands, on condition that the railroad shall be so located as to pass through them, is illegal and void.<sup>98</sup> Such an agreement, it is said, must either be in the nature of a bribe to procure the location of the road where it would not be of the greatest benefit to the stockholders, or it is a contract to pay the directors for doing what they were already bound to do but were fraudulently claiming they would not do, and is, therefore, without consideration; and in either case it cannot be enforced.<sup>99</sup> Such a contract will not be enforced even when the officers profess to act for the company in making it. Thus a contract to lay off 160 acres of land into town lots, and to make a deed to one-fourth of the lots to such persons as the directors might designate, in consideration that a depot should be located on the lands, is contrary to sound public policy, and can not be enforced even at the suit of the railroad company.<sup>1</sup> Contracts by which some benefit is secured to the corporation itself by the choice of a particular location are upheld so long as they do not infringe the rights of the public, and for this reason contracts of subscription and grants of land, conditioned upon the location of the road or a depot at a particular place, if fairly made, are upheld in most of the states.<sup>2</sup> But contracts by which it is sought

<sup>98</sup> *Woodstock Iron Co. v. Richmond &c. Extension Co.*, 129 U. S. 643, 9 Sup. Ct. 402, 32 L. ed. 819, 38 Am. & Eng. R. Cas. 683. *Cook v. Sherman*, 20 Fed. 167, 16 Am. & Eng. R. Cas. 561. In *Union Pacific R. Co. v. Durant*, 3 Dill. (U. S.) 343, 1 Cent. L. J. 581, it was held by Judge Dillon that where the president uses his power oppressively and by threats to compel citizens to convey lands to him for the company, the court will decree a reconveyance to the grantors. In *Fuller v. Dame*, 18 Pick. (Mass.) 472 the owner of a large tract of land in the south part of Boston agreed with one of the stockholders of a railroad company to pay him

\$9,600 for his services in inducing the company to run its road through that land, and to fix its termination and principal depot at a certain point. Suit having been brought upon the note, it was held that the contract was contrary to public policy, and that the note given in consideration of it was void.

<sup>99</sup> *Bestor v. Wathen*, 60 Ill. 138.

<sup>1</sup> *Pacific R. Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369.

<sup>2</sup> *Atlanta &c. R. Co. v. Thomas*, 60 Fla. 412, 53 So. 510; *Latham v. Illinois Cent. R. Co.*, 253 Ill. 93, 97 N. E. 254; *Cedar Rapids &c. R. Co. v. Spafford*, 41 Iowa 292; *Whalen v. Baltimore &c. R. Co.*,

to prevent the establishment of a rival depot at some other point, where the interests of the corporation and of the public demand it,<sup>3</sup> and contracts by which it is sought to bind the corporation to select a particular route can not be enforced against the company to the injury of the public.<sup>4</sup> It is also held in a few cases, contrary to what seems to be the weight of authority, that, no matter whether the public actually suffer any detriment or not, a contract with the company itself in a right of way deed, requiring it

108 Md. 11, 69 Atl. 390, 129 Am. St. 423, 17 L. R. A. (N. S.) 130; Missouri Pac. Ry. Co. v. Tygard, 84 Mo. 263, 54 Am. Rep. 97; note to Atlanta &c. R. Co. v. Camp, 14 Ann. Cas. 439; ante, §§ 140, 417, 440, 441. See also Piper v. Choctaw &c. Co., 16 Okla. 436, 85 Pac. 965. In Louisville &c. R. Co. v. Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719, the court said: "Public policy as declared by the legislature and enforced by this court, permits counties, cities and townships to make subscriptions or donations to railway corporations, subject to conditions in respect to the location of depots. We can see no good reason why the courts should declare a different policy as between individual and railway companies." But in Dix v. Shaver, 14 Hun (N. Y.) 392, it was held that an agreement by a land-owner that, if the railroad company will construct its road on a specified line, he will pay a certain sum of money, is against public policy and can not be enforced. And see Fort Edward &c. Co. v. Payne, 15 N. Y. 583; Bitternits &c. Tpk. Co. v. North, 1 Hill (N. Y.) 518.

<sup>3</sup> Louisville &c. R. Co. v. Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719, 24 Am. & Eng. R. Cas.

641; Williamson v. Chicago &c. R. Co., 53 Iowa 126, 4 N. W. 870, 36 Am. Rep. 206 and note; Marsh v. Fairbury &c. R. Co., 64 Ill. 414, 16 Am. Rep. 564; St. Louis &c. R. Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 122; St. Louis &c. R. Co. v. Mathers, 104 Ill. 257, 9 Am. & Eng. R. Cas. 600; St. Joseph &c. R. Co. v. Ryan, 11 Kans. 602, 15 Am. Rep. 357; Farrington v. Stucky, 165 Fed. 325. But see Mahaska Co. R. Co. v. Des Moines &c. R. Co., 28 Iowa 437. In Lexington &c. R. Co. v. Moore, 140 Ky. 514, 131 S. W. 257, this general rule is conceded and approved, but the court held that under the agreement and facts of the particular case it did not come within the rule.

<sup>4</sup> But it is held that damages may be awarded against a railroad company for the breach of an agreement made in consideration of a right of way across the plaintiff's lands, by which the company undertook to maintain its track at certain places and to provide the plaintiff with private side tracks connecting with his warehouse. Chapman & Harkness v. Mad River &c. R. Co., 6 Ohio St. 119. See also Louisville &c. R. Co. v. Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719.

to maintain a station or stop at a certain place, even though not exclusive, is void as against public policy.<sup>5</sup>

§ 1139 (929.) **Change of location—When authorized.**—The general railroad laws of many of the states provide for slight changes in the route of a railroad whenever it is necessary to improve the location and the change can be made without departing from the general route or avoiding any points named in the company's charter. Indeed, it is held that a railroad company may, under the general power to locate its road, change its location whenever it is shown to be necessary, so long as no steps have been taken toward securing possession of the first location.<sup>6</sup>

<sup>5</sup> *Ford v. Oregon Elec. R. Co.*, 60 Ore. 278, 117 Pac. 809, Ann. Cas. 1914A, 280, citing *Florida &c. R. Co. v. State*, 31 Fla. 482, 13 So. 103, 20 L. R. A. 419, 34 Am. St. 30; *Louisville &c. R. Co. v. Sumner*, 106 Ind. 55, 5 N. E. 404, 55 Am. St. 719; *Cincinnati &c. R. Co. v. Washburn*, 25 Ind. 259; *Texas &c. R. Co. v. Robards*, 60 Tex. 545, 48 Am. Rep. 268. But these cases, with the possible exception of the Florida case, do not fairly support the decision, and such an agreement now seems permissible under the Florida statutes.

<sup>6</sup> *Mahaska Co. R. Co. v. Des Moines Valley R. Co.*, 28 Iowa 437; *Hagner v. Pennsylvania &c. R. Co.*, 154 Pa. St. 475, 25 Atl. 1082, 57 Am. & Eng. R. Cas. 648. In this last case the court said: "It may be said that the company, having made its location, should be held to it. This would impose unnecessary hardships upon the company. The location may have been made in good faith, but subsequent investigation or action may show that a construction according to

the location is not feasible. Suppose, in this case, the company had been restrained from crossing the Philadelphia and Reading road under grade, because of unnecessary injury to the road so crossed. To hold that in such a case the company had exhausted its powers, and could not change the location, might deprive the public of necessary railroad facilities. . . . We are aware that it has been decided that a railroad company may not change its location after damages for land taken are assessed (*Neal v. Pittsburgh &c. R. Co.*, 31 Pa. St. 19; *Beale v. Pennsylvania &c. R. Co.*, 86 Pa. St. 509); but these decisions are based upon the ground that a railroad company has no right to experiment upon the question of damages. It can not change its location to escape the payment of unsatisfactory damages. But in the case before us no work was done on the original line at the time the change was made, and no steps were taken to assess damages; therefore the grounds upon which the foregoing decisions are

Gross injustice might arise from holding a company bound by all the details of an experimental survey,<sup>7</sup> and the company has, in general, full power and discretion to correct any errors in its first survey. And it will not be disturbed in the exercise of this discretion unless it has clearly erred.<sup>8</sup> The Supreme Court of Virginia has held that a railroad company accepting an amendment to its charter, allowing it to reach its terminal over a connecting line instead of over a line of its own construction, as required by original charter, cannot urge, as excuse for failure to

based do not exist in our case. If changes in location can not be made when proper railroad construction demands them, the public must suffer as well as the corporation. Mistakes will happen in engineering, as well as in other work, and such mistakes may not be discovered until after the location of the road. While the location continues, the owner, by reason of the appropriation of his land, may sustain some damages. These should be paid, and when they are paid no one is injured by a change of location made in good faith." See also *Washington &c. R. Co. v. Coeur D'Alene &c. Nav. Co.*, 60 Fed. 881, affirmed in 160 U. S. 77, 16 Sup. Ct. 231, 40 L. ed. 346; *Memphis &c. R. Co. v. Union R. Co.*, 116 Tenn. 500, 95 S. W. 1019.

<sup>7</sup> See *Works v. Junction R. Co.*, 5 McL. (U. S.) 425; *Hoard v. Chesapeake &c. R. Co.*, 123 U. S. 222, 8 Sup. Ct. 74, 31 L. ed. 130; *Eel River &c. R. Co. v. Field*, 67 Cal. 429, 7 Pac. 814, 22 Am. & Eng. R. Cas. 91; *McCartney v. Chicago &c. R. Co.*, 112 Ill. 611; *Mahaska Co. R. Co. v. Des Moines Valley R. Co.*, 28 Iowa 437; *New Orleans &c. R. Co. v. Second Municipality*, 1 La.

Ann. 128; *Minneapolis &c. R. Co. v. St. Paul &c. R. Co.*, 35 Minn. 265, 28 N. W. 705, 26 Am. & Eng. R. Cas. 638; *Hewitt v. St. Paul &c. R. Co.*, 35 Minn. 226, 28 N. W. 705, 27 Am. & Eng. R. Cas. 342; *Mississippi &c. R. Co. v. Devaney*, 42 Miss. 555, 2 Am. Rep. 608; *North Missouri R. Co. v. Lackland*, 25 Mo. 515; *Atlantic R. Co. v. St. Louis*, 66 Mo. 228; *New York &c. R. Co., In re*, 88 N. Y. 279, 10 Am. & Eng. R. Cas. 113; *South Carolina R. Co. Ex Parte*, 2 Rich. (S. Car.) 434; *South Carolina R. Co. v. Blake*, 9 Rich. (S. Car.) 228; *Collier v. Union R.*, 113 Tenn. 96, 83 S. W. 155 (deviation to avoid destruction of mill justified). But compare *State v. New Haven &c. R. Co.*, 45 Conn. 346; *Leverett v. Middle Georgia &c. R. Co.*, 96 Ga. 385, 24 S. E. 154. *Lake Shore &c. R. Co. v. Baltimore*, 149 Ill. 272, 37 N. E. 91.

<sup>8</sup> *Hentz v. Long Island R. Co.*, 13 Barb. (N. Y.) 646. Equity will not restrain the directors of a railroad company unless it is shown that they wantonly or capriciously disregard the rights of others. *Ans-pach v. Mahanoy &c. R. Co.*, 5 Phil. (Pa.) 491.

avail itself of either method of reaching the terminal, that both methods would have resulted in financial loss to the company.<sup>9</sup>

§ 1140 (930). **Change of location after first location is finally completed.**—When the company has exercised its discretion by making a final location of its road and filing a map of its proposed route, thereby fastening upon the right of way its claim for an easement,<sup>10</sup> and especially after the damages have been assessed,<sup>11</sup> the company can not change its route and invoke the power of eminent domain to procure another right of way except for reasons amounting to a legal necessity for the second taking,<sup>12</sup> and a successor to the original company has no greater rights as to a relocation after its predecessor has exercised its discretion in the matter.<sup>13</sup> "Once located," it is said, "a railroad is permanently located for the whole term of its existence, subject only to the exceptions of a specially granted express legislative enactment, authorizing a change or relocation."<sup>14</sup> If a

<sup>9</sup> Winchester &c. R. Co. v. Commonwealth, 106 Va. 264, 57 S. E. 692.

<sup>10</sup> San Francisco &c. R. Co. v. Mahoney, 29 Cal. 112; Old Colony R. Co. v. Miller, 125 Mass. 1, 28 Am. Rep. 194; Davidson v. Boston &c. R. Co., 3 Cush. (Mass.) 91; Neal v. Pittsburgh &c. R. Co., 2 Grant Cas. (Pa.) 137, 31 Pa. St. 19.

<sup>11</sup> Railway companies, it is said, may make experimental surveys at pleasure, before finally locating their route. But they can not have experimental suits at law, as means of chaffering with the land-owners for the cheapest route. The power of taking any man's land by such company is exhausted by a location. It can not be indulged with another choice. Neal v. Pittsburgh &c. R. Co., 2 Grant Cas. (Pa.) 137, 31 Pa. St. 19; Beale v. Pennsylvania &c. R. Co., 86 Pa. St. 509.

<sup>12</sup> Brown v. Atlantic &c. R. Co., 126 Ga. 248, 55 S. E. 24; Griffin v. House, 18 Johns. (N. Y.) 397; Moorhead v. Little Miami R. Co., 17 Ohio 340; Little Miami R. Co. v. Naylor, 2 Ohio St. 235, 59 Am. Dec. 667. A railroad company may condemn land for its relocation, if there be a manifest necessity for the change of location, and no detriment accrues to the public. Mississippi &c. R. Co. v. Devaney, 42 Miss. 555, 2 Am. Rep. 608. But as to what is not such a necessity, see Lusby v. Kansas City &c. R. Co., 73 Miss. 360, 19 So. 239, 36 L. R. A. 510, and note; State v. New Haven &c. R. Co., 45 Conn. 346.

<sup>13</sup> Brown v. Atlantic &c. R. Co., 126 Ga. 248, 55 S. E. 24.

<sup>14</sup> State v. Mobile &c. R. Co., 86 Miss. 172, 38 So. 732. See also State v. Sugarland Ry Co., (Tex. Civ. App.) 163 S. W. 1047. It has

change of location is made under statutory authority after condemnation proceedings have begun, and because the award of damages is unsatisfactory, and the proceedings are abandoned, the railroad company must pay all damages and costs occasioned by their institution.<sup>15</sup> After the road has been constructed the company will not be permitted to change its route and exercise the power of eminent domain to procure a new right of way, excepting where it has statutory authority to make the change.<sup>16</sup> Some courts, however, hold that a railroad company may condemn land for the purpose of varying, altering, and repairing the road upon a proper showing of its necessity. But in such a case the petition for condemnation must allege in detail the facts showing the taking to be necessary, and such allegations are traversable by the land-owner.<sup>17</sup> Where the power to change the location of a railroad whenever that location could be improved was expressly given by statute, it was held that the power

been held that where a railroad was constructed and operated for forty years its location for a long distance could not be changed without legislative authority, but if so authorized a member of the general public could have no common law right to damages. *Bryan v. Louisville &c. R. Co.*, 244 Fed. 650.

<sup>15</sup> *North Missouri R. Co. v. Reynal*, 25 Mo. 534; *Leisse v. St. Louis &c. R. Co.*, 2 Mo. App. 105, 72 Mo. 561, 6 Am. & Eng. R. Cas. 611, note; *Hudson River R. Co. v. Outwater*, 3 Sandf. (N. Y.) 689; *Drath v. Burlington &c. R. Co.*, 15 Nebr. 367, 18 N. W. 717, 20 Am. & Eng. R. Cas. 385. In *Hagner v. Pennsylvania &c. R. Co.*, 154 Pa. St. 475, 25 Atl. 1082, the opinion is expressed that the mere location of a railroad across land may give a claim for damages, though the land is never condemned. The court says: "While the location

continues, the owner, by reason of the appropriation of his land, may sustain some damages. These should be paid, and when they are paid, no one is injured by a change of location made in good faith."

<sup>16</sup> *Works v. Junction R. Co.*, 5 McL. (U. S.) 425; *Cleveland &c. R. Co. v. Speer*, 56 Pa. St. 325, 94 Am. Dec. 84. See also *State v. Norwalk &c. Tpk. Co.*, 10 Conn. 157; *Lusby v. Kansas City &c. R. Co.*, 73 Miss. 360, 19 So. 239, 36 L. R. A. 510; *Brown v. Atlantic &c. R. Co.*, 126 Ga. 248, 55 S. E. 24; *Louisville &c. Turnp. Co. v. Nashville &c. Tpk. Co.*, 2 Swan (Tenn.) 282. But see *Colorado Eastern R. Co. v. Union Pac. R. Co.*, 41 Fed. 293.

<sup>17</sup> *Knight v. Carrollton R. Co.*, 9 La. Ann. 284; *Mississippi &c. R. Co. v. Devaney*, 42 Miss. 555, 2 Am. Rep. 608; *South Carolina R. Co. v. Blake*, 9 Rich. (S. Car.) 228.



could be exercised after a partial construction of the road.<sup>18</sup> And it is firmly settled by the weight of authority that making one appropriation does not exhaust the power, but new appropriations of land for the construction of additional tracks, turnouts, engine houses, and other railroad facilities, may be made from time to time as the necessities of the road may require.<sup>19</sup> The right to change the location does not, as a rule, authorize a change in the termini, but only alterations in the route between the same termini.<sup>20</sup> It has been held, however, that a railroad company, having authority to construct branches, may effect a

<sup>18</sup> *Eel River &c. R. Co. v. Field*, 67 Cal. 429, 7 Pac. 814; *Cape Girardeau &c. R. Co. v. Dennis*, 67 Mo. 438. In the case of *Eel River &c. R. Co. v. Field*, the statute provided as follows: "If at any time after the location of the railroad and the filing of the maps and profiles thereof, as provided in the preceding section, it appears that the location can be improved, the directors may . . . alter or change the same and cause new maps and profiles to be filed showing such changes, in the same offices where the originals are on file, and may proceed in the same manner as the original location was acquired to acquire and take possession of such new line, and must sell or relinquish the lands owned by them for the original location within five years after such change. No new location shall, as herein provided, be so run as to avoid any points named in their articles of incorporation."

<sup>19</sup> *St. Louis &c. R. Co. v. Petty*, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434, and note; *Central Branch Union Pac. R. Co. v. Atchison &c. R. Co.*, 26 Kans. 669; *Water Comrs. v. Lawrence*, 3 Edw. Ch. (N. Y.)

552; *Ligat v. Commonwealth*, 19 Pa. St. 456; *Philadelphia &c. R. Co. v. Williams*, 54 Pa. St. 103; *Black v. Philadelphia &c. R. Co.*, 58 Pa. St. 249; *South Carolina R. Co. v. Blake*, 9 Rich. (S. Car.) 228. "It would be, indeed, a disastrous rule to hold that a railroad company must, in the first instance, acquire all the ground it will ever need for its own convenience or the public accommodation. . . . The greatest degree of sagacity could hardly determine precisely what conveniences the future might demonstrate to be necessary to do its business with facility." *Chicago &c. R. Co. v. Wilson*, 17 Ill. 123; *Pabst Brewing Co. v. Milwaukee*, 157 Wis. 158, 147 N. W. 47, 49 (quoting text and note). See also *Prather v. Jeffersonville &c. R. Co.*, 52 Ind. 16, 42; *Toledo &c. R. Co. v. Daniels*, 16 Ohio St. 390. But see *Lodge v. Philadelphia &c. R. Co.*, 8 Phila. (Pa.) 345.

<sup>20</sup> *Snook v. Georgia Imp. Co.*, 83 Ga. 61, 9 S. E. 1104; *Attorney-General v. West Wisconsin R. Co.*, 36 Wis. 466. But see *Protzman v. Indianapolis Co.*, 9 Ind. 467, 68 Am. Dec. 650.

virtual change, not only of a portion of its route, but of its terminus, by the construction of a branch road, beginning at a point near the end of the line and running in the same general direction as the main line of the road.<sup>21</sup> It has been held that a grant contained in a special charter, of authority to vary the route and change the location of a railroad whenever a better and cheaper route could be had, or whenever any obstacle occurred, either by way of difficulty of construction or inability to procure a right of way at reasonable cost, does not include authority to relocate the line after the road has been constructed, and to condemn land on which to build the road as relocated.<sup>22</sup> Indeed, most of the special charters granted to railroads have been construed to authorize but one exercise of the power of locating the road, and after this power has been exercised and a final location made, the power is held to be exhausted, and no change can thereafter be made, except by express consent of the legislature.<sup>23</sup> Where the charter enumerates the causes for which a change or relocation may be made, the route can only be changed for some cause that is fairly within the terms of the statute.<sup>24</sup> In New York, North Carolina and New Hampshire, provision is made for the reloca-

<sup>21</sup> *Atlantic &c. R. Co. v. St. Louis*, 66 Mo. 228.

<sup>22</sup> *Atkinson v. Marietta &c. R. Co.*, 15 Ohio St. 21; *Little Miami R. Co. v. Naylor*, 2 Ohio St. 235, 59 Am. Dec. 667; *Moorhead v. Little Miami R. Co.*, 17 Ohio 340.

<sup>23</sup> *Works v. Junction R. Co.*, 5 McL. (U. S.) 425; *State v. Norwalk &c. R. Co.*, 10 Conn. 157; *Brigham v. Agricultural &c. R. Co.*, 1 Allen (Mass.) 316; *Hastings v. Amherst &c. R. Co.*, 9 Cush. (Mass.) 596; *Doughty v. Somerville &c. R. Co.*, 21 N. J. L. 442; *Morris &c. R. Co. v. Central R. Co.*, 31 N. J. L. 205; *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358; *People v. New York &c. R. Co.*, 45 Barb. (N. Y.) 73; *Hudson &c. Canal Co. v. New*

*York &c. R. Co.*, 9 Paige (N. Y.) 323; *Moorhead v. Little Miami R. Co.*, 17 Ohio 340.

<sup>24</sup> *Works v. Junction R. Co.*, 5 McL. (U. S.) 425; *McRoberts v. Southern Minn. R. Co.*, 18 Minn. 108; *New York &c. R. Co.*, In re, 88 N. Y. 279. In *Works v. Junction R. Co.*, 5 McL. (U. S.) 425, it was held that the fact that a town situated upon the line of the road refused to contribute toward its construction was not sufficient reason for the relocation of the route under a charter authority to vary the location "either for the difficulty of construction, or of procuring a right of way at a reasonable cost, or whenever a better and cheaper route can be had."

tion of a proposed railroad upon the petition of any land-owner aggrieved by the location as made by the company whenever a better route is shown to exist.<sup>25</sup> Where the company has built its road without resorting to the power of **eminent domain**, and is able to acquire a new right of way by purchase, or otherwise, without condemnation, it has authority to make any changes in route that do not interfere with the rights of the public.<sup>26</sup> And the general rule against changing the location does not apply to a mere change of track from one part of the right of way to another.<sup>27</sup> It has been held that a provision in the charter of a railroad company requiring it to establish a terminal at one of

<sup>25</sup> Where, in a proceeding under the New York statute, it appears that notice of the application for commissioners has not been given to an individual whose lands will be affected thereby such proceeding is wholly void. *Norton v. Wallkill Valley R. Co.*, 63 Barb. (N. Y.) 77. The commissioners appointed by the court at the petition of a land-owner, as provided by the New York statute, have jurisdiction of the entire subject of the location of the route through the county in which the land of the person applying for their appointment is situated, and are not confined to the consideration of necessary changes in that part of the route which passes through the land of the petitioner. *Long Island R. Co. In re*, 45 N. Y. 364. But they have no power to so change a portion of the proposed route as to leave it disconnected at either end with the other portions. *People, ex rel. Erie &c. R. Co. v. Tubbs*, 49 N. Y. 356. See generally under the New York statute, *New York &c. R. Co. Matter of*, 99 N. Y. 388, 2 N. E. 35; *Erie R. Co. v. Steward*, 170 N. Y. 172, 63 N. E. 118.

<sup>26</sup> *Mine Hill &c. R. Co. v. Lippincott*, 86 Pa. St. 468. See also *Dewey v. Atlantic Coast Line*, 142 N. Car. 392, 55 S. E. 292; *Chicago &c. R. Co. v. People*, 222 Ill. 396, 78 N. E. 784; *Mobile &c. R. Co. v. State*, 89 Miss. 725, 41 So. 295, 299 (citing text). But where, in consideration of locating its machine shop and general offices in a certain city, it has received lands and other concessions from the city and citizens, it is held that it can not, by amending its charter, remove them to another city, and that the court may enforce specific performance by enjoining such removal. *Tyler v. St. Louis &c. R. Co.*, 99 Tex. 491, 91 S. W. 1. See, however, *Armour & Co. v. Texas &c. Ry. Co.*, 258 Fed. 185.

<sup>27</sup> *Stark v. Sioux City &c. R. Co.*, 43 Iowa 501; *Minneapolis &c. R. Co. v. St. Paul &c. R. Co.*, 35 Minn. 265, 28 N. W. 705; *Dougherty v. Wabash &c. R. Co.*, 19 Mo. App. 419. But see *Lake Shore &c. R. Co. v. Baltimore &c. R. Co.*, 149 Ill. 272, 37 N. E. 91; *Chapman v. Mad River &c. R. Co.*, 6 Ohio St. 119, as to the effect of constructing a side-track or parallel road.

two points named does not require it to maintain a terminal at each of these points, though it has constructed its road to both and established terminals at both.<sup>28</sup>

§ 1141 (931). **Abandonment of location.—Effect.**—It is provided by statute, in many of the states, that a failure on the part of a railroad company to begin the construction of its road within a time limited shall amount to an abandonment of its location,<sup>29</sup> and many of the states which authorize a company to change its proposed route provide that such a change shall work an abandonment of so much of the old line as is affected by the change. By abandoning its location the company loses all right thereto, and the land reverts to the owner.<sup>30</sup>

§ 1142. **Abandonment—What constitutes—When and how shown.**—In the absence of an express legislative enactment on the subject, perhaps, no court would be justified in fixing a limit

<sup>28</sup> *Sherwood v. Atlantic &c. R. Co.*, 94 Va. 291, 26 S. E. 943.

<sup>29</sup> See *Fernow v. Chicago &c. R. Co.*, 75 Iowa 526, 39 N. W. 769. Where the statute provided that in case any railroad company should not, within twelve months after the acceptance of the route by the commissioners, pay for a right of way over all the land covered by its location, such acceptance should be void, it was held that such failure to pay for the right of way was not in the nature of a forfeiture, to be taken advantage of only by the state in a direct proceeding against the company, but that the whole proceeding became of no effect upon the expiration of twelve months. *New York &c. R. Co. v. Boston &c. R. Co.*, 36 Conn. 196.

<sup>30</sup> *New York &c. R. Co. v. Boston &c. R. Co.*, 36 Conn. 196; *Hastings v. Burlington &c. R. Co.*, 38 Iowa 316; *Fernow v. Chicago &c.*

*R. Co.*, 75 Iowa 526, 39 N. W. 869; *Harrison v. Lexington &c. R. Co.*, 9 B. Mon. (Ky.) 470; *Roanoke Investment Co. v. Kansas City &c. R. Co.*, 108 Mo. 50, 17 S. W. 1000, 51 Am. & Eng. R. Cas. 426; *Troy &c. R. Co. v. Boston &c. R. Co.*, 86 N. Y. 107; *Girard College &c. R. Co. v. Thirteenth &c. R. Co.*, 7 Phila. (Pa.) 620; *Lawson v. Georgia So. R. Co.*, 142 Ga. 14, 82 S. E. 233. See also *Mobile &c. R. Co. v. Kamper*, 88 Miss. 817, 41 So. 513; *Spencer v. Wabash R. Co.* (Iowa), 109 N. W. 453. But not where the railroad company has been deeded the land in fee by warranty deed. *Enfield Mfg. Co. v. Ward*, 190 Mass. 314, 76 N. E. 1053. And abandonment of part of right of way does not transfer title to rails, ties, and other fixtures to original grantors of right of way. *Hatton v. Kansas City &c. R. Co.*, 253 Mo. 660, 162 S. W. 227.

at which a failure to construct its road should be held to be an abandonment of its location on the part of the company, but, if not controlled by the rule as to the loss of rights by prescription<sup>31</sup> the question is largely one of intention. Accordingly, it is held that a failure on the part of the company to construct its road for a number of years is not itself sufficient to show an abandonment of its right of way.<sup>32</sup> Neither does the use of a part of the right of way for the erection of restaurants and places of amusement constitute an abandonment of the part so used if such structures conduce to the comfort of its passengers and augment its business;<sup>33</sup> nor does the erection of a public elevator or warehouse by the company, or its licensee, to be used to facilitate the business of the company,<sup>34</sup> even if such use of its lands could be considered as unauthorized.<sup>35</sup> A sale or transfer

<sup>31</sup> *Pittsburgh &c. R. Co. v. Pittsburgh &c. R. Co.*, 159 Pa. St. 331, 28 Atl. 155, 57 Am. & Eng. R. Cas. 46; *Western Pennsylvania R. Co.'s Appeal*, 104 Pa. St. 399. It has been held that an adjoining owner may obtain title to a part of the right of way of a railroad company by adverse possession, where its conduct shows a purpose to abandon the part of its location of which he has taken possession. *Norton v. London &c. R. Co.*, L. R. 9 Ch. Div. 623, L. R. 13 Ch. Div. 268.

<sup>32</sup> *Durfee v. Peoria &c. R. Co.*, 140 Ill. 435, 30 N. E. 686 (ten years); *Barlow v. Chicago &c. R. Co.*, 29 Iowa 276 (thirteen years); *Roanoke Investment Co. v. Kansas City &c. R. Co.*, 108 Mo. 50, 17 S. W. 1000, 51 Am. & Eng. R. Cas. 426 (thirteen years); *Kansas City &c. R. Co. v. Kansas City &c. R. Co.*, 129 Mo. 62, 31 S. W. 451; *Western Pennsylvania R. Co.'s Appeal*, 104 Pa. St. 399; *Pittsburgh &c. R. Co. v. Pittsburgh &c. R. Co.*,

159 Pa. St. 331, 28 Atl. 155, 57 Am. & Eng. R. Cas. 46 (five years). Under the Iowa statute a right of way of a railroad, "not used nor operated for a period of eight years," reverts to the owner of the land from which it was taken. *Fernow v. Chicago &c. Co.*, 75 Iowa 526, 39 N. W. 869, 36 Am. & Eng. Cas. 420.

<sup>33</sup> *Prospect Park &c. R. Co. v. Williamson*, 91 N. Y. 552. Where it was shown that the depot was not constructed upon ground condemned for depot purposes, but the land adjoined the depot and was improved and used for beautifying the depot grounds, it was held that the question whether the land was abandoned should be left to the jury. *Muhle v. New York &c. R. Co.*, 86 Tex. 459, 25 S. W. 607, reversing (Tex. Civ. App.), 23 S. W. 809.

<sup>34</sup> *Gurney v. Minneapolis &c. Co.*, 63 Minn. 70, 65 N. W. 136, 30 L. R. A. 534.

<sup>35</sup> *Gurney v. Minneapolis &c. Co.*, 63 Minn. 70, 65 N. W. 136, 30 L.

of its right of way to another company, by whom the road is completed and operated, is not an abandonment.<sup>36</sup> And it has been held that the fact that a railroad company has entered into a contract to run its trains over the road of another company, and has taken up part of its own track, and permitted the owner of the adjoining lands to take possession thereof for cultivation, does

R. A. 534, citing *Roby v. New York R. Co.*, 142 N. Y. 176, 36 N. E. 1053; *Peirce v. Boston &c. R. Co.*, 141 Mass. 481, 6 N. E. 96.

<sup>36</sup> *United States v. Little Miami &c. R. Co.*, 1 Fed. 700, 9 Rep. 676; *Henery v. Dubuque &c. R. Co.*, 2 Iowa 288; *Noll v. Dubuque &c. R. Co.*, 32 Iowa 66; *Commonwealth v. Tenth Mass. Tpk. Co.*, 5 Cush. (Mass.) 509; *Crolley v. Minneapolis &c. R. Co.*, 30 Minn. 541, 16 N. W. 422; *State v. Rives*, 5 Ired. L. (N. Car.) 297; *Junction R. Co. v. Ruggles*, 7 Ohio St. 1; *Hatch v. Cincinnati &c. R. Co.*, 18 Ohio St. 92; *Commonwealth v. Central Pass. R. Co.*, 52 Pa. St. 506. But in *State v. Atchison &c. R. Co.*, 24 Nebr. 143, 38 N. W. 43, 8 Am. St. 164, and note, 32 Am. & Eng. R. Cas. 388, it was held that a lease of its road without statutory authority was such an abandonment as to incur a forfeiture of the franchises of the company under a statute making the abandonment of its road or a material part thereof by a railroad company a cause of forfeiture. See also *Blakely v. Chicago &c. R. Co.*, 46 Nebr. 272, 64 N. W. 972 (sale an abandonment). In *Roanoke Investment Co. v. Kansas City &c. R. Co.*, 108 Mo. 50, 17 S. W. 1000, 51 Am. & Eng. R. Cas. 426, 435, the court said: "It is not the policy of the law to permit a railroad to acquire a right

of way to build a railroad, do some work on it, and then, after changing its route, and abandoning the easement, still claim and exercise the right to sell the right of way to another. The statute permitting it to acquire land limits it to its own corporate purposes. It is not allowed to enter the market and speculate in real estate in this manner. When it ceases to use the land for the legitimate purposes indicated in its charter, the lands revert to the owner." A lease of land to a coal company for a coal yard into which the railroad company extended a switch by which they delivered coal to the lessee was held not to constitute an abandonment. *Roby v. New York &c. R. Co.*, 142 N. Y. 176, 36 N. E. 1053. Where a railroad company not prohibited by statute from acquiring by purchase or condemnation the fee-simple of land, on abandoning for railroad purposes land whose fee it had bought conveys such fee to a purchaser for purposes unconnected with its road—since there could be no reversion to the company's grantor, who had been paid full value for the fee, nor to his heirs—the title conveyed is at least good as against any private person. *Chamberlain v. Northeastern R. Co.*, 41 S. Car. 399, 19 S. E. 743, 25 L. R. A. 139, and note, 44 Am. St. 717.

not show an abandonment of another part of the right of way which is retained for use as a switch.<sup>37</sup> No general rule of law, applicable to all cases, can be laid down as to what constitutes abandonment of the whole or a part of its right of way by a railroad company, but the question whether abandonment exists in a given case must be determined by the particular circumstances of that case.<sup>38</sup> It is largely a question of intent, and, while long nonuser may be evidence of abandonment, yet mere nonuser does not of itself constitute an abandonment where there is no intent to abandon.<sup>39</sup> The relocation of part of a railroad in order to avoid real or seeming difficulties in the way of its construction

<sup>37</sup> *Columbus v. Columbus &c. R. Co.*, 37 Ind. 294. Where a street railroad having a double track took up one of its tracks and operated its line as a single track road for a period of ten years, it was held that its right to operate a double track was not thereby lost, but that the company could relay the track which it had taken up. *Hestonville R. Co. v. Philadelphia*, 89 Pa. St. 210. But see *Hickox v. Chicago &c. R. Co.*, 94 Mich. 237, 53 N. W. 1105.

<sup>38</sup> See *Henderson v. Central Pass. R. Co.*, 21 Fed. 358; *Columbus v. Columbus &c. R. Co.*, 37 Ind. 294; *Central Iowa R. Co. v. M. & A. R. Co.*, 57 Iowa 249, 10 N. W. 639. *Attorney-General v. Eastern R. Co.*, 137 Mass. 45; *In Muhle v. New York &c. R. Co.*, 86 Tex. 459, 25 S. W. 607, the question of what constitutes abandonment is held to be one for the jury.

<sup>39</sup> *Northern Pac. R. Co. v. Smith*, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. ed. 157; *Townsend v. Mich. Cent. R. Co.*, 101 Fed. 757; *St. Louis &c. R. Co. v. Foltz*, 52 Fed. 627, 633; *Southern Pac. R. Co. v.*

*Hyatt*, 132 Cal. 240, 64 Pac. 272, 54 L. R. A. 522; *Durfee v. Peoria &c. R. Co.*, 140 Ill. 435, 30 N. E. 686; *Barlow v. Chicago &c. R. Co.*, 29 Iowa 276; *Morgan v. Des Moines &c. R. Co.*, 113 Iowa 561, 85 N. W. 902; *Hummel v. Cumberland &c. R. Co.*, 175 Pa. St. 537, 34 Atl. 848; *Virginia &c. R. Co. v. Crow*, 108 Tenn. 17, 64 S. W. 485; *Nicomien Boom Co. v. North Shore &c. Co.*, 40 Wash. 315, 82 Pac. 412, 416 (citing text). Intention and nonuser must co-exist. *Stannard v. Aurora &c. R. Co.*, 220 Ill. 469, 77 N. E. 254. The question is to a great extent one of intent; but such intention can be established by the act of the company clearly indicating its purpose not to use such right of way and by long nonuse thereof." *Gurdon &c. R. Co. v. Vaught*, 97 Ark. 234, 133 S. W. 1019, 1021 (citing text and holding that almost twenty years nonuse under the circumstances showed an intention to abandon and that there was an abandonment). See also *New York &c. R. Co. v. Cella*, 88 Conn. 515, 91 Atl. 972; 3 Elliott Ev. §§ 1578, 1579.

upon the line as originally laid out amounts to an implied abandonment of a portion of the old line,<sup>40</sup> and permitting another company to occupy and use the land included within its location may estop a railroad company from denying that such location had been abandoned,<sup>41</sup> as will also, in general, any acts by which a clear intention to abandon is shown.<sup>42</sup> The doctrine of aban-

<sup>40</sup> *Louisville &c. R. Co. v. Louisville &c. R. Co.*, 2 Duv. (Ky.) 175; *Hagner v. Pennsylvania &c. R. Co.*, 154 Pa. St. 475, 25 Atl. 1082, 57 Am. & Eng. Cas. 648; *Stacey v. Vermont Central R. Co.*, 27 Vt. 39. But see *Hickox v. Chicago &c. R. Co.*, 94 Mich. 237, 53 N. W. 1105.

<sup>41</sup> *Chesapeake &c. Canal Co. v. Baltimore &c. R. Co.*, 4 G. & J. (Md.) 1; *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105.

<sup>42</sup> Where a route was wholly disused for a period of ten years, during which the company operated a competing line, and no disposition to relay the road was manifested until ten years had elapsed, and until after there was a move made by another railway company to obtain the route and operate a street railway over it, the court held that the evidence established an intention to abandon. *Henderson v. Central Pass. R. Co.*, 21 Fed. 358. See also *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296. But compare *Wright v. Milwaukee &c. Co.*, 95 Wis. 29, 69 N. W. 791, 36 L. R. A. 47, 60 Am. St. 74; *Denison &c. R. Co. v. St. Louis &c. Co.*, 30 Tex. Civ. App. 474, 72 S. W. 201. In *Central Iowa R. Co. v. M. & A. R. Co.*, 57 Iowa 249, 10 N. W. 639, the court held that making a survey of the unfinished portion of its line, and building station houses and

sidetracks along the part which had been built was not satisfactory evidence that a company, which had done nothing toward building the part of road that remained incomplete, suspended operations with a bona fide intention of resuming them at some time in the future. A failure to run passenger trains is not evidence of abandonment where the road is regularly used for hauling freight, and, because of competition, no passengers are offered to the company for transportation at a price that would be a reasonable compensation for the service. *Commonwealth v. Fitchburg R. Co.*, 12 Gray (Mass.) 180. Leasing a parallel road for a period of ten years, and taking up its track, and allowing its right of way to be fenced in by the owner of the adjoining land during all of said ten years, is not an abandonment, where the intention to resume the use of the right of way at the expiration of the lease is clearly proved. *Durfee v. Peoria &c. R. Co.*, 140 Ill. 435, 30 N. E. 686. Where a company had shown a disposition to abandon its proposed route, and, upon being remonstrated with by a committee of citizens from a town upon that route, replied through its chief engineer that the grade was so heavy that the road could not be built, where



donment will be applied with greater strictness, it seems, in a suit by the state against the company for nonuser of its franchises than in a suit by another corporation or a private individual, claiming title to the abandoned right of way.<sup>43</sup> And, under the Mississippi statute, it has been held that the state may enjoin the company from abandoning a portion of its road running through a town where it had maintained a depot.<sup>44</sup>

§ 1143 (931a). **Relocation of stations.**—A railroad company has the undoubted right, in the absence of anything to the contrary, to determine the location of its stations, provided it takes into account the convenience of the public and the interest of the company in deciding the matter; and this right, similarly limited, applies to the relocation of stations already established. An important inquiry in a proceeding to prevent abandonment and relocation is, whether persons previously using the station are

it then built its road over another route, did nothing toward building upon the land in dispute for a period of thirteen years, permitted the original owner and his assignee to make costly improvements, and even to fill up the cut which it had made without offering any protest, and finally conveyed its rights in the proposed route to another company, it was held that the evidence of abandonment was conclusive. The court said: "We think the intention to abandon and the absolute abandonment were consummated, the easement was lost, and the lands in question became discharged of this burden. Acts so decisive and conclusive in character as these have but one meaning. They indicate and prove a clear intention to abandon the right of way. *Moore v. Rawson*, 3 Barn. & Cr. 332; *Liggins v. Inge*, 7 Bing. 682; *Louisville & N. R. Co. v. Covington*, 2 Bush (Ky.) 526."

<sup>43</sup> *State v. Atchison &c. R. Co.*, 24 Nebr. 143, 38 N. W. 43, 8 Am. St. 164, and note; *Crolley v. Minneapolis &c. R. Co.*, 30 Minn. 541, 16 N. W. 422. See also *Chesapeake Beach R. Co. v. Washington &c. R. Co.*, 199 U. S. 247, 26 Sup. Ct. 25, 50 L. ed. 175; *Chicago &c. R. Co. v. Wright*, 153 Ill. 307, 38 N. E. 1062. In the last case above cited, it was held that failure to complete the road within the time limited by its charter is not such an abandonment that it can be taken advantage of by third persons, in the absence of any action by the state.

<sup>44</sup> *State v. Mobile &c. R. Co.*, 86 Miss. 172, 38 So. 732. See also *Kansas City &c. Ry. v. Davis*, 197 Mo. 669, 95 S. W. 881; *Seaboard Air Line R. Co. v. Olive*, 142 N. Car. 257, 55 S. E. 263. And compare *Brooks Scanlon Co. v. Railroad Com. of La. (La.)*, 81 So. 727, degree reversed in 40 Sup. Ct. 183.

deprived of reasonable facilities to transact business with the railroad company by reason of the change.<sup>45</sup> The mere fact that private citizens may have constructed residences or established business enterprises in view of the expectation that a depot established and maintained by a railroad company for many years would continue to be a regular stopping place for the trains of the company will not influence the court, in a mandamus proceeding, to compel the continuance of the depot and the stopping of trains there, where it appears that the patrons of the company in the vicinity suffer no inconvenience or hardship from the change.<sup>46</sup> The convenience of the railroad company, in making the change, however, is not the sole consideration. One court, addressing itself generally to this question, has said: "It would seem to be now well-settled, upon principles of public policy, that the decisive question in such a case should not be the convenience and benefit of the railway companies alone. They undoubtedly have a right to consider their own profit and convenience largely, but also owe duties to the public, for which reasons they have been permitted to establish their roads, and enjoy many substantial privileges depending on benefits which will accrue to patrons adjacent to their lines, and incidental to the obligations thus imposed must be the duty to treat the public fairly, and furnish them with reasonable facilities to enjoy the benefits they confer; hence the discontinuance of an established railway station, which their patrons have been permitted to use for years, upon the faith of whose location the people of a village and the surrounding country have depended, can not be

<sup>45</sup> *Butler v. Tifton &c. R. Co.*, 121 Ga. 817, 49 S. E. 763; *Mobile &c. R. Co. v. People*, 132 Ill. 559, 24 N. E. 643, 22 Am. St. 556; *Chicago &c. R. Co. v. People*, 222 Ill. 396, 78 N. E. 784; *State v. Des Moines &c. R. Co.*, 87 Iowa 644, 54 N. W. 461; *State v. Alabama &c. R. Co.*, 68 Miss. 653, 9 So. 469. A recent decision holds that the location of a union depot at the terminus of an important and much

frequented street, 210 feet from the corporate line, within four blocks of the former depot in the city, and within the police jurisdiction of the city, will not be restrained because of its being beyond the city limits. *Dewey v. Atlantic Coast Line*, 142 N. Car. 392, 55 S. E. 292.

<sup>46</sup> *Chicago &c. R. Co. v. People*, 222 Ill. 396, 78 N. E. 784.

determined solely by the consideration whether a railway station is profitable to the road, nor upon its convenience and the adaptation of its affairs to the increased advantages and methods of transacting its business, nor by the test whether the continuance of a station will require it to incur increased expense. This wholesome conclusion is supported by authority, and is founded upon equity and reasonable grounds of general utility."<sup>47</sup>

**§ 1144. Right of individual to enjoin change of depot or station.**—As already shown a railroad company ordinarily has a broad discretion in determining the location of depots and stations and in making changes in their location.<sup>48</sup> So, too, a railroad commission have been created in many of the states with authority over such matters. For these reasons it is seldom that a private individual can enjoin the change or removal of a depot or station, at least in the first instance.<sup>49</sup> It may be that in some instances a private individual having a valid contract with the company might maintain mandamus or a suit for specific performance or an injunction requiring the company to maintain a depot or station at a certain place or preventing its removal, but, ordinarily, a private individual has no such right and the courts

<sup>47</sup> Gladson v. Minnesota, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. ed. 1064; People v. Louisville &c. R. Co., 120 Ill. 48, 10 N. E. 657; People v. Chicago &c. R. Co., 130 Ill. 175, 22 N. E. 857; Mobile &c. R. Co. v. People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. 556; citing Railway Commrs. v. Portland &c. R. Co., 63 Maine 269, 18 Am. Rep. 208; State v. Northern &c. R. Co., 90 Minn. 277, 96 N. W. 81; State v. Sioux City &c. R. Co., 7 Nebr. 357. The question as to the validity and effect of statutes and orders of railroad or public utility commission as to maintaining depots or stations at certain places has already been considered in other chapters in this volume. See,

however, on the general subject, notes in Ann. Cas. 1912A, 227; Ann. Cas. 1914C, 1171; also St. Louis &c. R. Co. v. Bellamy, 113 Ark. 384, 169 S. W. 322; Kansas City So. R. Co. v. Redwine, 43 Okla. 610, 143 Pac. 847; Gulf &c. R. Co. v. State (Tex. Civ. App.), 167 S. W. 192.

<sup>48</sup> See also People v. Chicago &c. R. Co., 130 Ill. 175, 22 N. E. 857; Chicago &c. R. Co. v. State, 74 Nebr. 77, 103 N. W. 1087.

<sup>49</sup> Horton v. Southern R. Co., 173 Ala. 231, 55 So. 531, Ann. Cas. 1914A, 685; College Arms Hotel Co. v. Atlantic Coast Line R. Co., 61 Fla. 553, 54 So. 459; Cooper v. Mobile &c. R. Co., 94 Miss. 413, 48 So. 832.

can not or will not assume jurisdiction. His remedy, if any, even where there is a contract has been held to be an action for damages and not injunction.<sup>50</sup>

<sup>50</sup> *Fritts v. Delaware &c. R. Co.*, 75 N. J. L. 384, 73 Atl. 92. See also *Armour &c. Co. v. Texas &c. Ry. Co.*, 258 Fed. 185; *Jacquelin v. Erie R. Co.*, 69 N. J. Eq. 432, 61

Atl. 18. As to right to specific performance of contract to erect depot or maintain station, see note in 14 Ann. Cas. 478.

## CHAPTER XXXVII.

### ACQUISITION OF RIGHT OF WAY

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| <p>Sec.</p> <p>1150. How right of way may be acquired.</p> <p>1151. Authority to purchase.</p> <p>1152. Who may convey.</p> <p>1153. Construction of deeds and contracts for right of way.</p> <p>1154. Where route is not described in deed.</p> <p>1155. Enforcement of agreement to sell—Specific performance.</p> <p>1156. When specific performance will not be enforced.</p> <p>1157. Effect of conveyance or release of damages.</p> <p>1158. What estate is taken.</p> <p>1159. What estate is taken—Continued.</p> <p>1160. Conveyance of right of way by railroad companies.</p> <p>1161. Conditional conveyances.</p> <p>1162. Difference between conditions precedent and conditions subsequent — Effect of failure to perform conditions precedent.</p> <p>1163. Conditions subsequent—What is sufficient performance—Effect of failure to perform.</p> <p>1164. Remedies of grantor for failure of company to per-</p> | <p>Sec.</p> <p>form conditions subsequent.</p> <p>1165. Construction of conditions subsequent — Compliance with conditions.</p> <p>1166. When equity will interfere in case of a breach of conditions subsequent.</p> <p>1167. Covenants running with the land.</p> <p>1168. Other covenants.</p> <p>1169. Right of way over mineral lands — Reservation of right to mine.</p> <p>1170. Use of land acquired for right of way purposes.</p> <p>1171. Title on abandonment of right of way.</p> <p>1172. Dedication of land to the use of railroad.</p> <p>1173. Dedication to railroad—Statute of frauds.</p> <p>1174. Title by adverse possession.</p> <p>1175. Adverse possession — Tacking—Extent of right acquired.</p> <p>1176. Adverse possession as against municipality.</p> <p>1177. Rights of railroad company acquired by entry under license.</p> <p>1178. When license is irrevocable.</p> |
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**§ 1150 (932). How right of way may be acquired.**—A right of way may be acquired by a railroad company by purchase, by

grant, by dedication,<sup>1</sup> by adverse possession, by license, or by condemnation under the power of eminent domain. Or, as said in a recent case, it may be by condemnation, purchase, or voluntary grant, and also by estoppel, adverse possession, or license.<sup>2</sup> We have already treated of the acquisition of a right of way by public grant, and we shall consider the subject of eminent domain in a subsequent chapter. In this chapter we shall consider the other modes of acquiring a right of way. The first is by purchase.

**§ 1151 (933). Authority to purchase.**—Railroads are generally authorized to purchase the necessary lands for a right of way and for the erection of station-houses, repair shops, and other accommodations for the transaction of their business,<sup>3</sup> or to take such land by gift or as a consideration for any agreement which the company is empowered to make. Indeed, an attempt to purchase or agree upon the compensation is usually made a condition precedent to the exercise of the power of eminent domain.<sup>4</sup> But, even without special statutory authority, a railroad

<sup>1</sup> But see post, § 1172. In *Clark v. Wabash R. Co.*, 132 Iowa 11, 109 N. W. 309, it is said that "a railroad right of way is an easement which can be acquired only by grant, either from the owner or from the state, through the exercise of the right of eminent domain, or by prescription"; but there was no question of dedication in the case.

<sup>2</sup> *Town of New Point v. Cleveland &c. R. Co.*, 59 Ind. App. 147, 107 N. E. 560, 564. See also *Louisville &c. R. Co. v. Berkey*, 136 Ind. 591, 36 N. E. 642; *Town of New-castle v. Lake Erie &c. R. Co.*, 155 Ind. 18, 57 N. E. 516; *Hill v. Woodward*, 100 Miss. 879, 57 So. 294, 39 L. R. A. (N. S.) 538, Ann. Cas. 1914A, 390.

<sup>3</sup> That they have the right to

purchase the right of way, see *Munson v. Syracuse &c. R. Co.*, 103 N. Y. 58, 8 N. E. 355; *McClure v. Missouri River R. Co.*, 9 Kans. 373; *Chamberlain v. Northwestern R. Co.*, 41 S. Car. 399, 19 S. E. 743, 25 L. R. A. 139, and note, 44 Am. St. 717; *Williamsport &c. R. Co. v. Philadelphia &c. R. Co.*, 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220, and note; *State v. Boston &c. R. Co.*, 25 Vt. 433.

<sup>4</sup> See *Brown v. Rome &c. R. Co.*, 86 Ala. 206, 5 So. 195, 36 Am. & Eng. Cas. 571; *Lake Shore &c. R. Co. v. Cincinnati &c. R. Co.*, 116 Ind. 578, 19 N. E. 440; *Terre Haute &c. R. Co. v. Scott*, 74 Ind. 29; *Toledo &c. R. Co. v. Detroit &c. R. Co.*, 62 Mich. 564, 29 N. W. 500, 28 Am. & Eng. Cas. 272; 4 Am. St. 875; *Ellis v. Pacific R. Co.*, 51 Mo.

company could, if not expressly forbidden to do so, purchase such lands under its implied power as a corporation to acquire and hold whatever property is reasonably useful and convenient in attaining its legitimate ends.<sup>5</sup> A grantee in existence, and capable of taking, is ordinarily essential to every conveyance. Accordingly it has been held that, in the absence of special statutory authority, a railroad company can take nothing by a conveyance executed before its organization.<sup>6</sup> But it is competent for the legislature to authorize conveyances to be made to a corporation by name in advance of its organization as an inducement to the formation of the company, and such conveyances, upon ratification by the company after its organization, by entering upon the land and locating its line upon the same, become binding upon the grantor and the company.<sup>7</sup> So, of course, a conveyance may be taken by individuals in trust for the company when formed.<sup>8</sup> So, it has been held that a nonresident company which has no authority to condemn land may nevertheless acquire it by contract with the owner, and that the latter, by taking part in the

200; *Omaha R. v. Gerrard*, 17 Nebr. 587, 24 N. W. 279; *Pennsylvania R. Co. v. National Docks &c. Co.*, 57 N. J. L. 86, 30 Atl. 183; *Prospect Park &c. R. Co.*, In re, 67 N. Y. 371; *Powers v. Hazelton &c. R. Co.*, 33 Ohio St. 429; *Oregon &c. R. Co. v. Oregon &c. Co.*, 10 Ore. 444; *O'Hara v. Pennsylvania R. Co.*, 25 Pa. St. 445.

<sup>5</sup> *Blanchard's Gun Stock &c. Factory v. Warner*, 1 Blatchf. (U. S.) 258; *Ryan v. Leavenworth &c. R. Co.*, 21 Kans. 365, 400; *Old Colony R. Co. v. Evans*, 6 Gray (Mass.) 25, 66 Am. Dec. 394; *Thompson v. Waters*, 25 Mich. 214, 227, 12 Am. Rep. 243; *Moss v. Averell*, 10 N. Y. 449; *Spear v. Crawford*, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513; *Page v. Heineberg*, 40 Vt. 81, 94 Am. Dec. 378, and note; *Royal Bank of India's Case*,

L. R. 4 Ch. App. 252, L. R. 7 Eq. Cas. 91; 1 Bl. Com. 475, 478; 2 Kent's Com. 227. But it has been held that a non-resident corporation may acquire a right of way and land for depot grounds, yards and machine shops by contract, although prohibited from doing so by condemnation. *St. Louis &c. R. Co. v. Foltz*, 52 Fed. 627. See *American &c. Co. v. Minnesota &c. Co.*, 157 Ill. 641, 42 N. E. 153.

<sup>6</sup> *Gage v. New Market &c. R. Co.*, 18 Q. B. 457. See *Boston &c. R. Co. v. Babcock*, 3 Cush. (Mass.) 228, and compare *Chattanooga &c. Co. v. Evans*, 66 Fed. 809. See ante, § 470.

<sup>7</sup> *Bravard v. Cincinnati &c. R. Co.*, 115 Ind. 1, 17 N. E. 183. Ante, § 470.

<sup>8</sup> *Burrow v. Terre Haute &c. R. Co.*, 107 Ind. 432, 8 N. E. 167.

condemnation proceedings and accepting the award, is estopped to deny that there was an implied contract for the right of way.<sup>9</sup>

**§ 1152 (934). Who may convey.**—A conveyance to a railroad company is subject to the same restrictions and conditions as if made to a person not possessing the right of eminent domain. The grantor can ordinarily convey only his own interest. A deed from the husband does not convey the wife's land,<sup>10</sup> and the same is true of a conveyance by the wife in which her husband

<sup>9</sup> *St. Louis &c. R. Co. v. Foltz*, 52 Fed. 627.

<sup>10</sup> *Pilcher v. Atchison &c. R. Co.*, 38 Kans. 516, 16 Pac. 945, 5 Am. St. 770; *Texas &c. R. Co. v. Durrett*, 57 Tex. 48; *Galveston &c. R. Co. v. Donahoo*, 59 Tex. 128. In *Chicago &c. R. Co. v. Anderson*, 42 Kans. 297, 21 Pac. 1059, it is held that the husband or wife had such an interest in the lands of the other as to be a necessary party to condemnation proceedings. But it has been held that where the husband is, in law, the absolute owner of all lands held in his name, and possessed of an absolute power of sale or alienation, that a statutory inhibition against the conveyance of any part of the "homestead" without the consent of the wife does not deprive the husband of the right to release to the railroad a right of way over which it has located its line. The railroad company could take the property by process of condemnation, if it were not released, in which case the damages assessed would be payable to the husband, and a release from him is merely a release of his claim for damages. *Randall v. Texas Central R. Co.*, 63 Tex. 586, 22 Am. & Eng. R. Cas.

102. In Iowa, decisions to the same effect are put upon the ground that a release of a mere easement through a homestead for the construction of a railroad may be made by the husband without the consent of the wife if the occupancy of the right of way will not materially interfere with the use of the homestead premises as such. *Chicago &c. R. Co. v. Swinney*, 38 Iowa 182. In *Ottumwa &c. R. Co. v. McWilliams*, 71 Iowa 164, 32 N. W. 315, 29 Am. & Eng. R. Cas. 544, the same court held that a railroad running through a forty-acre homestead tract, through a cut, the edge of which was ninety-five feet, and the deepest part, in which the track was laid, 144 feet from the dwelling-house, did not destroy the homestead or defeat its occupancy as such. This was an action on a contract by which the husband bound himself to convey a fee-simple title to a strip of ground for a right of way for the railroad. The court below directed the conveyance of an easement, and its decree was approved on appeal. In *Canty v. Latterner*, 31 Minn. 239, it was held that the husband has the sole right to damages awarded on condemnation of



does not join, where the husband is required by statute to join in all conveyances of land by the wife.<sup>11</sup> Nor does the deed of the mortgagor affect the mortgagee's interest.<sup>12</sup> A guardian can not bind the trust estate by his deed for a right of way unless it is made with the approval of the court.<sup>13</sup> Nor can an executor or administrator, unless he has a power to sell.<sup>14</sup> If, however, the owner of an equitable interest in lands conveys to a railroad a right of way across them, and afterward perfects his title, it has been held that the new rights which he acquires will inure to the benefit of the railroad company.<sup>15</sup> A life tenant may convey the land during his tenancy for any use which does not injure the

property for a railroad right of way through a homestead, from which the doctrine of *Randall v. Texas Central R. Co.* would logically follow. But this position is denied in Iowa, and the court holds that the damages awarded are a part of the homestead. *Kaiser v. Seaton*, 62 Iowa 463, 17 N. W. 664.

<sup>11</sup> *Colorado Central R. Co. v. Allen*, 13 Colo. 229, 22 Pac. 605, 44 Am. & Eng. R. Cas. 193. In this case it was held that the wife could convey her land to a railroad company without joining her husband under the act removing the disabilities of married women, even though the law required her husband to be joined with her in a suit by the railroad company to take the land under the power of eminent domain. In *Texas & C. R. Co. v. Durrett*, 57 Tex. 48, it was held that the husband could not, without the concurrence and consent of the wife as prescribed by the statute, grant to a railroad company a right of way across the separate property of the wife. In

*Pickert v. Ridgefield Park R. Co.*, 25 N. J. Eq. 316, it is held that the wife can not, after the company has entered into possession and begun the construction of its road under an agreement with her husband who held the record title to the property and who made the agreement with her knowledge, enjoin the further prosecution of the work on the ground that she holds an unrecorded deed to the property, of which the railroad company had no opportunity to acquire knowledge.

<sup>12</sup> *Wade v. Hennessy*, 55 Vt. 207.

<sup>13</sup> *Indiana & C. R. Co. v. Brittingham*, 98 Ind. 294; *Indiana & C. R. Co. v. Allen*, 100 Ind. 409; *State v. Commissioners*, 39 Ohio St. 58. See also *Myers v. McGavock*, 39 Nebr. 843, 58 N. W. 522, 42 Am. St. 627.

<sup>14</sup> *Rush v. McDermott*, 50 Cal. 471; *Hankins v. Kimball*, 57 Ind. 42; *Tompkins v. Augusta & C. R. Co.*, 21 S. Car. 420.

<sup>15</sup> *Indianapolis & C. R. Co. v. Rayl*, 69 Ind. 424.

inheritance,<sup>16</sup> but he can not bind the reversioner.<sup>17</sup> As in the case of private individuals, the railroad company takes only the estate which its grantors had in the land. Thus the holder of a leasehold interest can not be divested of his estate by a conveyance by his landlord.<sup>18</sup> Neither can the title of the landlord be prejudiced by a deed from the tenant.<sup>19</sup> Where the company enters under a deed from one tenant in common, it has been held a trespasser as to the other tenants in common who do not join in the deed.<sup>20</sup> Where the joint deed of husband and wife is necessary to convey her real estate, a release of damages by a mar-

<sup>16</sup> *Chicago &c. R. Co. v. Goodwin*, 111 Ill. 273, 53 Am. Rep. 622; *Tutt v. Port Royal &c. R. Co.*, 16 S. Car. 365; *Hope v. Norfolk &c. R. Co.*, 79 Va. 283. See also *Bentonville R. v. Baker*, 45 Ark. 252.

<sup>17</sup> *Bentonville R. v. Baker*, 45 Ark. 252; *Chicago &c. R. Co. v. Goodwin*, 111 Ill. 273, 53 Am. Rep. 622; *Bradley v. Missouri Pac. R. Co.*, 91 Mo. 493, 4 S. W. 427; *Austin v. Rutland &c. R. Co.*, 45 Vt. 215; *Hope v. Norfolk &c. R. Co.*, 79 Va. 283. Where the reversioner, and her trustee know of the grant of a right of way across the estate, and acquiesce in the construction and operation of the railroad thereon for many years, the trustee can not recover the land in the lifetime of the life tenant upon allegations of forfeiture for waste. *Tutt v. Port Royal &c. R. Co.*, 20 S. Car. 110. Under the Canadian statute a tenant for life is authorized to convey to a railroad company, and the latter remains liable to the reversioner or remainder-man for the proportion of the price due to his interest. *Midland Railroad v. Young*, 22 Can. S. C. Rep. 190.

<sup>18</sup> *Chattanooga &c. R. Co. v. Brown*, 84 Ga. 256, 10 S. E. 730, 43 Am. & Eng. R. Cas. 611; *Bur-*

*bridge v. New Albany &c. R. Co.*, 9 Ind. 546; *Crowell v. New Orleans &c. R. Co.*, 61 Miss. 631.

<sup>19</sup> *Toledo &c. R. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271.

<sup>20</sup> *Rush v. Burlington &c. R. Co.*, 57 Iowa 201, 10 N. W. 628. But in *Charleston &c. R. Co. v. Leech*, 33 S. Car. 175, 11 S. E. 631, 26 Am. St. 667, 43 Am. & Eng. R. Cas. 588, it was held that a railroad company which had built its road across a farm belonging to its grantor and her three children as tenants in common, was entitled to an order compelling a partition of the land as upon the application of the grantor, and directing that, if possible, the allotment to the grantor should include the strip over which the company had constructed its road; and that proceedings instituted by the minor children to recover damages to their interests should be enjoined pending the partition proceedings. The court says: "Suppose the proceedings instituted by the minors for compensation and damages are allowed to proceed to final judgment before any partition is made. Of course the plaintiff would be compelled to pay them the amount so adjudged. And suppose that after this, when parti-

ried woman, in which her husband does not join, has been held inoperative for any purpose.<sup>21</sup> Contracts of this kind, like all other contracts, are not binding upon the company unless those assuming to act for the corporation had the requisite authority, or their acts are afterwards ratified.<sup>22</sup>

**§ 1153 (934a). Construction of deeds and contracts for right of way.**—The ordinary rules governing the construction of similar instruments apply in general to the construction of deeds and contracts for a railroad right of way. Statutory provisions, and the nature and purpose for which a right of way is acquired and used, and other circumstances, may sometimes result, how-

tion is made, it shall turn out that the railroad does not go through or over any portion of the land allotted to the minors, but goes only over the land allotted to Mrs. Leech, would not this be the greatest injustice to the plaintiff? For, in such case, the plaintiff will have been required to pay for a right of way over land for which it holds a grant, and to persons who, as it turns out, are not entitled to a foot of the land over which such right of way has been paid for." But the doctrine of this case is manifestly unsound, since the construction of a railroad across the property may have damaged it to a greater or less extent, and such damage could not be taken into account by the commissioners and charged against the interest of the grantor in effecting a partition. Indeed, it is conceivable that a tract of land of which but a small part was taken, should be damaged by the construction of a railroad across it to an amount greater than the entire interest of the tenant in common by whom alone its construction was authorized. Upon the general proposition that one tenant

in common can not convey to a stranger a specific portion of the common estate so as to prejudice the rights of his co-tenants in the part conveyed, see *Shepardson v. Rowland*, 28 Wis. 108; *Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139; *Marsh v. Holley*, 42 Conn. 453; *Markoe v. Wakeman*, 107 Ill. 251; *Mattox v. Hightshue*, 30 Ind. 95; *Ballou v. Hale*, 47 N. H. 347, 93 Am. Dec. 438; *Dennison v. Foster*, 9 Ohio 126, 34 Am. Dec. 429; *Jewett v. Stockton*, 3 Yerg. (Tenn.) 492, 24 Am. Dec. 594; *Good v. Coombs*, 28 Tex. 34. See also *Draper v. Williams*, 2 Mich. 536. But compare *Casteel v. St. Louis & C. R. Co.*, 81 Ark. 364, 99 S. W. 540.

<sup>21</sup> *Delaware & C. R. Co. v. Burson*, 61 Pa. St. 369. Where the statute authorizes the railroad company to acquire title by a release from the "owner," the fact that the wife does not release her inchoate right of dower is immaterial. *Chouteau v. Missouri Pacific R. Co.*, 122 Mo. 375, 22 S. W. 458.

<sup>22</sup> *Reynolds v. Dunkirk & C. R. Co.*, 17 Barb. (N. Y.) 613; *Central Mills Co. v. New York & C. R. Co.*, 127 Mass. 537.

ever, in causing a different interpretation, construction, or effect to be given to such a contract or some of its provisions from that which might be given to an ordinary deed or contract between individuals for land or for a private right of way. The construction of provisions as to the location and extent of the right of way, and the particular rules applicable to conditions and covenants, are considered in subsequent sections in this chapter. Where, as is usually the case, the statute authorizes only an easement or interest in land, and not a fee to be taken by condemnation proceedings, a deed will not be construed to convey a fee in the absence of a clearly apparent intention to that effect.<sup>23</sup> Even where an agreement purported to grant and convey to a railroad company a "full right of way of the width of fifty feet," but closed with a statement that the land-owner also covenanted and agreed, when required by the company, to execute "a deed conveying to said company in fee-simple the land hereinbefore described," and the company did not demand a deed until the discovery, some years afterwards, that the land was valuable for gas and oil, it was held that the company took only an easement, and that nothing more was intended to be conveyed.<sup>24</sup> It was also said, in the same case, that as the agreement was prepared by the railroad company, and was ambiguous, the construction should be favorable to the land-owner, and the doubt "should be solved adversely to the railway company." On the other hand, it has been held that a deed granting a "right of way of sufficient width for the track, cuts and embankments of the said road, as also for turnouts and all other extensions and enlargements, or repair of the same from time to time, not to exceed one hundred feet on each side, with the right to use the earth, stone, and timber within the said tract for the construction, extension, or repair of the same road," conveys such rights as the company would be

<sup>23</sup> See post, § 1158. See also *Shepard v. Suffolk &c. R. Co.*, 140 N. Car. 391, 53 S. E. 137; *St. Louis &c. R. Co. v. Temple &c. Ry. Co.* (Tex. Civ. App.), 170 S. W. 1073. And compare *People v. Walsh*, 211 N. Y. 90, 105 N. E. 136. But in *Stevenson v. Galveston &c. R. Co.*

(Tex. Civ. App.), 169 S. W. 644, it was held that the company took a fee.

<sup>24</sup> *Lockwood v. Ohio River R. Co.*, 103 Fed. 243. See also *South Penn. Oil Co. v. Calf Creek Oil &c. Co.*, 140 Fed. 507.

presumed to have acquired if it acquired them by condemnation proceedings under the statute.<sup>25</sup> Where the right of way is obtained by contract, as well as where it is acquired by condemnation, the company has a right to use suitable material, found within the limits of the right of way, for the construction of its road, but not to take it from the land outside of such limits unless there is additional compensation or an agreement to that effect.<sup>26</sup> It has also been held, in other cases, that a deed for a right of way gives the company the right to use it as the statute provides,<sup>27</sup> but that the language of the deed should be interpreted in the light of the surrounding circumstances, in order to arrive at the intention of the parties,<sup>28</sup> and that, although it contains a clause giving the company the right to establish on the right of way so conveyed "any business connected with said railway or incident thereto," this does not give the right to erect and maintain stock pens that would constitute a nuisance.<sup>29</sup> A deed of a right of way given to correct a prior deed therefor, and expressly

<sup>25</sup> Harman v. Southern R., 72 S. Car. 228, 51 S. E. 689. See and compare § 1158. See also Colgate v. New York &c. R. Co., 100 N. Y. S. 650; Seaboard Air Line R. Co. v. Olive, 142 N. Car. 257, 55 S. E. 263; Hord v. Holston River R. Co., 122 Tenn. 339, 123 S. W. 637. And the presumption is that the company in obtaining a right of way by agreement did not intend to barter away the right to make necessary improvements authorized by statute. Lilley v. Pittsburgh &c. R. Co., 213 Pa. St. 247, 62 Atl. 852.

<sup>26</sup> Hendler v. Lehigh Valley R. Co., 209 Pa. St. 256, 58 Atl. 486, 103 Am. St. 1005. In this case however, the right to take timber was excepted by the statute and the agreement was treated as having the same effect. In Cincinnati &c. R. Co. v. Simpson (Ind.), 104 N.

E. 301, it is held that where the conveyance of a right of way is limited to a certain distance from the center line of the road it can not assert a right to a greater width without acquiring new rights. This case also considers the relative rights of the company and the landowner having a right to mine coal under the right of way.

<sup>27</sup> Missouri &c. R. Co. v. Mott, 98 Tex. 91, 81 S. W. 285, 287, citing Calcasien Lumber Co. v. Harris, 77 Tex. 18, 12 S. W. 453. See also Mobile &c. R. Co. v. Kamper, 88 Miss. 817, 41 So. 513.

<sup>28</sup> Newaygo Mfg. Co. v. Chicago &c. R. Co., 64 Mich. 114, 30 N. W. 910; Missouri &c. R. Co. v. Mott, 98 Tex. 91, 81 S. W. 285, 288.

<sup>29</sup> Missouri &c. R. Co. v. Mott, 98 Tex. 91, 81 S. W. 285.

reserving to the grantor all rights under the former deed, has been held not to be a waiver of a former abandonment of the right of way by the company.<sup>30</sup> In another case, a deed granting a railroad company a right of way of a certain width across grantor's land, followed by the clause, "this right of way to be exclusive for one year," was held not to impose on the company the duty of entering within the year under penalty of a reversion of the grant, but merely to give to the company an exclusive right for one year to a way over grantor's land, after which the grantor was at liberty to grant other rights of way to other companies.<sup>31</sup> An election not to take advantage of an option to purchase land for right of way purposes is shown by the commencement of condemnation proceedings.<sup>32</sup>

**§ 1154 (934b). Where route is not described in deed.**—Generally, where a right of way is granted to a railroad company without any particular description of the route in the deed, the occupancy of a route by the railroad company with the consent of the grantor will sufficiently identify and locate the route granted.<sup>33</sup> And, in a recent case, where a description was insufficient in itself, but the company had been put in possession and had built the road, the court enforced the contract.<sup>34</sup>

**§ 1155 (935). Enforcement of agreement to sell—Specific performance.**—The railroad company may make a binding agreement for the purchase of lands to be conveyed to it at some future time,<sup>35</sup> and may, in a proper case, enforce specific performance of the agreement on the part of the land-owner, under the rules governing decrees for specific performance of contracts in general.<sup>36</sup> These rules are briefly, but comprehensively, stated

<sup>30</sup> Gill v. Chicago &c. R. Co., 117 Iowa 278, 90 N. W. 606.

<sup>31</sup> Virginia &c. R. Co. v. Crow, 108 Tenn. 17, 64 S. W. 485.

<sup>32</sup> Stamnes v. Milwaukee &c. R. Co., 131 Wis. 85, 109 N. W. 100.

<sup>33</sup> Gaston v. Gansville &c. R. Co., 120 Ga. 516, 48 S. E. 188; Pennsylvania R. Co. v. Guthrie, 66 Pa. Super. Ct. 470. See also Wynkoop

v. Burger, 12 Johns. (N. Y.) 222.

<sup>34</sup> Howard v. Huntington &c. R. Co., 59 W. Va. 91, 53 E. 278.

<sup>35</sup> Ross v. Chicago &c. R. Co., 77 Ill. 127; Dayton &c. R. Co. v. Lawton, 20 Ohio St. 401, 55 Am. Dec. 464.

<sup>36</sup> See in general Purinton v. Northern Illinois &c. R. Co., 46 Ill. 297; Telford v. Chicago &c. R.

by Justice Story,<sup>37</sup> as follows: "An agreement, to be entitled to be carried into specific performance, ought to be certain, fair and just in all its parts. Courts of equity will not decree a specific performance in cases of fraud or mistake; or of hard and unconscionable bargains; or where the decree would produce injustice; or where it would compel the party to an illegal or immoral act; or where it would be against public policy; or where it would involve a breach of trust; or where a performance has become impossible; and, generally, not in any cases where such a decree would be inequitable under all the circumstances."<sup>38</sup> If, for any reason, it would be inequitable to compel performance, the party will usually be left to his remedy at law.<sup>39</sup> But a decree for specific performance of a contract may be granted in a proper case, even though the plaintiff has a remedy at law.<sup>40</sup> A defective description of land in an agreement to convey may be cured by putting the vendee into possession of a tract to which the description may be made to apply.<sup>41</sup> In such a case, conveyance of the tract so delivered to the vendee may be enforced in a court

Co., 172 Ill. 559, 50 N. E. 105; Minneapolis &c. R. Co. v. Cox, 76 Iowa 306, 41 N. W. 24, 14 Am. St. 216; Boston &c. R. Co. v. Babcock, 3 Cush. (Mass.) 228; Blanchard v. Detroit &c. R. Co., 31 Mich. 43, 18 Am. Rep. 142; Coe v. N. J. Midland R. Co., 31 N. J. Eq. 105; Clarke v. Rochester &c. R. Co., 18 Barb. (N. Y.) 350; South Wales R. Co. v. Wythes, 5 DeG., M. & G. 880; Holmes v. Eastern Counties R. Co., 3 K. & J. 675; Flanagan v. Gt. Western R. Co., L. R. 7 Eq. 116; Hood v. Northeastern R. Co., L. R. 5 Ch. 525.

<sup>37</sup> Story's Equity Juris., 14th ed. § 1055.

<sup>38</sup> See note, 43 Am. & Eng. R. Cas. 645.

<sup>39</sup> Whitney v. New Haven, 23 Conn. 624; Coe v. New Jersey &c. R. Co., 31 N. J. Eq. 105. The land-

owner, as well as the railroad company, may have his action for damages for breach of the contract by the other party. Morss v. Boston &c. R. Co., 2 Cush. (Mass.) 536; Sherwood v. St. Paul &c. R. Co., 21 Minn. 122; Hubbard v. Kansas City R. Co., 63 Mo. 68; Houston R. Co. v. McKinney, 55 Tex. 176. Specific performance was refused for fraud in procuring the contract in Grand Tower &c. R. Co. v. Walton, 150 Ill. 428, 37 N. E. 920.

<sup>40</sup> Blanchard v. Detroit &c. R. Co., 31 Mich. 43, 18 Am. Rep. 142. Eastern Counties R. Co. v. Hawkes, 5 H. L. Cas. 331.

<sup>41</sup> Purinton v. Northern Ill. R. Co., 46 Ill. 297; Ottumwa &c. R. Co. v. McWilliams, 71 Iowa 164. See Burrow v. Terre Haute &c. R. Co., 107 Ind. 432, 8 N. E. 167; Indianapolis &c. R. Co. v. Rayl,

of equity.<sup>42</sup> And the mere fact that the value of the land exceeds the price agreed upon will not prevent a decree for specific performance, where the construction of the road is a part of the consideration.<sup>43</sup> The right to compel a specific performance of an agreement is reciprocal, and the land-owner may, in a proper case, compel the company to perform a contract to purchase.<sup>44</sup> A contract signed by only one of the contracting parties cannot

69 Ind. 424. In *Hall v. Peoria &c. R. Co.*, 143 Ill. 163, 32 N. E. 598, it was held that a court of equity would decree a specific performance of the contract, though it was not in writing, where one agreed to convey land to a railroad company for depot purposes, the consideration being paid and accepted, and the land staked out by the grantor and occupied by the railroad company for twenty years, with valuable improvements. See also *Sands v. Kagey*, 150 Ill. 109, 36 N. E. 956; *Cherokee &c. R. Co. v. Renken*, 77 Iowa 316, 42 N. W. 307.

<sup>42</sup> *Ottumwa &c. R. Co. v. McWilliams*, 71 Iowa 164, 32 N. W. 315. In this case suit was brought to enforce a contract to convey "a right of way" of a designated width "by deed in fee-simple," and the court decreed the conveyance of an easement for a right of way, and the supreme court affirmed the decree, saying: "The purposes for which the land was to be used, and the object of the plaintiff in securing the contract, was to secure a right of way, and not a fee-simple title to the land."

<sup>43</sup> *Ottumwa &c. R. Co. v. McWilliams*, 71 Iowa 164, 32 N. W. 315. See *Western R. Co. v. Babcock*, 6 Metc. (Mass.) 346.

<sup>44</sup> *Viele v. Troy &c. R. Co.*, 20 N. Y. 184; *Inge v. Birmingham &c. R. Co.*, 3 DeG., M. & G. 658; *Williams v. St. George's Harbor Co.*, 2 DeG. & J. 547. Or recover damages. *Minneapolis &c. R. Co. v. Cox*, 76 Iowa 306, 41 N. W. 24, 14 Am. St. 216. In *Hoard v. Huntington &c. R. Co.*, 59 W. Va. 91, 53 S. E. 278, the description was held insufficient, but as the company had been put in possession and had built the road it was held that the vendor should make a proper deed and that the company should pay the purchase money with interest. The fact that an application to parliament was necessary to make a good title, was held not to be a valid objection to a decree for the specific performance by a railroad company of its contract for the purchase of lands. *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 331; *Hawkes v. Eastern Counties R. Co.*, 1 DeG., M. & G. 737. But where the location of the railway for which the land was taken has been abandoned, and it would be inequitable to require the company to pay a price for the land based upon damages which were never inflicted, the court will not decree a specific performance. *Webb v. Direct London &c. R. Co.*, 9 Hare, 129, 1



ordinarily be enforced by the signer,<sup>45</sup> but it may be enforced against him by the other party upon proof that he has acted upon it.<sup>46</sup>

§ 1156 (936). **When specific performance will not be enforced.**—Equity will not, as a rule, decree the specific performance of a contract to do a succession of acts extending through a long period of time, and requiring the exercise of skill and discretion in their performance.<sup>47</sup> Accordingly, the land-owner cannot enforce specific performance of a contract made in consideration of the grant of a right of way, by which the railroad undertakes to build a branch road,<sup>48</sup> to operate a line of rail-

DeG., M. & G. 521; *Whitney v. New Haven*, 23 Conn. 624. See also as to right of landowner to compel specific performance of an agreement for a crossing. *Childs v. Boston &c. R. Co.*, 213 Mass. 91, 99 N. E. 957, 48 L. R. A. (N. S.) 378, 387 and cases there cited in note.

<sup>45</sup> *Boston &c. R. Co. v. Bartlett*, 10 Gray (Mass.) 384; *Jacobs v. Peterborough &c. R. Co.*, 8 Cush. (Mass.) 223. And where the contract was a mere option to purchase it was held that the railroad company had elected not to take advantage of it by beginning condemnation proceedings. *Stamnes v. Milwaukee &c. R. Co.*, 131 Wis. 85, 109 N. W. 100.

<sup>46</sup> *Old Colony R. Co. v. Evans*, 6 Gray (Mass.) 25, 66 Am. Dec. 394. But in *Hall v. Peoria &c. R. Co.*, 143 Ill. 163, 32 N. E. 598, it was held that a court of equity would decree a specific performance of the contract, though it was not in writing, where one agreed to convey land to a railroad company for depot purposes, the consideration being paid and accepted,

and the land staked out by the grantor and occupied by the railroad company for twenty years with valuable improvements. *East Tennessee &c. R. Co. v. Davis*, 91 Ala. 615, 8 So. 349.

<sup>47</sup> *Marble Co. v. Ripley*, 10 Wall. (U. S.) 339, 19 L. ed. 955; *Ross v. Union Pac. Co.*, Woolw. (U. S.) 26; *Blanchard v. Detroit &c. R. Co.*, 31 Mich. 43, 18 Am. Rep. 142; *South Wales R. Co. v. Wythes*, 1 K. & J. 186; *Ranger v. Great Western R. Co.*, 1 Eng. R. & Can. Cas. 1.

<sup>48</sup> *Peto v. Brighton &c. R. Co.*, 1 H. & M. 468; *South Wales R. Co. v. Wythes*, 1 K. & J. 186; *Munro v. Wivenhoe &c. R. Co.*, 4 DeG. J. & S. 723; *Heathcote v. North Staffordshire R. Co.*, 20 L. J. N. S. Ch. 82; *Waring v. Manchester &c. R. Co.*, 7 Hare 482; *Ross v. Union Pacific R. Co.*, Woolw. (U. S.) 26. In *Hoard v. Chesapeake &c. R. Co.*, 123 U. S. 222, 8 Sup. Ct. 674, 31 L. ed. 130, the court declined to enforce the specific performance of an agreement to build the railroad across certain lots through which it was granted a right of way.

road,<sup>49</sup> to stop daily trains a certain point on the road,<sup>50</sup> or to erect fences and cattleguards and keep them in repair.<sup>51</sup> But it has been held that the breach of such a contract may be pre-

<sup>49</sup> *Port Clinton R. Co. v. Cleveland R. Co.*, 13 Ohio St. 544. In this case the P. C. Co. conveyed its line to the Cleveland Co. by lease in partial consideration of a covenant on the part of the Cleveland Co. to keep the road in operation. A railroad corporation, in consideration of a grant of the right of way through the premises of S., contracted to place beside their road, on said premises, a platform convenient for lading and unlading cars, and to take from that platform all produce to be shipped by S., and to bring and place on it all freight shipped by or for him to that place from any other point on their road, provided that the railroad had three days' notice of any such freight to be transported. Held, that a bill in equity would not lie to compel a specific performance of the contract. *Atlanta &c. R. Co. v. Speer*, 32 Ga. 550, 79 Am. Dec. 305.

<sup>50</sup> *Blanchard v. Detroit &c. R. Co.*, 31 Mich. 43, 18 Am. Rep. 142. In this case the court said: "If the writing embodies any promissory agreement at all, it is that when and so long as trains run on the road, one train each way shall every day stop at that place, and also that passengers and freight shall there be regularly received and discharged. . . . Waiving all considerations of possible future action by the government under the postal, war, police or other powers, inconsistent with any par-

ticular decree which might now be made, can the court see that in all coming time these requirements are carried out? Can it know or keep informed whether trains are running, and what accommodations are suitable to the public interest? Can it see whether the proper stoppages are made each day? Can it take notice, or legitimately and truly ascertain from day to day, what amounts to regularity in the receipt and discharge of passengers and freight? Can it have the means of deciding at all times whether the due regularity is observed? Can it superintend and supervise the business, and cause the requirements in question to be carried out? If it can, and if it may do this in regard to one station on the road, it may with equal propriety upon a like showing to the same in regard to all station on the road, and not only so, but in regard to all stations on all the present and future roads in the state."

<sup>51</sup> *Cincinnati &c. R. Co. v. Washburn*, 25 Ind. 259; *Columbus &c. R. Co. v. Watson*, 26 Ind. 50. But see opinion in *Dayton v. Lewton*, 20 Ohio St. 401, 55 Am. Dec. 464; *Aikin v. Albany &c. R. Co.*, 26 Barb. (N. Y.) 289; *Midland R. Co. v. Fisher*, 125 Ind. 19, 24 N. E. 756, 8 L. R. A. 604, and note, 21 Am. St. 189. A covenant by a railroad company in consideration of a grant of a right of way to fence it and put in cattle-guards and cross-

vented by injunction.<sup>52</sup> Where the railroad company makes a contract with persons who are known to have no interest in the lands through which it desires to run, by which such persons bind themselves to procure the owners to grant a right of way across such lands to the railroad, it cannot have a decree for specific performance, but must be left to its action at law for damages. The court will not command the defendants to control the actions of other persons not before the court.<sup>53</sup>

**§ 1157 (937). Effect of conveyance or release of damages.—**The conveyance of land to a railroad for a right of way<sup>54</sup> or the execution of a release of damages for its construction<sup>55</sup> usually has the same effect as the assessment and payment of damages under proceedings for condemnation, and the land-owner can claim no further damages for the legal and proper construction

ings runs with the land, and is binding upon immediate and subsequent grantees, and passes to immediate and remote grantees of both the easement and the fee-simple. *Toledo &c. R. Co. v. Co-sand*, 6 Ind. App. 222. See also *Lake Erie &c. R. Co. v. Priest*, 131 Ind. 413, 31 N. E. 77; *Childs v. Boston &c. R. Co.*, 213 Mass. 91, 99 N. E. 957, 48 L. R. A. (N. S.) 378, (agreement to put in crossing enforced).

<sup>52</sup> It is now firmly established that the court will often interfere by injunction to restrain acts in violation of a lawful contract, although the nature of the contract is such that specific performance would not be enforced. *Singer Sewing Machine Co. v. Union &c. Co.*, 1 Holm. (U. S.) 253; *Western Union Tel. Co. v. Union Pac. R. Co.*, 3 Fed. 423, 429; *Coe v. Louisville &c. R. Co.*, 3 Fed. 775; *Wells, Fargo & Co. v. Oregon &c. R. Co.*,

18 Fed. 517; *Wells, Fargo & Co. v. Northern Pac. R. Co.*, 23 Fed. 469; *Chicago &c. R. Co. v. New York &c. R. Co.*, 24 Fed. 516, 22 Am. & Eng. R. Cas. 265, and note on page 271. See also *Miller v. Lake Shore &c. R. Co.*, 88 Ohio St. 499, 103 N. E. 374; *Tyler v. St. Louis &c. R. Co.*, 99 Tex. 491, 91 S. W. 1. For instances where affirmative acts have been required similar to those prayed for in the cases cited in preceding notes, see ante, § 733 et seq.

<sup>53</sup> *Chicago &c. R. Co. v. Durant*, 44 Minn. 361, 46 N. W. 676, 46 Am. & Eng. R. Cas. 488.

<sup>54</sup> *St. Louis &c. R. Co. v. Wal-bring*, 47 Ark. 330, 1 S. W. 545; *St. Louis &c. R. Co. v. Hurst*, 14 Ill. App. 419.

<sup>55</sup> *Eaton v. Boston &c. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147. See *Trickey v. Schlader*, 52 Ill. 78; *Freeman v. Weeks*, 45 Mich. 335, 7 N. W. 904.

of the railroad.<sup>56</sup> The same effect has been given to a receipt by the owner for the amount of damages agreed upon.<sup>57</sup> It has been held that a release, to be binding, must have been executed by the owner while free from legal disabilities,<sup>58</sup> and must be free

<sup>56</sup> McDonald v. Southern California R. Co., 101 Cal. 206, 35 Pac. 643; Gilbert v. Savannah &c. R. Co., 69 Ga. 396; Stodghill v. Chicago &c. R. Co., 43 Iowa 26, 22 Am. Rep. 211; Chicago &c. R. Co. v. Smith, 111 Ill. 363; St. Louis &c. R. Co. v. Van Hoorebeke, 191 Ill. 633, 61 N. E. 326; McCarty v. St. Paul &c. R. Co., 31 Minn. 278, 17 N. W. 616; Radke v. Minneapolis &c. R. Co., 41 Minn. 350, 43 N. W. 6; Benson v. Chicago &c. R. Co., 78 Mo. 504; Moreley v. Chicago &c. R. Co., 57 Nebr. 636, 78 N. W. 293, 294; North &c. R. Co. v. Swank, 105 Pa. St. 555; International &c. R. Co. v. Bost, 2 Tex. Ct. App. (Civ. Cas.) 334; Houston &c. R. Co. v. Adams, 58 Tex. 476; Norris v. Vermont Central R. Co., 28 Vt. 99; Watts v. Norfolk &c. R. Co., 39 W. Va. 196, 19 S. E. 521, 23 L. R. A. 674, 45 Am. St. 894; Croft v. London &c. R. Co., 3 B. & S. 436, 113 Eng. C. L. R. 435; Kirk v. Kansas City &c. R. Co., 51 La. Ann. 667, 25 So. 457, 461 (citing text). See also Hodge v. Lehigh Val. R. Co., 39 Fed. 449; Burrows v. Terre Haute &c. R. Co., 107 Ind. 432; Hord v. Holsten River R. Co., 122 Tenn. 399, 123 S. W. 637, 135 Am. St. 878; Libby v. Canadian Pac. R. Co., 82 Vt. 316, 73 Atl. 593. But it has been held that he is not barred from an action for damages caused by the construction of the

road across the land of an adjoining proprietor; Eaton v. Boston &c. R. Co., 51 N. H. 504, 12 Am. Rep. 147; St. Louis &c. R. Co. v. Harris, 47 Ark. 340, 1 S. W. 609. See also Egbert v. Lake Shore &c. R. Co., 6 Ind. App. 350, 33 N. E. 659; Doan v. Cleveland &c. R. Co., 54 Ind. App. 620, 100 N. E. 95 (not released from damages for lowering grade on old right of way by grant of adjoining strip); Hartley v. Keokuk &c. R. Co., 85 Iowa 455, 52 N. W. 352; Lunden v. Brookings &c. R. Co., 31 S. Dak. 357, 141 N. W. 93. The grant of a right of way gives the company the right to raise its grade without liability for damages to the rest of the tract owned by the grantor, but the company is liable to the owners of land abutting on a highway for injury to their rights as such abutter by raising the approaches of the highway outside the company's right of way. Fleming v. Elgin &c. R. Co., 275 Ill. 486, 114 N. E. 187; Longworth v. Meriden &c. R. Co., 61 Conn. 451, 23 Atl. 827. And see also as to damages for removal of lateral support not being covered in Kentucky. Louisville &c. R. Co. v. Culbertson, 158 Ky. 561, 165 S. W. 681.

<sup>57</sup> Rockland Water Co. v. Tillson, 69 Maine 255.

<sup>58</sup> Delaware &c. R. Co. v. Burson, 61 Pa. St. 369.

from fraud.<sup>59</sup> If it was made upon a condition, the performance of the condition must be shown.<sup>60</sup> It will be presumed, however, that a deed to the right of way, or a release of damages, was executed in contemplation of the lawful and proper construction of the road, and the land-owner will be permitted to recover for damages occasioned by negligence and lack of skill,<sup>61</sup> such as a failure to provide necessary culverts,<sup>62</sup> the diversion of a stream of water,<sup>63</sup> the negligent removal of earth by which the adjoining soil is deprived of support,<sup>64</sup> or the construction of its em-

<sup>59</sup> *Rockford &c. R. Co. v. Shunick*, 65 Ill. 223.

<sup>60</sup> *Rockford &c. R. Co. v. Shunick*, 65 Ill. 223. See also *Humphreys v. Richmond &c. R. Co.*, 88 Va. 431, 13 S. E. 985; *Bredin v. Pittsburgh &c. R. Co.*, 165 Pa. St. 262, 31 Atl. 39. But compare *Matson v. Port Townsend &c. R. Co.*, 9 Wash. 449, 37 Pac. 705. In a recent case before the Missouri Supreme Court, it was held that the railway company's charter, by providing for relinquishment of the right of way by the "owner," impliedly made it unnecessary for the wife to join in the conveyance by reason of her inchoate right of dower, and it made no difference that the husband did not convey directly to the railroad, but by mesne conveyances. *Chouteau v. Missouri Pac. R. Co.*, 122 Mo. 375, 22 S. W. 458, 30 S. W. 299.

<sup>61</sup> *Jacksonville &c. R. Co. v. Cox*, 91 Ill. 500; *Hortsman v. Lexington &c. R. Co.*, 18 B. Mon. (Ky.) 218; *Ludlow v. Hudson River R. Co.*, 6 Lans. (N. Y.) 128; *Spencer v. Hartford &c. R. Co.*, 10 R. I. 14; *Hatch v. Vermont Central R. Co.*, 25 Vt. 49, 70. See also *Sims v. Ohio River &c. R. Co.*, 56 S. Car. 30, 33 S. E. 746; *Georgetown &c.*

*R. Co. v. Eagles*, 9 Colo. 544, 13 Pac. 696; *Ohio &c. R. Co. v. Thillman*, 143 Ill. 127, 32 N. E. 529, 36 Am. St. 359.

<sup>62</sup> *Heath v. Texas &c. R. Co.*, 37 La. Ann. 728. See also *Van Wert Co. v. Peirce*, 90 Fed. 764; *O'Connell v. East Tenn. &c. R. Co.*, 87 Ga. 246, 13 S. E. 489, 13 L. R. A. 394, and note 27 Am. St. 246; *Emery v. Raleigh &c. R. Co.*, 102 N. Car. 209, 9 S. E. 139, 11 Am. St. 727; *Chicago &c. R. Co. v. Ely*, 77 Nebr. 809, 110 N. W. 539. But see *Forsythe v. Southern R. Co.* (Ky. App.), 113 S. W. 85.

<sup>63</sup> *Stodghill v. Chicago &c. R. Co.*, 43 Iowa 26, 22 Am. Rep. 211; *Toledo &c. R. Co. v. Chicago &c. R. Co.*, 155 Ill. 9, 39 N.E.809.

<sup>64</sup> *Ludlow v. Hudson River R. Co.*, 6 Lans. (N. Y.) 128. See also *Nading v. Denison &c. R. Co.* (Tex. Civ. App.), 62 S. W. 97. It has been held that a general release of damages covered all damages from the making of cuts necessary to the proper enjoyment of the right of way, and that the company is not bound to build walls to prevent the banks from falling. *Hortsman v. Covington &c. R. Co.*, 18 B. Mon. (Ky.) 218. See post, § 1233.

bankment in such a way as to unnecessarily flood the grantor's land,<sup>65</sup> or leave dirt and rock upon a part not granted.<sup>66</sup> It has also been held that, where the statute requires a railroad company to fence its right of way, a conveyance of a right of way in consideration of a promise to fence is without consideration, and does not prevent the grantor from afterwards having his damages assessed.<sup>67</sup> So, it was held, in another case, that a deed conveying a right of way, and releasing all damages by reason of the location and construction of the railroad, did not release the grantor's right to a way of necessity across the land conveyed.<sup>68</sup>

§ 1158 (938). **What estate is taken.**—An estate in fee may be acquired by purchase, even though the corporation is created for a limited period, and the fee so acquired may be transferred to the successor or assignee of the company.<sup>69</sup> The question as to what estate is acquired by the railroad company under a grant must usually be settled by reference to the deed of conveyance.<sup>70</sup> And the mere fact that the railroad company's charter empow-

<sup>65</sup> *St. Louis &c. R. Co. v. Morris*, 35 Ark. 622; *New York &c. R. Co. v. Hamlet Hay Co.*, 149 Ind. 344, 49 N. E. 269; *Hunt v. Iowa Cent. R. Co.*, 86 Iowa 15, 52 N. W. 668, 41 Am. St. 473.

<sup>66</sup> *Watts v. Norfolk &c. R. Co.*, 39 W. Va. 196, 19 S. E. 521, 23 L. R. A. 674, 45 Am. St. 894.

<sup>67</sup> *Shortle v. Terre Haute &c. R. Co.*, 131 Ind. 338, 30 N. E. 1084.

<sup>68</sup> *New York &c. R. Co. v. Railroad Comrs.*, 162 Mass. 81, 38 N. E. 27. See also *Cleveland &c. R. Co. v. Smith*, 177 Ind. 524, 97 N. E. 164; *Pittsburgh &c. R. Co. v. Kearns*, 58 Ind. App. 694, 108 N. E. 873.

<sup>69</sup> *Holt v. City &c. of Somerville*, 127 Mass. 408; *Nicoll v. New York &c. R. Co.*, 12 N. Y. 121; *Hill v. Western Vermont R. Co.*,

32 Vt. 68. See also *Watkins v. Iowa Central R. Co.*, 123 Iowa 390, 98 N. W. 910; *Enfield Mfg. Co. v. Ward*, 190 Mass. 314, 76 N. E. 1053; *Coburn v. Coxeter*, 51 N. H. 158; *Page v. Heineberg*, 40 Vt. 81, 94 Am. Dec. 378, and note. In Wisconsin it is held that a railroad taking a warranty deed to a strip of land for its track acquires a title in fee, subject, at most, to forfeiture for nonuser or misuser, and not a mere easement. *Hicks v. Smith*, 109 Wis. 532, 85 N. W. 512.

<sup>70</sup> *Cincinnati &c. R. Co. v. Geisel*, 119 Ind. 77, 21 N. E. 470. See also as to the width, *Olive v. Sabine &c. R. Co.*, 11 Tex. Civ. App. 208, 33 S. W. 139; *Indianapolis &c. R. Co. v. Reynolds*, 116 Ind. 356, 19 N. E. 141.

ered it to acquire a greater estate than that which it contracted for does not affect its rights in the land purchased.<sup>71</sup> Under the Missouri statute, however, it has been held that a railroad company takes only an easement under a deed purporting to convey the fee.<sup>72</sup> The courts of North Carolina<sup>73</sup> and Iowa<sup>74</sup> seem to take the same position, and hold that a deed conveying land to a railroad for a right of way gives the railroad no more rights than it would have acquired by condemnation. In the latter state it is said: "The easement is not that spoken of in the old law books, but is peculiar to the use of a railroad which is usually a permanent improvement, a perpetual highway of travel and commerce, and will rarely be abandoned by nonuser. The exclusive use of the surface is acquired, and damages are assessed, on the theory that the easement will be perpetual; so that, ordinarily, the fee is of little or no value unless the land is underlaid by quarry or mine."<sup>75</sup> Where the intention to convey a fee does not appear,<sup>76</sup> as in case of the conveyance of a "right of way" for the railroad

<sup>71</sup> *Cincinnati &c. R. Co. v. Geisel*, 119 Ind. 77, 21 N. E. 470.

<sup>72</sup> *Chouteau v. Missouri Pac. R. Co.*, 122 Mo. 375, 22 S. W. 458, 30 S. W. 299; *Union Depot Co. v. Frederick*, 117 Mo. 138, 21 S. W. 1118; *St. Louis &c. Co. v. Clark*, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751. "The term 'easement,' as employed in those cases, was not used in its strict, technical sense, but partakes, rather, of the meaning of an interest in the land, than of the original meaning given to the term, 'easement;' that is, a right in common, with the owner or others." *Boyce v. Missouri Pac. R. Co.*, 168 Mo. 583, 68 S. W. 920, 58 L. R. A. 442.

<sup>73</sup> *Shepard v. Suffolk &c. R. Co.*, 140 N. Car. 391, 53 S. E. 137. See also to same effect *Hodges v. Telegraph Co.*, 133 N. Car. 225, 45 S. E. 572.

<sup>74</sup> *Smith v. Hall*, 103 Iowa 95, 72 N. W. 427.

<sup>75</sup> *Smith v. Hall*, 103 Iowa 95, 72 N. W. 427. See also *Santa Fe &c. R. Co. v. Loune (Okla.)*, 168 Pac. 1022 (warranty deed for railroad right of way held not to vest an absolute title in the company but only an interest limited by such use, so that on its abandonment the land reverts to the original owners).

<sup>76</sup> *Junction R. Co. v. Ruggles*, 7 Ohio St. 1.

through certain lands,<sup>77</sup> the company takes an easement only.<sup>78</sup> When the width of the right of way is not specified in the grant

<sup>77</sup> *Cincinnati &c. R. Co. v. Geisel*, 119 Ind. 77, 21 N. E. 470; *Blakely v. Chicago &c. R. Co.*, 46 Nebr. 272, 64 N. W. 972; *Cincinnati &c. R. Co. v. Wachter*, 70 Ohio St. 113, 70 N. E. 974; *Uhl v. Ohio River R. Co.*, 51 W. Va. 106, 41 S. E. 340. Where the deed conveys the land, absolutely "for railroad purposes," it has been said that the railroad company takes a base or qualified fee, liable to be divested whenever the land is devoted to other uses. *State v. Brown*, 27 N. J. L. 13. A deed to a railroad company entitled "Deed of Right of Way," but in the form of a regular warranty deed, will convey the fee and not merely an easement. *Ballard v. Louisville &c. R. Co.*, 9 Ky. L. 523, 5 S. W. 484. A contract releasing to a railroad company a right of way of indefinite size and location, through certain land, and agreeing to convey a strip of ground by metes and bounds, by deed in fee-simple, when desired, has, however, been held to be a contract for the conveyance of an easement merely and not the fee. *Ottumwa &c. R. Co. v. McWilliams*, 71 Iowa 164, 32 N. W. 315.

<sup>78</sup> In *Williams v. Western Union R. Co.*, 50 Wis. 71, 5 Am. & Eng. R. Cas. 290, Judge Orton, speaking for the court, said: "'Right of way,' in its strict meaning, is 'the right of passage over another man's ground,' and in its legal and generally accepted meaning, in reference to a railway, it is a mere easement in the lands of others,

obtained by lawful condemnation to public use or by purchase. (Mills Em. Dom. § 110.) It would be using the term in an unusual sense, by applying it to an absolute purchase of the fee-simple of lands to be used for a railway or any other kind of way." See *Walker v. Illinois Cent. R. Co.*, 215 Ill. 610, 74 N. E. 812; *Wild v. Deig*, 43 Ind. 455, 13 Am. Rep. 399; *Pfaff v. Terre Haute &c. R. Co.*, 108 Ind. 144, 9 N. E. 93; *Lake Erie &c. R. Co. v. Ziebarth*, 6 Ind. App. 228, 33 N. E. 256; *Bodfish v. Bodfish*, 105 Mass. 317; *Jones v. Van Bochove*, 103 Mich. 93, 61 N. W. 342; *Blakely v. Chicago &c. R. Co.*, 46 Nebr. 272, 64 N. W. 972; *Stuyvesant v. Woodruff*, 21 N. J. L. 133, 47 Am. Dec. 156. Where a land-owner conveys to a railroad company a right of way, and the property and franchises of the company to which the conveyance is made are subsequently mortgaged and sold on a decree of foreclosure, the railroad company which becomes the owner of such property and franchises, and constructs a railroad on the right of way, will be entitled to the easement granted to the company by which the mortgage was executed. *Columbus &c. R. Co. v. Braden*, 110 Ind. 558, 11 N. E. 357. Under a written agreement a land-owner granted and conveyed to a railroad company "the full and free right of way, of the width of 50 feet," through his land on a line previously surveyed and covenanted to execute a deed when re-



the company will, in general, acquire only so much as is actually taken and used,<sup>79</sup> or is reasonably necessary,<sup>80</sup> and the acts and declarations of the parties are admissible to determine the width.<sup>81</sup> There is much reason, however, for holding that, where the width is not specified, and there is nothing either in the contract or in the acts of the parties to indicate that less than the statutory width was granted, it will be presumed that a right of way of the full statutory width was intended.<sup>82</sup> Where land is conveyed to a railroad company in fee-simple, the company may devote it to any use to which a private owner might put

quired by the railroad company, conveying the land in fee-simple. The instrument was signed and acknowledged by the grantor alone and filed for record by the railroad company and some 16 years afterward when oil was discovered on the right of way, the railroad company demanded a deed. It was held that a right of way only was intended to be conveyed and that the railroad company took only an easement in the land. *Lockwood v. Ohio River R. Co.*, 103 Fed. 243.

<sup>79</sup> *Fort Wayne &c. Co. v. Sherry*, 126 Ind. 334, 25 N. E. 898, 10 L. R. A. 48; *Peoria &c. R. Co. v. Attica &c. R. Co.*, 154 Ind. 218, 56 N. E. 210; *Lake Erie &c. R. Co. v. Michener*, 117 Ind. 465, 20 N. E. 254. See also *Morgan v. Railroad Co.*, 96 U. S. 716, 24 L. ed. 743; *Nashville &c. R. Co. v. Hammond*, 104 Ala. 191, 15 So. 935.

<sup>80</sup> See *Grafton v. Moir*, 130 N. Y. 465, 29 N. E. 974, 27 Am. St. 533; *Jones v. Erie &c. R. Co.*, 169 Pa. St. 333, 32 Atl. 535, 47 Am. St. 916.

<sup>81</sup> *Indianapolis &c. R. Co. v. Lewis*, 119 Ind. 218, 21 N. E. 660; *Indianapolis &c. R. Co. v. Reynolds*, 116 Ind. 356, 19 N. E. 141. See also *Jennison v. Walker*, 11

*Gray (Mass.)* 423; *Onthank v. Lake Shore &c. R. Co.*, 71 N. Y. 194, 27 Am. Rep. 35; *Pennsylvania R. Co. v. Pearsol*, 173 Pa. St. 496, 34 Atl. 226.

<sup>82</sup> *Indianapolis &c. R. Co. v. Rayl*, 69 Ind. 424; *Prather v. Western Union Tel. Co.*, 89 Ind. 501; *Campbell v. Indianapolis &c. R. Co.*, 110 Ind. 490, 11 N. E. 482; *Hargis v. Kansas City &c. R. Co.*, 100 Mo. 210, 13 S. W. 680; *Morris &c. R. Co. v. Bonnell*, 34 N. J. L. 474; *Philadelphia &c. R. Co. v. Obert*, 109 Pa. 193, 1 Atl. 398; *Jones v. Erie &c. R. Co.*, 144 Pa. St. 629, 23 Atl. 251; *Duck River &c. R. Co. v. Cochrane*, 3 Lea (Tenn.) 478; *Nashville &c. R. Co. v. McReynolds (Tenn. Ch.)* 48 S. W. 258. But see *Nashville &c. R. Co. v. Hammond*, 104 Ala. 191, 15 So. 935; *Ft. Wayne &c. R. Co. v. Sherry*, 126 Ind. 334, 25 N. E. 898, 10 L. R. A. 48. In *Cedar Rapids &c. Co. v. Burlington &c. R. Co.*, 120 Iowa 724, 95 N. W. 195, it is said that there is such a presumption but that it was overcome by other facts in that case. See also *Hendrix v. Southern R. Co.*, 162 N. Car. 9, 77 S. E. 1001.

his land without incurring a liability to the adjoining landowner. Thus, it is held that it may lease a portion of the land over which its track runs, for use as a lumber yard, and may permit the erection of necessary buildings for handling and storing lumber, where such a use of its land will not interfere with the transaction of its business as a common carrier.<sup>83</sup>

**§ 1159 (938a). What estate is taken—Continued.**—It has been held that a railroad company, without power to acquire a fee in its right of way but only an easement therein, will take a valid title to a right of way transferred to it under a warranty deed. The transaction, even though *ultra vires* in a sense, is regarded as valid until assailed in a direct proceeding brought for that purpose by the government. Private persons cannot attack the title in a collateral action.<sup>84</sup> Another decision is to the effect that a railroad company, taking possession of land for its right of way under a verbal gift, and maintaining such possession for the statutory period, will acquire only an easement in such right of way, and not the fee.<sup>85</sup>

**§ 1160 (938b). Conveyance of right of way by railroad companies.**—A railroad company, acquiring title to land for railroad purposes either by purchase or condemnation, and constructing its railroad thereon, has been held to have such an interest in the land that, without intending to abandon the same, it may sell

<sup>83</sup> *Calcasieu Lumber Co. v. Harris*, 77 Tex. 18, 43 Am. & Eng. R. Cas. 570. See also *Cleveland & C. R. Co. v. Huddleston*, 21 Ind. App. 621, 627, 52 N. E. 1008, 69 Am. St. 385 (citing text). The company is not liable for the expense of removing a building on the right of way purchased by it. *Delsol v. Spokane & C. R. Co.*, 4 Idaho 456, 40 Pac. 59. But a grant of a right of way 100 feet wide, with the right to use such additional land as may be necessary for the construction and maintenance of the roadbed,

does not give the right to permanently appropriate and cut timber on the land outside of the right of way. *Gulf & C. R. Co. v. Richards*, 11 Tex. 95, 32 S. W. 96. See also *Hendler v. Lehigh Valley R. Co.*, 209 Pa. St. 256, 58 Atl. 486, 103 Am. St. 1005.

<sup>84</sup> *Hicks v. Smith*, 109 Wis. 532, 85 N. W. 512. See also *Farwell v. Wolfe*, 96 Wis. 10, 70 N. W. 289, 37 L. R. A. 138, 65 Am. St. 22.

<sup>85</sup> *Capps v. Texas & C. R. Co.*, 21 Tex. Civ. App. 85, 50 S. W. 643.

to another railroad company for like purposes all or part of the premises so acquired.<sup>86</sup> Thus, under an Alabama statute giving a railroad company power to lease or purchase any part of any railroad constructed by any other corporation, if its line be continuous or connecting, it has been held that a railroad company was authorized to convey to a connecting railroad company lands acquired by it for right of way.<sup>87</sup> So, it has been held that a railroad company may lease a portion of its right of way for business purposes with a view to securing freight. Such a contract, it was held, is not opposed to public policy.<sup>88</sup>

§ 1161 (939). **Conditional conveyances.**—A railroad company may, in general, accept a conveyance of land upon any conditions that may lawfully be annexed to an ordinary grant.<sup>89</sup> And, generally speaking, it may be said that an agreement with a railroad company for a right of way stands upon the same footing as any other contract for the conveyance of an interest in land.<sup>90</sup> Where title is not expressly made to depend upon the

<sup>86</sup> *Garlick v. Pittsburg &c. R. Co.*, 67 Ohio St. 223, 65 N. E. 896. But compare *State v. Grimes*, 96 Nebr. 719, 148 N. W. 942. So, where a city grants a right of way in an alley to a railroad company, it has been held that the company may transfer such right to another company, though it has never used the alley for railroad purposes. *Morgan v. Des Moines U. R. Co.*, 113 Iowa 561, 85 N. W. 902. Even though such a conveyance should be regarded as an abandonment it would only be taken advantage of by the owner of the fee, and can not avail a city which claims the land for public purposes through a dedication made by a lessee of the railroad company. *Durham v. Southern R. Co.*, 121 Fed. 894.

<sup>87</sup> *Coyne v. Warrior Southern R. Co.*, 137 Ala. 553, 34 So. 1004.

<sup>88</sup> *Detroit v. C. H. Little R. Co.*, 146 Mich. 373, 109 N. W. 671, 13 Det. Leg. N. 803.

<sup>89</sup> *Hammond v. Port Royal &c. R. Co.*, 15 S. Car. 10. And conditions may be either conditions precedent or conditions subsequent. *Gray v. Chicago &c. R. Co.*, 189 Ill. 400, 59 N. E. 950; *Cleveland &c. R. Co. v. Coburn*, 91 Ind. 557; *Louisville &c. R. Co. v. Power*, 119 Ind. 269, 21 N. E. 751; *Hannibal &c. R. Co. v. Frowein*, 163 Mo. 1, 63 S. W. 500; *New York &c. R. Co. v. Providence*, 16 R. I. 746, 19 Atl. 759; *Monat v. Seattle &c. R. Co.*, 16 Wash. 84, 47 Pac. 233.

<sup>90</sup> *Littlejohn v. Chicago &c. R. Co.*, 219 Ill. 584, 76 N. E. 840, 841; *St. Louis &c. R. Co. v. Van Hoorebeke*, 191 Ill. 633, 61 N. E. 326.

performance of certain conditions, stipulations contained in a deed will usually be construed to amount to covenants only, since conditions by which title is prevented from vesting, or by which forfeitures are incurred, are not favored in law.<sup>91</sup> But provisos<sup>92</sup> and recitals of the considerations for which the deed was made<sup>93</sup> have been construed to amount to implied conditions, upon a breach of which the land would revert to the grantors.<sup>94</sup> And if it clearly appears by the form and terms of a

<sup>91</sup> *Georgia Southern R. Co. v. Reeves*, 64 Ga. 492; *Midland R. Co. v. Fisher*, 125 Ind. 19, 24 N. E. 756, 8 L. R. A. 604, and note, 21 Am. St. 189; *Jeffersonville &c. R. Co. v. Barbour*, 89 Ind. 375. If it be doubtful whether a clause in a deed is a condition or a covenant the courts will incline against the condition, for a covenant is far preferable. *Roanoke Inv. Co. v. Kansas City &c. R. Co.*, 108 Mo. 50, 51 Am. & Eng. R. Cas. 426, 433, quoting 4 Kent's Com. 132. See also *Pittsburg &c. R. Co. v. Wilson*, 34 Ind. App. 324, 72 N. E. 666; *Krueger v. St. Louis &c. R. Co.*, 185 Mo. 227, 84 S. W. 808; *Gratz v. Highland &c. R. Co.*, 165 Mo. 211, 65 S. W. 223, 225; 2 Elliott Cont. §§ 1575, 1611.

<sup>92</sup> *Taylor v. Cedar Rapids &c. R. Co.*, 25 Iowa 371; *Southard v. Central R. Co.*, 26 N. J. L. 13. In this latter case, the owner of land conveyed a part thereof for the purposes of a depot and passenger refreshment room by a deed containing a proviso that if the railroad company should erect and use any other buildings within a mile for the same purposes, the deed should be avoided. In *Rathbone v. Tioga Navigation Co.*, 2 W. & S. (Pa.) 74, land was con-

veyed to a railroad company upon which to build its road, "provided the same does not interfere with buildings on the grantor's land," and it was held that the company took the land subject to an obligation to construct its road so far away from said buildings as not to endanger them or prevent their usefulness. See also *St. Louis Southwestern R. Co. v. Curtis*, 113 Ark. 92, 167 S. W. 489; *Stevens v. Galveston &c. R. Co.* (Tex. Civ. App.), 169 S. W. 644.

<sup>93</sup> *Indianapolis &c. R. Co. v. Hood*, 66 Ind. 580. In this case the deed recited that it was made "for and in consideration of the permanent location and construction of the depot of said railroad" thereon, and the court held that upon the removal of the depot by the railroad, the land reverted to the grantor. See also *Seaboard Air Line R. Co. v. Anniston Mfg. Co.*, 186 Ala. 264, 65 So. 187. But see contra, *East Line R. Co. v. Garrett*, 52 Tex. 153; *Blanchard v. Detroit &c. R. Co.*, 31 Mich. 43, 18 Am. Rep. 142.

<sup>94</sup> In *Aikin v. Albany &c. R. Co.*, 26 Barb. (N. Y.) 289, the owner of a farm granted to a railway company a right of way through it by a deed which contained, inter alia,

clause in a deed that it is, in legal effect, a condition, the fact that the parties make use of the word "covenant" will not alter its legal character.<sup>95</sup>

**§ 1162 (940). Difference between conditions precedent and conditions subsequent—Effect of failure to perform conditions precedent.**—Where an act is required to be done before the title vests, it is a condition precedent,<sup>96</sup> and the company can assert no rights under the deed without showing the performance of the condition.<sup>97</sup> But, "if the act or condition required do not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate; or, if from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession, then the condi-

the following clause: "The said Albany Northern Railroad is to construct and maintain two good farm crossings." The court intimated the opinion that this was properly a condition, but, in order to aid the grantor, it was construed in that case to amount to a covenant only. In *Donisthorpe v. Fremont &c. R. Co.*, 30 Nebr. 142, 27 Am. St. 387, 43 Am. & Eng. R. Cas. 583, it was held that parol evidence was admissible to annex the condition that the property should be used only for the main line and not for side tracks, to a deed which expressly stipulated that the grantor thereby released the grantee, its successors and assigns, from all costs, expenses and damages sustained by the construction, building and use of the railroad. And the grantor was held entitled to damages for the con-

struction of side tracks upon the right of way.

<sup>95</sup> *Blanchard v. Detroit &c. R. Co.*, 31 Mich. 43, 18 Am. Rep. 142. As to the effect of a conveyance of land "for railroad purposes," or the like, see *Ritter v. Thompson*, 102 Ark. 442, 144 S. W. 910; *United States &c. Wood Co. v. Bangor &c. R. Co.*, 104 Maine 472, 72 Atl. 190; *Kensington R. Co. v. Moore*, 115 Md. 36, 80 Atl. 614; *American Spinning Co. v. Southern R. Co.*, 81 S. Car. 482, 62 S. E. 787; note in *L. R. A.* 1918B, 695 et seq.

<sup>96</sup> *Nicoll v. New York &c. R. Co.*, 12 N. Y. 121; *Rome &c. R. Co. v. Gleason*, 42 App. Div. 530, 59 N. Y. S. 647.

<sup>97</sup> *Crosbie v. Chicago &c. R. Co.*, 62 Iowa 189, 17 N. W. 481, 14 Am. & Eng. R. Cas. 463. See also *Central I. R. Co. v. McMains*, 58 Ind. App. 132, 107 N. E. 88.

tion is subsequent."<sup>98</sup> The same words have been construed differently, and the question whether a condition, precedent or subsequent, is created, is always one of intention.<sup>99</sup> The distinction between conditions precedent and conditions subsequent, while difficult to define, is very important, since a condition precedent must be fulfilled before the title vests, and in case it be impossible or unlawful, or the grantee neglect to perform, the title remains with the grantor.<sup>1</sup> But in case of a grant upon condition subsequent the title vests at once, and in case an illegal condition is imposed the condition is treated as a nullity and the estate is held to be absolute.<sup>2</sup> Thus, where land is deeded to a railroad company upon condition that it shall locate its road upon a certain route, it has been held that the company acquires no rights under the deed until the route is located in substantial compliance with the condition.<sup>3</sup> So, where land is conveyed upon condition that the railroad is to be built by a certain date, it has been held that a failure to comply with the condition will

<sup>98</sup> *Underhill v. Saratoga R. Co.*, 20 Barb. (N. Y.) 456; *Parmelee v. Oswego &c. R. Co.*, 6 N. Y. 74. See also *Bright v. Louisville &c. R. Co.*, 27 Ky. L. 1052, 87 S. W. 780. For rule for determining whether condition is precedent or subsequent, see *Rannals v. Rowe*, 145 Fed. 296, and for suggested tests see note in 102 Am. St. 366, et seq.

<sup>99</sup> *Finlay v. King*, 3 Pet. (U. S.) 346, 374, 7 L. ed. 711, per Marshall, Ch. J.; *Rannals v. Rowe*, 145 Fed. 296; *Parmelee v. Oswego &c. R. Co.*, 6 N. Y. 74; *Hotham v. East India Co.*, 1 T. R. 638.

<sup>1</sup> *Vanhorne v. Dorrance*, 2 Dall. (U. S.) 304, 1 L. ed. 391; *Taylor v. Mason*, 9 Wheat. (U. S.) 325, 6 L. ed. 101; *Martin v. Ballou*, 13 Barb. (N. Y.) 119; *Bertie v. Falkland*, 2 Freem. 222; *Mizell v. Burnett*, 4 Jones L. 249.

<sup>2</sup> *Bertie v. Falkland*, 2 Freem. 220; *Story's Eq. Juris.*, 14 ed. § 1720; 4 Elliott Cont. § 3876; *Co. Litt.* 206, a and b; *Co. Litt.* 217a; 2 Bl. Com. 156, 157. *Indianapolis &c. R. Co. v. Hood*, 66 Ind. 580. See also *Morrill v. Wabash &c. R. Co.*, 96 Mo. 174, 9 S. W. 657; *Gratz v. Highland &c. R. Co.*, 165 Mo. 211, 65 S. W. 223; *Cleveland &c. R. Co. v. Coburn*, 91 Ind. 557. It does not, ordinarily, produce a reversion of the title, without some proper step being taken to consummate a forfeiture. *Rannals v. Rowe*, 145 Fed. 296.

<sup>3</sup> *Crosbie v. Chicago &c. R. Co.*, 62 Iowa 189, 17 N. W. 481; *Detroit &c. R. Co. v. Forbes*, 30 Mich. 165. See also *Littlejohn v. Chicago &c. R. Co.*, 219 Ill. 584, 76 N. E. 840 (license also given to take possession).

deprive the company of the right to locate thereon under the deed.<sup>4</sup> After performance on the part of the grantee, it is entitled to the property in the same manner that it would be after payment in case of an ordinary contract of purchase.<sup>5</sup>

§ 1163 (941). **Conditions subsequent—What is sufficient performance—Effect of failure to perform.**—Conveyances of land to railroad companies are very frequently made upon conditions subsequent, as that the property shall be used for railroad purposes,<sup>6</sup> that a depot shall be permanently located thereon,<sup>7</sup> that

<sup>4</sup> *Peterson v. Atlantic &c. R. Co.*, 120 Ga. 967, 48 S. E. 372.

<sup>5</sup> *Chicago &c. R. Co. v. Boyd*, 118 Ill. 73, 7 N. E. 487; *Borders v. Murphy*, 78 Ill. 81.

<sup>6</sup> *Boone v. Clark*, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276, and note. A conveyance to a railroad company of the right of way for its road, the consideration for which is shown to be the construction and permanent maintenance of the road upon the line so granted, and the erection and maintenance of its depot upon adjoining lands, is a condition subsequent, and if such depot and tracks be afterward abandoned, it is a breach of the condition, which defeats the grant. *Cleveland &c. R. Co. v. Coburn*, 91 Ind. 557, 17 Am. & Eng. R. Cas. 37. Where a grant was of land to be used for the raceway of a mill, it was held to be no breach of the condition that it was also used for a towpath, or that a building encroached upon it, so long as it continued to be used as a raceway. *McKelway v. Seymour*, 29 N. J. L. 321. See cases in next note. The limitation that the estate is to exist only so long as the property is used for a specified purpose is dis-

tinguished from the ordinary condition subsequent, inasmuch as it marks the limit or boundary beyond which the estate conveyed can not continue to exist. *Mayor &c. Macon v. East Tennessee &c. R. Co.*, 82 Ga. 501, 9 S. E. 17, 40 Am. & Eng. R. Cas. 462.

<sup>7</sup> *Indianapolis &c. R. Co. v. Hood*, 66 Ind. 580; *Jeffersonville &c. R. Co. v. Barbour*, 89 Ind. 375; *Taylor v. Cedar Rapids &c. R. Co.*, 25 Iowa 371; *Close v. Burlington &c. R. Co.*, 64 Iowa 149, 19 N. W. 886, 17 Am. & Eng. R. Cas. 33; *Brown v. Chicago &c. R. Co. (Iowa)*, 82 N. W. 1003; *Vicksburg &c. R. Co. v. Ragsdale*, 54 Miss. 200; *New York &c. R. Co. v. Stanley*, 34 N. J. Eq. 55; *Horner v. Chicago &c. R. Co.*, 38 Wis. 165. See note 38 Am. & Eng. R. Cas. 711; *Jessup v. Grand Trunk R. Co.*, 28 Grant Ch. (Up. Can.) 583. See also *Latham v. Illinois Cent. R. Co.*, 253 Ill. 93, 97 N. E. 254; *Lexington &c. R. Co. v. Moore*, 140 Ky. 518, 131 S. W. 257; *Maxwell v. Mississippi &c. R. Co.*, 95 Miss. 466, 48 So. 610; *Bridgess v. Beaman*, 159 N. Car. 521, 75 S. E. 798. But compare *Killgore v. Cobell County*, 80 W. Va. 283, 92 S. E. 562; *Shreve*

the railroad shall be constructed across the grantor's land upon a particular route,<sup>8</sup> or that the company maintain crossings and cattle-guards,<sup>9</sup> or build a dam or embankment,<sup>10</sup> or keep open certain portions of the land conveyed as a public street,<sup>11</sup> or keep up a certain system of drainage,<sup>12</sup> or furnish the grantor and his

v. Norfolk &c. R. Co., 109 Va. 706, 64 S. E. 972, 23 L. R. A. (N. S.) 771. Contracts for the location of a depot at a certain point are generally sustained where the contract does not prohibit the location of depots at other points, and the agreement is fairly made for a valuable consideration. Louisville &c. R. Co. v. Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; McClure v. Missouri River &c. R. Co., 9 Kans. 373; Cedar Rapids &c. R. Co. v. Spafford, 41 Iowa 292; Kansas Pac. R. Co. v. Hopkins, 18 Kans. 494; Vicksburg &c. R. Co. v. Ragsdale, 54 Miss. 200; Kinēaly v. St. Louis &c. R. Co., 69 Mo. 658; Missouri Pac. R. Co. v. Tygard, 84 Mo. 263, 54 Am. Rep. 97; Courier v. Concord R. Co., 48 N. H. 321; Cumberland Valley R. Co. v. Baab, 9 Watts (Pa.) 458, 36 Am. Dec. 132; Texas &c. R. Co. v. Robards, 60 Tex. 545, 48 Am. Rep. 268. But some courts have held that an agreement by which a railroad company undertakes to locate and maintain a station at a particular point is void, as being contrary to the public policy which demands that stations shall be located with a view to the best interests of the public and of the stockholders, and can not be hampered by private contracts. Mobile &c. R. Co. v. People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. 556; Pacific R. Co. v. Seely, 45 Mo. 212, 100 Am. Dec. 369.

<sup>8</sup> Cleveland &c. R. Co. v. Curn, 91 Ind. 557; Douglass v. New York &c. R. Co., Clarke Ch. (N. Y.) 174. A condition in a deed to a railroad company providing that the same shall be void unless the railroad shall be built upon a particular route, and one of its stations located at a particular point, is not void as being opposed to public policy. McClure v. Missouri &c. R. Co., 9 Kans. 373. See Chicago &c. R. Co. v. Estes, 71 Iowa 603, 33 N. W. 124, 30 Am. & Eng. R. Cas. 276, as to what constitutes a contract upon such a condition.

<sup>9</sup> Dayton v. Lewton, 20 Ohio St. 401, 55 Am. Dec. 464. Where the maintenance of fences between the railroad right of way and the adjoining property is expressly made a condition of holding title to the land, a failure to maintain the fences will defeat the title. Emerson v. Simpson, 43 N. H. 475, 80 Am. Dec. 184; Hartung v. Witte, 59 Wis. 285, 18 N. W. 175.

<sup>10</sup> Underhill v. Saratoga &c. R. Co., 20 Barb. (N. Y.) 455.

<sup>11</sup> Such a condition is not void as imposing upon the company a duty or trust inconsistent with its business and foreign to the objects for which it was formed. Tinkham v. Erie R. Co., 53 Barb. (N. Y.) 393.

<sup>12</sup> Hammond v. Port Royal &c. R. Co., 15 S. Car. 10, 11 Am. & Eng. R. Cas. 352.



family annual passes during their lives.<sup>13</sup> The performance of a condition subsequent may be excused when its performance becomes impossible by the act of God,<sup>14</sup> or the company is prevented by the grantor from performing it.<sup>15</sup> Performance is also unnecessary where the condition is opposed to positive law or public policy, as in case the conveyance is made upon condition that no stations shall be established within a certain distance of one to be located upon the land conveyed.<sup>16</sup>

**§ 1164 (942). Remedies of grantor for failure of company to perform conditions subsequent.**—In case of a failure on the part of the grantee to comply with a condition subsequent in the deed the grantor may usually re-enter and maintain ejectment to re-

<sup>13</sup> *Ruddick v. St. Louis &c. R. Co.*, 116 Mo. 25, 22 S. W. 499, 38 Am. St. 570, 57 Am. & Eng. R. Cas. 290. In this case it was held that the railroad company's successor took subject to the condition annexed to its deed, and that, upon its failure to furnish the passes, the land-owner could maintain an action to recover the land. But see *Dickey v. Kansas City &c. R. Co.*, 122 Mo. 223, 26 S. W. 685, and post, § 1168. See also for other conditions subsequent, *Rannels v. Rowe*, 145 Fed. 296; *Schlesinger v. Kansas City &c. R. Co.*, 152 U. S. 444, 14 Sup. Ct. 647, 38 L. ed. 507; *Nicoll v. New York &c. R. Co.*, 12 N. Y. 121. But the interstate commerce act and recent statutes may make such an agreement illegal. *Louisville &c. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. ed. 297, 34 L. R. A. (N. S.) 671; 2 *Elliott Cont.* § 686; 4 *Elliott Cont.* § 3326. As to the rights and remedies where the agreement to give passes rendered impossible because of subsequent

legislation, see also and compare *Louisville &c. R. Co. v. Crowe*, 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (N. S.) 848, with *Dorr v. Chesapeake &c. R. Co.*, 78 W. Va. 150, 88 S. E. 666, L. R. A. 1916E, 622.

<sup>14</sup> *Stuyvesant v. Mayor of New York*, 11 Paige (N. Y.) 414.

<sup>15</sup> *Jones v. Chesapeake &c. R. Co.*, 14 W. Va. 514.

<sup>16</sup> *St. Louis &c. R. Co. v. Mathers*, 71 Ill. 592, 22 Am. Rep. 122, 104 Ill. 257; *Williamson v. Chicago &c. R. Co.*, 53 Iowa 126, 4 N. W. 870, 36 Am. Rep. 206 and note; *St. Joseph &c. R. Co. v. Ryan*, 11 Kans. 602, 15 Am. Rep. 357; *Holladay v. Patterson*, 5 Ore. 177. In *McClain v. Chicago &c. R. Co.*, 90 Iowa 646, 57 N. W. 594, it was held that the provisions of the code declaring that eight years' non-user of a railroad right of way shall work a reversion does not forbid forfeiture for abandonment by non-user in accordance with the conditions of a deed.

cover the property,<sup>17</sup> or he may waive the forfeiture, and sue for damages,<sup>18</sup> or, in some cases, he may bring a bill for specific performance by the railroad company of its implied agreement to perform the conditions.<sup>19</sup> A waiver by the grantor of a breach of the conditions in a deed relieves the estate from the forfeiture, even though it does not affect the grantor's right to have the condition performed. Thus, where a grant to a railroad company of land was upon condition that the road should be completed by a certain time, and the company failed to complete it before the

<sup>17</sup> *Indianapolis &c. R. Co. v. Hood*, 66 Ind. 580; See also and compare *Gratz v. Highland &c. R. Co.*, 165 Mo. 211, 65 S. W. 223; *McClellan v. St. Louis &c. R. Co.*, 103 Mo. 295, 15 S. W. 546. In *Close v. Burlington &c. R. Co.*, 64 Iowa 149, 19 N. W. 886, it was held that a railroad company did not, by accepting a conveyance of land in consideration of one dollar "and the permanent location of a depot on the grounds conveyed" render itself liable in damages for a failure to maintain the depot; but that this provision was a condition subsequent, for a breach of which the estate could be forfeited. But see *Hubbard v. Kansas City &c. R. Co.*, 63 Mo. 68; *Bright v. Louisville &c. R. Co.*, 27 Ky. L. 1052, 87 S. W. 780. The grantor can only enter for breach of an entire condition, and such an entry affects the entire tract conveyed. And where a grantor parts with his right of re-entry as to part of a tract, the condition is destroyed. *Tinkham v. Erie R. Co.*, 53 Barb. (N. Y.) 393.

<sup>18</sup> *Joliet &c. R. Co. v. Jones*, 20 Ill. 221; *Kankakee &c. R. Co. v. Fitzgerald*, 17 Ill. App. 525; *Rush v. Burlington &c. R. Co.*, 57 Iowa

201, 10 N. W. 628; *Gray v. Burlington &c. R. Co.*, 37 Iowa 119; *Baker v. Chicago &c. R. Co.*, 57 Mo. 265. See *Hubbard v. Kansas City &c. R. Co.*, 63 Mo. 68; *Thornton v. Sheffield &c. R. Co.*, 84 Ala. 109, 4 So. 197, 5 Am. St. 337. In *Jones v. St. Louis &c. R. Co.*, 79 Mo. 92, the court held that the proper remedy of a grantor of land upon condition that it be used for depot purposes alone, was to re-enter for condition broken in the event of its being devoted to other purposes, and not by suit to set aside the deed.

<sup>19</sup> *Gray v. Burlington &c. R. Co.*, 37 Iowa 119; *Hubbard v. Kansas City &c. R. Co.*, 63 Mo. 68; *Aikin v. Albany &c. R. Co.*, 26 Barb. (N. Y.) 289. But see *Hoard v. Chesapeake &c. R. Co.*, 123 U. S. 222, 8 Sup. Ct. 74, 31 L. ed. 130; *Louisville &c. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. ed. 297, 34 L. R. A. (N. S.) 671 (specific performance refused where agreement to issue annual pass for life was invalid under interstate commerce act); *Tyler v. St. Louis &c. R. Co.* (Tex. Civ. App.), 87 S. W. 238 (reversed in 91 S. W. 1).

time expired; and after that, the grantor, knowing the fact, suffered the company to go on and incur expenses in constructing their road, and made no objection, it was held to be a waiver of the condition and forfeiture.<sup>20</sup> A breach of a condition subsequent can only be taken advantage of by the grantor or his heirs,<sup>21</sup> and a person to whom he has conveyed his interests either before or after the breach acquires no rights as against the company.<sup>22</sup> The general rule is that a forfeiture for this cause can only be enforced by an actual entry<sup>23</sup> with intent to defeat the estate,<sup>24</sup> or at least by some act equivalent thereto. But in an Iowa case, where a right of way was deeded to a railroad company upon condition that the company's depot should be located near a certain point, and the condition was not complied with, it was held that the breach of this condition forfeited the title, and that, the estate being less than a freehold, no formal act of entry was necessary to enable the land-owner to proceed under the statute for an assessment of his damages.<sup>25</sup> Other

<sup>20</sup> *Baker v. Chicago &c. R. Co.*, 57 Mo. 265; *Ludlow v. New York &c. R. Co.*, 12 Barb. (N. Y.) 440.

<sup>21</sup> This rule has been changed by statute in some of the states in favor of devisees and some others. *Southard v. Central R. Co.*, 26 N. J. L. 13; *McKissick v. Pickle*, 16 Pa. St. 140; *Hayden v. Stoughton*, 5 Pick. (Mass.) 528; *Austin v. Cambridgeport Parish*, 21 Pick. (Mass.) 215. In *Rice v. Boston &c. R. Co.*, 12 Allen (Mass.) 141, it is held that a son of the grantor, to whom he conveyed the adjoining property by deed, could not take advantage of the breach of a condition, since he claimed by grant and not by descent. *Hooper v. Cummings*, 45 Maine 359.

<sup>22</sup> *Paul v. Connersville &c. R. Co.*, 51 Ind. 527; *Hooper v. Cummings*, 45 Maine 359; *Rice v. Boston &c. R. Co.*, 12 Allen (Mass.)

141; *Nicoll v. New York &c. R. Co.*, 12 N. Y. 121; *Underhill v. Saratoga &c. R. Co.*, 20 Barb. (N. Y.) 455; 4 Kent's Com. 129. See also *Golconda Northern Ry. v. Gulf Lines &c. R.*, 265 Ill. 194, 106 N. E. 818, Ann. Cas. 1916A, 833.

<sup>23</sup> *Hall v. Pickering*, 40 Maine 548; *Fonda v. Sage*, 46 Barb. (N. Y.) 109. See also *Golconda Northern Ry. Co. v. Gulf Lines &c. R.*, 265 Ill. 194, 106 N. E. 818, Ann. Cas. 1916A, 833.

<sup>24</sup> *Ruddick v. St. Louis &c. R. Co.*, 116 Mo. 25, 22 S. W. 499, 38 Am. St. 570, 57 Am. & Eng. R. Cas. 290; *Rollins v. Riley*, 44 N. H. 9. As to whether the right can be assigned, see *Bouvier v. Baltimore &c. R. Co.*, 67 N. J. L. 281, 51 Atl. 781, 60 L. R. A. 750 and note.

<sup>25</sup> *Taylor v. Cedar Rapids &c. R. Co.*, 25 Iowa 371.

strong courts take a like stand, and hold that it is not necessary that the grantor demand compliance with the conditions in the deed before bringing suit for a decree of forfeiture of the right of way. In this view the commencement of the action stands in lieu of entry and demand of possession.<sup>26</sup>

**§ 1165 (943). Construction of conditions subsequent—Compliance with conditions.**—Conditions subsequent are not favored in law,<sup>27</sup> but are strictly construed, and a substantial compliance with the conditions is generally held sufficient.<sup>28</sup> Thus, it has been held that a railroad company will hold a right of way conveyed to it for the location, construction and maintenance of its road, and conditioned upon the continued maintenance and operation thereof, provided it builds and operates the road across the land conveyed; and the fact that it does not build a road the full extent of its charter route will not work a forfeiture.<sup>29</sup> A conveyance recited that the ground was deeded “expressly for the use and purpose of depot grounds” for a railroad company,

<sup>26</sup> *Lyman v. Suburban R. Co.*, 190 Ill. 320, 60 N. E. 515, 52 L. R. A. 645; *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. ed. 547, citing *Austin v. Cambridgeport*, 21 Pick. (Mass.) 215; *Cornelius v. Ivins*, 2 Dutch. (N. J. L.) 376; *Ruch v. Rock Island*, 97 U. S. 693, 24 L. ed. 1101. See also *Maison St. Joseph du Sault au Recollet v. Montréal Park &c. R. Co.*, Rap. Jud. Que. 19 C. S. 484.

<sup>27</sup> *Jeffersonville &c. R. Co. v. Barbour*, 89 Ind. 375; *Ellis v. Elkhart Car Works Co.*, 97 Ind. 247; *Sumner v. Darnell*, 128 Ind. 38, 27 N. E. 162, 13 L. R. A. 173 and note; *Hammond v. Port Royal &c. R. Co.*, 15 S. Car. 10, 11 Am. & Eng. R. Cas. 352, 369.

<sup>28</sup> *Voris v. Renshaw*, 49 Ill. 425; *Hoyt v. Kimball*, 49 N. H. 322. Locating the depot upon a five-

acre tract of land which touched the corner of a designated field was held to be a substantial compliance with a condition requiring the depot to be located on a five-acre tract adjoining that field. *Fitzgerald v. Britt*, 43 Iowa 498. Building a depot a quarter of a mile from the edge of the town plat, and stopping trains there, was held a compliance with a condition that a certain town should be made a station on the road. *Jenkins v. Burlington &c. R. Co.*, 29 Iowa 255; *Meador v. Lowry*, 45 Iowa 684. And see *Cedar Falls &c. R. Co. v. Rich*, 33 Iowa 113; *Courtright v. Stickler*, 37 Iowa 382.

<sup>29</sup> *Morrill v. Wabash &c. R. Co.*, 96 Mo. 174, 9 S. W. 657, 36 Am. & Eng. R. Cas. 425. See also *Union Stockyards Co. v. Nashville &c. Co.*, 140 Fed. 701.

and provided that in case the grantee "shall fail to erect buildings and occupy said ground for the use and purpose above mentioned," it should revert to the donor. The buildings were erected and the ground used for depot purposes for thirty-three years, after which the depot was removed to another location, and the tract in question ceased to be used for such purposes. The court held that the condition had been fully performed, and that the title of the railroad company was absolute.<sup>30</sup> But a mere colorable compliance with a condition that the road over a certain tract shall be used and operated as a railway, by using it for the storage of cars, while trains are run over another route, has been held insufficient to prevent a forfeiture.<sup>31</sup> It has been held that a city is without power to release a railroad company from the performance of these conditions by ordinance, as this would amount to the impairment of a contract.<sup>32</sup> "In determining whether a condition subsequent in a deed has been broken or not, construction is required in nearly every case. But little assistance can be had from examining other cases, except to ascertain rules for interpretation. Each case differs so widely from all others that even rules of construction cannot be wholly depended upon. The application of good sense and sound equity are as much to be relied upon as subtle and artificial rules of construction. The

<sup>30</sup> *Jeffersonville &c. R. Co. v. Barbour*, 89 Ind. 375. The court said: "The condition of the grant in the present case was in effect that the grantee should locate and occupy the lots as depot grounds. No time was mentioned, and the language does not, strictly construed, mean perpetuity. We think thirty years' occupancy of the lots as depot grounds was a substantial compliance with the condition."

<sup>31</sup> *Hickox v. Chicago &c. R. Co.*, 78 Mich. 615, 43 Am. & Eng. R. Cas. 613. But see dissenting opinion of Judges Campbell and Champ-

lin, to the effect that the words "used and operated" in the deed under consideration referred to the railroad as a whole. And that the fact that the track laid upon this particular tract was used for switching purposes, while the cars were run over a parallel track, passing through the stations nearest to the plaintiff's farm, was not a breach of the condition. See also in support of text *Lyman v. Suburban R. Co.*, 190 Ill. 320, 60 N. E. 515, 52 L. R. A. 645.

<sup>32</sup> *Lyman v. Suburban R. Co.*, 190 Ill. 320, 60 N. E. 515, 52 L. R. A. 645.

point, of course, to be arrived at in every case, is to ascertain the intention of the parties."<sup>33</sup>

**§ 1166 (944). When equity will interfere in case of a breach of conditions subsequent.**—Equity will not, as a general rule, lend its aid to enforce a forfeiture for the breach of a condition subsequent, but will sometimes cancel a deed as a cloud upon the grantor's title, where the right to a forfeiture is clear, and there is no adequate remedy at law.<sup>34</sup> Even after entry for condition broken the railroad company has a right to proceed under the statute to condemn the land it occupies for a right of way.<sup>35</sup> And, in view of the hardship attending the ejectment of a railroad company from any part of its right of way, equity will enjoin proceedings to oust it from land upon which it has in good faith constructed its road, until it can have an opportunity to acquire title by condemnation.<sup>36</sup>

<sup>33</sup> *Jeffersonville &c. R. Co. v. Barbour*, 89 Ind. 375, 379, per Hammond, J. It was held under a deed obligating the railroad company to establish and maintain a station on the land conveyed that the erection of a small building called a "depot" for temporary purposes, until the grantee could build a permanent structure, was not a compliance with the contract; and neither the grantee, nor a company which purchased its property and franchises, having ever erected a permanent structure, the purchaser must respond in damages for the breach of contract. *Ecton v. Lexington &c. R. Co.*, 22 Ky. L. 1133, 59 S. W. 864. In another case a condition in a deed of land for a railroad right of way that the company should stop all its accommodation passenger trains at the point thereon where its passenger depot was then located on the prem-

ises was held to continue so long as the grantee holds and uses the land. *Gray v. Chicago &c. R. Co.*, 189 Ill. 400, 59 N. E. 950.

<sup>34</sup> *Memphis &c. R. Co. v. Neighbors*, 51 Miss. 412; *Vicksburg &c. R. Co. v. Ragsdale*, 54 Miss. 200; *Stringer v. Keokuk &c. R. Co.*, 59 Iowa 277, 13 N. W. 308. That it will not ordinarily interfere to enforce a forfeiture. See also *Brown v. Chicago &c. R. Co. (Iowa)*, 82 N. W. 1003, and other cases there cited.

<sup>35</sup> *New York &c. R. Co. v. Stanley*, 35 N. J. Eq. 283, 10 Am. & Eng. R. Cas. 345.

<sup>36</sup> *South &c. R. Co. v. Alabama &c. R. Co.*, 102 Ala. 236, 14 So. 747; *Harrington v. St. Paul &c. R. Co.*, 17 Minn. 215; *New York &c. R. Co. v. Stanley*, 35 N. J. Eq. 283; *Jones v. Great Western R. Co.*, 1 Eng. R. & Can. Cas. 684. See also *Silver Springs &c. R. Co. v. Van*

§ 1167 (945). **Covenants running with the land.**—An important difference between conditions and covenants is in the remedy allowed for a breach of them, and it has been held that words which may import either will be construed as one or the other, according to which construction is necessary that the party for whose benefit the provision is made may have a remedy.<sup>37</sup> The breach of a covenant involves the payment of damages only, and because of the hardship which usually attends the enforcement of a forfeiture, and the consequent aversion to forfeitures on the part of the courts,<sup>38</sup> stipulations and agreements contained in deeds are usually construed as covenants running with the land where complete relief can be given by a decree for specific performance or an award of damages, or where the language of the deed admits of a doubt as to whether a condition is intended.<sup>39</sup> Thus stipulations in the deed that the grantee shall fence its right of way<sup>40</sup> or construct farm crossings, or other conven-

Ness, 45 Fla. 559, 34 So. 884, 888 (citing text). In *Pittsburgh &c. R. Co. v. Bruce*, 102 Pa. St. 23, the court said, that an injunction might be obtained to restrain the execution of a judgment in ejectment that had been recovered until an assessment of damages under the statute could be had. *Justice v. Nesquehoning Valley R. Co.*, 87 Pa. St. 28.

<sup>37</sup> *Aikin v. Albany &c. R. Co.*, 26 Barb. (N. Y.) 289.

<sup>38</sup> See *Sappington v. Little Rock &c. R. Co.*, 37 Ark. 23; *Lake Erie &c. R. Co. v. Lee*, 14 Ind. App. 328, 41 N. E. 1058; See *Louisville &c. R. Co. v. Taylor*, 96 Ky. 241, 28 S. W. 666; *Hornback v. Cincinnati &c. R. Co.*, 20 Ohio St. 81; *Kemble v. Philadelphia &c. R. Co.*, 140 Pa. St. 14, 21 Atl. 225; *Chicago &c. R. Co. v. Titterton*, 84 Tex. 218, 19 S. W. 472, 31 Am. St. 39. Relief from forfeiture is always proper

when compensation in damages can be calculated with certainty. *Giles v. Austin*, 62 N. Y. 486; *Nelson v. Carrington*, 4 Munf. (Va.) 332, 6 Am. Dec. 519; *Hill v. Barclay*, 16 Ves. 402. See *Walker v. Wheeler*, 2 Conn. 299; *Messersmith v. Messersmith*, 22 Mo. 369; *Voorhis v. Murphy*, 26 N. J. Eq. 434; *Hagar v. Buck*, 44 Vt. 285, 8 Am. Rep. 368.

<sup>39</sup> *Blanchard v. Detroit &c. R. Co.*, 31 Mich. 43, 18 Am. Rep. 142; *Hornback v. Cincinnati &c. R. Co.*, 20 Ohio St. 81. See also *Gatz v. Highland &c. R. Co.*, 165 Mo. 211, 65 S. W. 223, 225; *Union Stock Yards Co. v. Nashville &c. Co.*, 140 Fed. 70.

<sup>40</sup> *Louisville &c. R. Co. v. Power*, 119 Ind. 269, 21 N. E. 751; *Kentucky Cent. R. Co. v. Kenney*, 82 Ky. 154; *New York &c. R. Co. v. Clarke*, 228 Mass. 274, 117 N. E. 322 (covenant running with the

iences,<sup>41</sup> or that it shall locate and maintain a depot at a certain point,<sup>42</sup> will be construed as covenants unless the language clearly makes them conditions. And the company will become bound to observe covenants contained in a deed which it accepts, to the same extent that it would be bound by the execution of an instrument signed by itself.<sup>43</sup> A railroad may covenant to pave and repair a street along which its track is laid,<sup>44</sup> or to permit other railroads, upon certain conditions, to use the right

land); *Hornback v. Cincinnati & C. R. Co.*, 20 Ohio St. 81; *Dayton & C. R. Co. v. Lewton*, 20 Ohio St. 401, 55 Am. Dec. 464; *Kelly v. Nypano R. Co.*, 23 Pa. Co. Ct. 177. But see *Railway v. Bosworth*, 46 Ohio St. 81, 38 Am. & Eng. R. Cas. 290, 2 L. R. A. 199 and note. In *Martin v. New York & C. R. Co.*, 36 N. J. Eq. 109, the court enforced a covenant to fence which had been stricken out of the deed before it was signed, upon the promise of the receiver of the grantee company that the fences should be maintained. See *Donisthorpe v. Fremont & C. R. Co.*, 30 Nebr. 142, 46 N. W. 240, 27 Am. St. 387, 43 Am. & Eng. R. Cas. 583.

<sup>41</sup> *Congregation & C. v. Texas Pac. R. Co.*, 41 Fed. 564; *Aikin v. Albany & C. R. Co.*, 26 Barb. (N. Y.) 289. See also *Illinois Cent. R. Co. v. Willenborg*, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862; *Hull v. Chicago & C. R. Co.*, 65 Iowa 713, 22 N. W. 940; *Elizabethtown & C. R. Co. v. Killen*, 21 Ky. L. 122, 50 S. W. 1108; *Louisville & C. R. Co. v. Durbin*, 178 Ky. 363, 198 S. W. 908 (grantor to fence and company to provide suitable crossings, covenants running with the land and binding on remote grantee and railroad); *Hall v. Clearfield & C. R.*

*Co.*, 168 Pa. St. 64, 31 Atl. 940.

<sup>42</sup> *Gilmer v. Mobile & C. R. Co.*, 79 Ala. 569, 58 Am. Rep. 623; *Georgia So. R. Co. v. Reeves*, 64 Ga. 492, 11 Am. & Eng. R. Cas. 333; *Dorsey v. St. Louis & C. R. Co.*, 58 Ill. 65; *Pitkin v. Long Island & C. R. Co.*, 2 Barb. Ch. (N. Y.) 221, 47 Am. Dec. 320; *Sayre v. New York & C. R. Co.*, 3 Duer (N. Y.) 54; *Galveston & C. R. Co. v. Pfeuffer*, 56 Tex. 66. See also *Little Rock & C. R. Co. v. Birnie*, 59 Ark. 66, 26 S. W. 528. But stipulations of this kind are often construed as conditions subsequent. *Taylor v. Cedar Rapids & C. R. Co.*, 25 Iowa 371; *Blanchard v. Detroit & C. R. Co.*, 31 Mich. 43, 18 Am. Rep. 142; *Horner v. Chicago & C. R. Co.*, 38 Wis. 165. Where a deed recites that it is made "in consideration of the sum of one dollar, and the permanent location of a depot on grounds conveyed," the stipulation is a condition subsequent which imposes no personal obligation upon the grantee. *Close v. Burlington & C.*, 64 Iowa 149, 19 N. W. 886.

<sup>43</sup> *Georgia S. R. Co. v. Reeves*, 64 Ga. 492.

<sup>44</sup> *Mayor & C. New York v. Second Ave. R. Co.*, 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839.



of way granted,<sup>45</sup> or to construct a switch upon the lands conveyed, and to stop trains thereat,<sup>46</sup> or to pay a rental for the land used for railroad purposes.<sup>47</sup> Covenants such as these, which are connected with, or require something to be done on or about the land, and become united with, and form a part of, the consideration for which the land, or some interest in it, is parted with, run with the land,<sup>48</sup> and bind it in the hands of any one who claims title through or under the covenantor,<sup>49</sup> with notice of the cov-

<sup>45</sup> *Joy v. St. Louis*, 138 U. S. 1 11 Sup. Ct. 243, 34 L. ed. 843, 45 Am. & Eng. R. Cas. 655.

<sup>46</sup> *Gilmer v. Mobile &c. R. Co.*, 79 Ala. 569, 58 Am. Rep. 623. *Pitkin v. Long Island &c. R.*, 2 Barb. (N. Y.) 221, 47 Am. Dec. 320; *Lydick v. Baltimore &c. R. Co.*, 17 W. Va. 427, 11 Am. & Eng. R. Cas. 336.

<sup>47</sup> *Hastings v. Northeastern R.*, 67 L. J. Ch. 590 (1898), 2 Ch. 674, 78 L. T. (N. S.) 812, 47 Wkly. Rep. 59, 63 J. P. 36, affirmed (1899), 68 L. J. Ch. 315 (1899), 1 Ch. 656, 80 L. T. (N. S.) 217.

<sup>48</sup> *St. Louis &c. Co. v. O'Baugh*, 49 Ark. 418, 5 S. W. 711; *Lake Erie &c. R. Co. v. Priest*, 131 Ind. 413, 31 N. E. 77; *Pittsburgh &c. R. Co. v. Kearns*, 58 Ind. App. 694, 108 N. E. 873; *Peden v. Chicago &c. R. Co.*, 73 Iowa 328, 35 N. W. 424, 5 Am. St. 680; *Kentucky Cent. R. Co. v. Kenney*, 82 Ky. 154, 20 Am. & Eng. R. Cas. 458; *Ruddick v. St. Louis &c. R. Co.*, 116 Mo. 25, 22 S. W. 499, 38 Am. St. 570, per Burgess, J., *Avery v. New York &c. R. Co.*, 106 N. Y. 142, 12 N. E. 619, and cases cited in preceding notes. See also *Scowden v. Erie R. Co.*, 26 Pa. Super. Ct. 15; *Chi-*

*cago &c. R. Co. v. McEwen*, 35 Ind. App. 251, 71 N. E. 926.

<sup>49</sup> A covenant running with the land "is a covenant beneficial to the owner of the estate, and to no one but the owner of the estate, and which, therefore, may be said to be beneficial to the estate." Best, J., in *Vernon v. Smith*, 5 B. & Ald. 1; *Vyvyan v. Arthur*, 1 B. & Co. 410; *Aikin v. Albany R. Co.*, 26 Barb. (N. Y.) 289. A successor of the original company, by purchase at judicial sale, is bound by the covenant to fence. *Midland R. Co. v. Fisher*, 125 Ind. 19, 24 N. E. 756, 8 L. R. A. 604, and note, 21 Am. St. 189, and cases there cited. See generally to the effect that the successor is bound by such a covenant. *Chappell v. New York &c. R. Co.*, 62 Conn. 195, 24 Atl. 997, 17 L. R. A. 420; *Toledo &c. R. Co. v. Cosand*, 6 Ind. App. 222, 33 N. E. 251; *Ruddick v. St. Louis &c. R. Co.*, 116 Mo. 25, 22 S. W. 499, 38 Am. St. 570; *Kansas Pac. R. Co. v. Hopkins*, 18 Kans. 494; *Ecton v. Lexington &c. R. Co.*, 22 Ky. L. 1133, 59 S. W. 864. And that the covenant inures to the covenantee's successor. See also *Pittsburgh &c. R. Co. v. Kearns*, 58 Ind. App. 694, 108 N. E. 873.

enant. And the fact that the covenant is contained in the covenantor's title deeds is sufficient notice to bind his assignee.<sup>50</sup>

§ 1168 (946). **Other covenants.**—So, in the absence of any statute to the contrary, a railroad company may bind itself by a covenant to give a free annual pass over its road to the grantor and his family,<sup>51</sup> or to run trains to a certain point in a town,<sup>52</sup> to employ the land-owner to transport freight across a certain river,<sup>53</sup> or to do or refrain from doing any act within the range of its power to contract.<sup>54</sup> But covenants of this kind, by which the grantee undertakes to do something for the personal convenience or benefit of the land-owner wholly disconnected from the use and occupation of the land conveyed, do not, as a general rule, run with the land,<sup>55</sup> and cannot be enforced against an

<sup>50</sup> *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. ed. 843.

<sup>51</sup> *Dodge v. Boston &c. R. Co.*, 154 Mass. 299, 28 N. E. 243, 13 L. R. A. 318, and note. See *Pennsylvania Co. v. Erie &c. R. Co.*, 108 Pa. St. 621; *Ruddick v. St. Louis &c. R. Co.*, 116 Mo. 25, 22 S. W. 499, 38 Am. St. 570; *Eddy v. Hinant*, 82 Tex. 354, 18 S. W. 562; but the interstate commerce act and other recent statutes may prevent this. See ante, § 1335.

<sup>52</sup> *People v. Louisville &c. R. Co.*, 120 Ill. 48, 5 N. E. 379, 10 N. E. 657, 25 Am. & Eng. R. Cas. 235.

<sup>53</sup> *Wiggins Ferry Co. v. Chicago &c. R. Co.*, 73 Mo. 389, 39 Am. Rep. 519, 5 Am. & Eng. R. Cas. 1.

<sup>54</sup> A landowner may bind himself by a covenant with a railroad company for the shipment over its road of the entire product of his quarries or iron furnaces, but such a covenant does not bind his assignees, unless they expressly assume the obligation. *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111, 40

Am. & Eng. R. Cas. 449; *Kippell v. Bailey*, 2 Mylne & K. 517. But see *Bald Eagle &c. R. Co. v. Nittany Val. R. Co.*, 171 Pa. St. 284, 33 Atl. 239, 29 L. R. A. 423, 50 Am. St. 807; *Tulk v. Moxhay*, 2 Phil. (Eng. Ch.) 774.

<sup>55</sup> *Dickey v. Kansas City &c. R. Co.*, 122 Mo. 223, 26 S. W. 685; *Gulf &c. R. Co. v. Smith*, 72 Tex. 122, 9 S. W. 865, 2 L. R. A. 281; *West Virginia Trans. Co. v. Ohio River &c. Co.*, 22 W. Va. 600, 46 Am. Rep. 527. A covenant to have a terminus at a certain place, and not to extend the road beyond it, will not bind another corporation which succeeds to the ownership of the road. *Lynn v. Mount Savage &c. Co.*, 34 Md. 603. See also *Close v. Burlington &c. R. Co.*, 64 Iowa 149, 19 N. W. 886; *Piper v. Union Pac. R. Co.*, 14 Kans. 568; *Wilder v. Maine &c. R. Co.*, 65 Maine 332; *Guilfoos v. New York &c. R. Co.*, 69 Hun (N. Y.) 593; *Hammond v. Port Royal &c. R. Co.*, 16 S. Car. 567.

assignee of the covenantor, unless the grant is expressly made subject to the condition that the state shall be forfeited for a breach of the covenant.<sup>56</sup>

**§ 1169 (946a). Right of way over mineral lands—Reservation of right to mine.**—It has been properly held that one selling a railroad right of way with a reservation of the right to mine must so exercise this right as not to undermine the surface support or let down the tracks, unless that right is clearly reserved by express words or by necessary implication.<sup>57</sup> “The court,” it is said in the case cited, “must be able to see clearly, from the language used, that the right reserved was to extend to letting down the road or undermining the surface support, before the reservation will be construed to give that power.”<sup>58</sup>

**§ 1170 (946b). Use of land acquired for right of way purposes.**—It may be said generally that a railroad company is entitled to use the right of way acquired by it for all purposes incident to its business as a railroad company and for which such a right of way may properly be used, and the mere fact that the company does not occupy or make use of the right of way to its full width does not abridge this right.<sup>59</sup> It has the right to change its grade from time to time as required by the exigencies of

<sup>56</sup> *Ruddick v. St. Louis &c. R. Co.*, 116 Mo. 25, 22 S. W. 499, 38 Am. St. 570. But see *Bald Eagle R. Co. v. Nittany Val. R. Co.*, 171 Pa. St. 284, 33 Atl. 239, 29 L. R. A. 423, 50 Am. St. 807.

<sup>57</sup> *Silver Springs &c. R. Co. v. Van Ness*, 45 Fla. 559, 34 So. 884. See also *Montana Ore Purchasing Co. v. Boston &c. Min. Co.*, 20 Mont. 533, 52 Pac. 375.

<sup>58</sup> See also *Caledonian R. Co. v. Sprot*, 2 Jur. (N. S.) 623; *Bell v. Earl of Dudley* (1895), L. R. 1 Ch. Div. 182; *Robertson v. Youghiogheny &c. Co.*, 172 Pa. St. 566, 33 Atl. 706; *Mickle v. Douglas*, 75

*Iowa* 78, 39 N. W. 198. And compare *Cleveland &c. R. Co. v. Simpson* (Ind.), 104 N. E. 301.

<sup>59</sup> *Mt. Pleasant Coal Co. v. Delaware &c. R. Co.*, 6 Lack. Leg. N. 1. See also *Kotz v. Ill. Cent. R. Co.*, 188 Ill. 578, 59 N. E. 240; *Cleveland &c. R. Co. v. Hadley*, 179 Ind. 429, 440, 101 N. E. 473 (citing text); *Leidel v. Northern Pac. R. Co.*, 89 Minn. 284, 94 N. W. 877; *Hargis v. Kansas City &c. R. Co.*, 100 Mo. 210, 13 S. W. 680; *Clark v. Hannibal &c. R. Co.*, 36 Mo. 202; *New York Cent. &c. R. Co. v. Buffalo*, 85 Misc. R. 78, 147 N. Y. S. 209. Post, § 1281.

traffic and the public interest.<sup>60</sup> Among other things, it has the right to construct necessary switches and turn tables,<sup>61</sup> to erect water tanks,<sup>62</sup> and, in a proper case and for a proper purpose, to build and maintain hotels and eating houses on the right of way.<sup>63</sup> And this is also true as to warehouses, elevators, yards and other freight facilities.<sup>64</sup> In Texas, where the term "right of way" is used in the statute in contradistinction to depots, shops, etc., and in the sense of land required for roadbed, a conveyance of land to a railroad company for right of way is held not to authorize its use for a switch-yard.<sup>65</sup> In the case announcing this principle the court declared that the facts that the land was near a city, was valuable for residence purposes, that a yard could not be constructed on a right of way twice as wide as that conveyed, and that the land was used for many years only as a main track, tended to show that it was the intention of the parties that the land should not be used for a switch-yard.<sup>66</sup>

**§ 1171 (946c). Title on abandonment of right of way.**—It is essential to an abandonment of land for railroad purposes that there should be an intention to abandon the land; mere nonuser

<sup>60</sup> *Kotz v. Ill. Central R. Co.*, 188 Ill. 578, 59 N. E. 240; *Liedel v. Northern Pac. R. Co.*, 89 Minn. 284, 94 N. W. 877. See also *Cleveland & C. R. Co. v. Hadley*, 179 Ind. 429, 440, 101 N. E. 473 (citing text and holding that the company, although it takes only an easement under condemnation proceedings, may use material within the limits of its right of way to construct or repair its roadbed at other places).

<sup>61</sup> *Ill. Cent. R. Co. v. Anderson*, 73 Ill. App. 621.

<sup>62</sup> *Louisville & C. R. Co. v. French*, 100 Tenn. 209, 43 S. W. 771, 66 Am. St. 752.

<sup>63</sup> *Abraham v. Oregon & C. R. Co.*, 41 Ore. 550, 69 Pac. 653.

<sup>64</sup> *Illinois Cent. R. Co. v. Wa-*

*then*, 17 Ill. App. 582; *Anderson v. Interstate Mfg. Co.*, 152 Iowa 455, 132 N. W. 812, 36 L. R. A. (N. S.) 512, and note; *Griswold v. Illinois Cent. R. Co.*, 90 Iowa 265, 57 N. W. 843, 24 L. R. A. 647; *Michigan Cent. R. Co. v. Bullard*, 120 Mich. 416, 79 N. W. 635; *Detroit v. C. H. Little Co.*, 146 Mich. 373, 109 N. W. 671; *Gurney v. Minneapolis & C. Co.*, 63 Minn. 70, 65 N. W. 136, 30 L. R. A. 534.

<sup>65</sup> *Missouri & C. R. Co. v. Anderson*, 36 Tex. Civ. App. 121; 81 S. W. 781. See also *Lyon v. McDonald*, 78 Tex. 71, 14 S. W. 261, 9 L. R. A. 295.

<sup>66</sup> *Missouri & C. R. Co. v. Anderson*, 36 Tex. Civ. App. 121, 81 S. W. 781.

is not alone sufficient.<sup>67</sup> But nonuser may exist for such a length of time as to show an intention to abandon the right of way, and this was held to be true where the construction of a railroad was delayed for thirty-four years.<sup>68</sup> The laws of Iowa provide for a reversion of a railroad right of way where it is not used for a period of eight years. Under this provision it was held that a land-owner was entitled to the possession of the right of way through his land where the only use made of it by the railroad company during this period was to occasionally shove an old, worn-out car upon the track, and allow it to stand there for months, while the other portions of the right of way were used for legitimate railroad purposes.<sup>69</sup> It has been held, under a conveyance of land for railroad purposes solely, to revert to the grantor if not so used, that the operation only of gravel trains from time to time, though at no stated times, did not amount to an abandonment and work a forfeiture to the grantor.<sup>70</sup> A mere

<sup>67</sup> *Holmes v. Jones*, 80 Ga. 659, 7 S. E. 168; *Gaston v. Gainesville R. Co.*, 120 Ga. 516, 48 S. E. 188; *Stannard v. Aurora &c. R. Co.*, 220 Ill. 469, 77 N. E. 254; *Golconda Northern Ry. v. Gulf Lines &c. R.*, 265 Ill. 194, 106 N. E. 818, Ann. Cas. 1916A, 833, 838; *Enfield Mfg. Co. v. Ward*, 190 Mass. 314, 76 N. E. 1053; *New York Cent. &c. R. Co. v. Chelsea*, 213 Mass. 40, 99 N. E. 455; *Garlick v. Pittsburgh &c. R. Co.*, 67 Ohio St. 223, 65 N. E. 896; *Canadian River R. Co. v. Wichita Falls &c. R. Co. (Okla.)*, 166 Pac. 163 (question for jury); *Denison &c. R. Co. v. St. Louis &c. R. Co.*, 96 Tex. 233, 72 S. W. 161; ante § 1141. Thus, it has been held that mere nonuser by a railroad company for a period of five years of a portion of a strip of land over which it has laid its track, by reason of obstructions caused by a land slide, the remain-

ing part being used by it for storing cars, is not an abandonment of its easement in the strip. *Scarritt v. Kansas City &c. R. Co.*, 148 Mo. 676, 50 S. W. 905.

<sup>68</sup> *Pöllock v. Maysville &c. R. Co.*, 19 Ky. L. 1717, 44 S. W. 359. See also *Gurdon &c. R. Co. v. Vaught*, 97 Ark. 234, 133 S. W. 1019; *Roby v. New York &c. R. Co.*, 142 N. Y. 176, 36 N. E. 1053; *Santa Fe &c. R. Co. v. Laune (Okla.)*, 168 Pac. 1022.

<sup>69</sup> *Gill v. Chicago &c. R. Co.*, 117 Iowa 278, 90 N. W. 606. In *People ex rel Golconda N. Ry. v. Toledo &c. R. Co.*, 280 Ill. 495, 117 N. E. 701, it is said that it is contrary to public policy to permit a railroad company to control a located right of way for a time longer than the statutory period.

<sup>70</sup> *Behlow v. Southern &c. R. Co.*, 130 Cal. 16, 62 Pac. 295.

deflection of the road from the granted right of way does not amount to an abandonment and will not work a forfeiture.<sup>71</sup> Where a railroad company has merely an easement in the right of way, and the abandonment is established, it has been held that the right of way reverts to the owner of the land at the time of the abandonment, and not to the original owner.<sup>72</sup>

§ 1172 (947). **Dedication of land to use of railroad.**—The question as to whether land can be acquired by a railroad company by a common law dedication must be considered an open one, with the weight of authority apparently to the effect that, in a strict sense, there can be no such dedication to a railroad company.<sup>73</sup> The question has arisen in a number of cases, in some of which it is said that a railroad is so far a public highway that, whenever the owner of the land has shown, by an unequivocal act or declaration, his purpose to dedicate the land to the use of a railway, and the company engaged in building the railway has acted in reference to and upon the faith of such declaration, the title of the railway company is complete.<sup>74</sup> But it has been held that a dedication will not be presumed from the peaceable occupancy and user of land for a right of way or for depot purposes by the company for any period less than that required to confer title by prescription under the statute of limitations.<sup>75</sup> And this occupancy must have been continuous, and with the actual knowledge of the owner, or of some one having full power to represent him in disposing of the land.<sup>76</sup> In those

<sup>71</sup> *Dickson v. St. Louis &c. R. Co.*, 168 Mo. 90, 67 S. W. 642.

<sup>72</sup> *McLemore v. Charleston &c. R. Co.*, 111 Tenn. 639, 69 S. W. 338. See also *Mobile &c. R. Co. v. Kamper*, 88 Miss. 817, 41 So. 513; *Missouri Pac. R. Co. v. Bradbury*, 106 Mo. App. 450, 79 S. W. 966.

<sup>73</sup> The text is cited in *Shinanek v. Chicago &c. R. Co.* (Iowa), 152 N. W. 574, 575, to the effect that the weight of authority seems this

way, but the question is still left open.

<sup>74</sup> *Texas &c. R. Co. v. Sutor*, 56 Tex. 496, 11 Am. & Eng. R. Cas. 506. See *Morgan v. Railroad Co.*, 96 U. S. 716, 24 L. ed. 743; *Denver Circle R. Co. v. Nestor*, 10 Colo. 403, 15 Pac. 714; *Texas &c. R. Co. v. Sutor*, 59 Tex. 29.

<sup>75</sup> *Jones v. New Orleans &c. R. Co.*, 70 Ala. 227.

<sup>76</sup> *Daniels v. Chicago &c.*, 35 Iowa 129, 14 Am. Rep. 490.

states where the statute provides that the designation of land upon a duly acknowledged and recorded plat of a town or addition thereto, as belonging to any individual or corporation, shall operate as a conveyance of such land for the uses and purposes therein specified or intended, there can be no doubt as to the right of a railway company to claim lands dedicated to it in this manner, since the making and recording of such a plat amounts to the execution of a conveyance to the company of the designated land.<sup>77</sup> But it is held that the intention to dedicate must be evidenced by the plat alone, and cannot be proven by parol.<sup>78</sup> A common law or parol dedication can only be made to the public.<sup>79</sup> And since the lands acquired by a railroad corporation for the purposes of its enterprise are, so far as the right of property is concerned, strictly private property, over which the corporation exercises exclusive control, the better opinion seems to be that property cannot be dedicated by a common law dedication either for depot grounds,<sup>80</sup> or for a right of way<sup>81</sup> for a railroad,

<sup>77</sup> *Morgan v. Railroad Co.*, 96 U. S. 716, 24 L. ed. 743. In Ohio, it is held that the recording by a husband and wife, of a plat of an addition to a town or city, the title to which is in the wife, with a lot of ground designated as the depot of a railroad company whose road extends over the same ground, operates to invest the title of the lot in the company, either as a conveyance or by dedication. A feme covert in Ohio can only divest herself of title to realty by an act of conveyance made in conformity to the statute. *Todd v. Pittsburgh &c. R. Co.*, 19 Ohio St. 514, holding that marking upon a plat one lot "depot of O. & P. Railroad" does not dedicate it. See *Watson v. Milwaukee &c. R. Co.*, 46 Minn. 321, 48 N. W. 1129, 46 Am. & Eng. R. Cas. 543.

<sup>78</sup> *Watson v. Chicago &c. R. Co.*,

46 Minn. 321, 48 N. W. 1129, 46 Am. & Eng. R. Cas. 543. See also *Louisville &c. R. Co. v. Stephens*, 76 Ky. 401, 29 S. W. 14; *Noblesville v. Lake Erie &c. R. Co.*, 130 Ind. 1, 29 N. E. 484. But compare *Morgan v. Railroad Co.*, 96 U. S. 716, 24 L. ed. 743.

<sup>79</sup> *McWilliams v. Morgan*, 61 Ill. 89; *Carpenter v. Gwynn*, 35 Barb. (N. Y.) 395; *Todd v. Pittsburgh &c. R. Co.*, 19 Ohio St. 514. But see *Morgan v. Railroad Co.*, 96 U. S. 716, 24 L. ed. 743; *Illinois Cent. R. Co. v. Indiana &c. R. Co.*, 85 Ill. 211; *State v. Strong*, 25 Maine 297.

<sup>80</sup> *Todd v. Pittsburgh &c. R. Co.*, 19 Ohio St. 514.

<sup>81</sup> *Lake Erie &c. R. Co. v. Whitham*, 155 Ill. 514, 40 N. E. 1014, 28 L. R. A. 612, 46 Am. St. 355; *Louisville &c. R. Co. v. Stephens*, 96 Ky. 401, 29 S. W. 14, 49 Am. St. 303; *Minneapolis &c. R. Co. v. Marble*,

at least where it is held to be an interest in land and within the

112 Mich. 4, 70 N. W. 319; Currie v. Natchez &c. R. Co., 61 Miss. 725; Watson v. Chicago &c. R. Co., 46 Minn. 321, 48 N. W. 1129, 46 Am. & Eng. R. Cas. 543. In this last case the court, by Gilfillan, C. J. said: "There are two principal questions in the case—First, Was there a statutory donation or grant of the land in controversy to the defendant Clark W. Thompson, by means of the plat of the town of Wells? Second, May a railroad corporation acquire an easement in lands by a common-law dedication of it to public use for railroad purposes? For, if the second question be answered in the affirmative, there can be no doubt of the defendant's title, as the facts found are sufficient to establish a dedication. The first of these questions is really covered by the decision in County Commissioners of Hennepin Co. v. Dayton, 17 Minn. 260 . . . Such a donation or grant must be evidenced wholly by the plat. It can not rest partly upon the plat and partly in parol, any more than can a conveyance by deed. The intent to donate or grant must appear from the plat itself. . . It is remarkable that there are so few decisions touching in any way the capacity of a railroad company to receive a common-law dedication of land for the purpose of a railway. The appellant refers us to 1 Ror. R. p. 322, where the author assumes that such dedication may be made, and to Daniels v. Chicago &c. R. Co., 35 Iowa 129, 14 Am. Rep. 490; Texas &c. R. Co. v.

Sutor, 56 Tex. 496, 11 Am. & Eng. R. Cas. 506; and Morgan v. Chicago &c. R. Co., 96 U. S. 716, 24 L. ed. 743,—in which the same thing seems to have been assumed, though in none of them is there anything to indicate that the question was raised. In Todd v. Pittsburgh &c. R. Co., 19 Ohio St. 514, referred to by the respondent, the court held directly that a railroad company can not acquire title to land by dedication. The appellant argues that, whenever the right of eminent domain may be exercised to appropriate private property to public use, the property, or an easement in it, may pass by a common-law dedication; and therefore, as lands for the use of a railroad company may be appropriated under the right of eminent domain, such a dedication may be made to a railroad company. It is not true, however, that a public use, which will justify taking private property under the right of eminent domain, will in all cases sustain a dedication to public use. . . . The rule that a right in the public to use the land of an individual may be vested by dedication, by acts in pais, when such a right can vest in an individual only by grant, is anomalous, and grows out of the necessity of the case, and has been accounted for on the ground that there is no grantee in esse capable of taking. The origin of the doctrine of dedication has sometimes been ascribed to Lade v. Shepherd, 2 Strange, 1004, decided about 150 years ago. That is the earliest case in which



statute of frauds, unless the dedication is made in accordance

we find the word 'dedication' used, and in which some of the requisites of a dedication are suggested. But, though it has been greatly developed and modified since that time, to meet the altered condition of public needs, the doctrine had its roots in the common law for centuries before that case. The public right, however, was not described as held by dedication, but by custom. As to the rights of the public, some requisites of a good custom are not retained in the law of dedication, most notably that in relation to the time of duration of the public uses. Others are, a custom to take a profit out of the land of another to use it for purposes of profit was not good. *Gateward's Case*, 6 Coke, 60; *Grimstead v. Marlowe*, 4 Term Rep. 717; *Mellor v. Spateman*, 1 Saund. 339; *Blewett v. Tregonning*, 3 Adolph. & E. 1002; *Waters v. Lilley*, 4 Pick. (Mass.) 145, 16 Am. Dec. 333; *Pearsall v. Post*, 20 Wend. (N. Y.) 111; *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Littlefield v. Maxwell*, 31 Maine 134, 50 Am. Dec. 653. All that could be claimed was an easement, as a right of way. The claim of right to take a profit from the soil of another had to be supported by grant or by prescription, which supposes a grant; and as the public, as such, could not take a grant, of course it could not take such a right. We have not been referred to any decided case. nor been able to find any, which decides that the law of dedication is not subject to this restriction, or which

holds that a dedication may be made to take a profit out of the land, or to use it for purposes of profit. The case of *Pearsall v. Post*, especially, in the court of errors, goes over the whole doctrine, and denies that such a right can be claimed by dedication. Most of the land throughout the country, appropriated under the right of eminent domain, is taken and employed in the public use, through the agency of business corporations. They are authorized to employ the land taken, not only for the public benefit, in the public use, but for carrying on the business they are authorized to transact, not only to serve the public, but to serve their own private interests—to make for themselves a profit out of the use of the land taken. Where land is to be employed in the public use, by a business corporation or an individual, there is no reason, founded on necessity, for the doctrine of dedication; because there is, in such case, a grantee in esse capable of taking a grant. Private property can not be acquired by dedication.

. . The lands acquired by the corporation, for the purposes of its enterprise, are, so far as the right of property is concerned, private property. If purchased, the corporation pays for them; if taken in the exercise of the right of eminent domain, it pays the compensation. It is true they are charged with a public duty, which the corporation, in consideration of the rights and powers conferred on it by the state, assumes to perform, and which the

with a statute, by which it is given the force and effect of a grant.<sup>82</sup>

state can compel it to perform. But its rights in the lands as its own property are secure and inviolable. *State v. Chicago &c. R. Co.*, 36 Minn. 402, 31 N. W. 365. The corporation, for its own profit and advantage, accepts the franchises offered by the state, and assumes to perform the functions and duties required by the state, not with property furnished it by the state, but with its own property. The ownership of the property is private, though the use required to be made of it is public. The private ownership prevents the acquisition of it by dedication."

<sup>82</sup> *Morgan v. Railroad Co.*, 96 U. S. 716, 24 L. ed. 743; *Watson v. Chicago &c. R. Co.*, 46 Minn. 321, 48 N. W. 1129, 46 Am. & Eng. R. Cas. 543. But while *Watson v. Railroad Co.*, 46 Minn. 321, 48 N. W. 1129, 46 Am. & Eng. R. Cas. 543, holds that the evidence of such a dedication must be made certain and complete by the map on which an intention to dedicate is noted, and that parol evidence of acts and declarations of the landowner which accompanied or followed the recording of the map can not be received to prove an intention to dedicate, *Morgan v. Railroad Co.*, 96 U. S. 716, 24 L. ed. 743, holds the contrary. In the latter case, in construing the Illinois statute with regard to dedication, which provides that a donation or grant marked or noted on the map or plat duly executed and recorded, shall vest in the grantee a fee-simple title to the land "for uses and purposes therein

named, expressed or intended," the court said: "The purposes of the grant are not required to be set forth, nor is there any limitation as to what they shall be. The power and will of the donor are unfettered. The provisions are simply a mode of conveyance which the grantor may pursue, if he chooses to do so. The language of the statute is clear and explicit. There is no room for doubt. . . . Was the intention of the appellant to dedicate the premises to the railroad company for its use for depot purposes, as claimed, 'named, expressed or intended'? Either, as to the use, is, according to the statute, sufficient. The facts to which we have adverted in the previous parts of this opinion seem to us conclusive upon the subject. The question must be resolved in the affirmative. If this view be correct, the legal title, by virtue of the statute, passed to the corporation with the right of user as to the premises for all depot purposes, but for none other. 'No particular form of words is required to the validity of a dedication. The dedication may be made by a survey and plat alone, without any declaration, either oral or on the plat, that it was the intention of the proprietor to set apart certain grounds for the use of the public. An examination of the cases referred to in the argument will show that dedications have been established in every conceivable way by which the intention of the dedicator could be evinced.' *Godfrey v. Alton*, 12 Ill. 29, 52 Am. Dec. 476."

§ 1173. **Dedication to railroad—Statute of frauds.**—As already indicated there is some conflict of authority as to whether a parol transfer by dedication is within the statute of frauds. But the weight of authority is clearly to the effect that no matter whether the right of way is to be held absolutely in fee or is a mere easement it is an interest in land and must be evidenced by a writing under the statute of frauds.<sup>83</sup> The question has not been squarely decided in very many dedication cases, and, while there are many decisions, in rather closely analogous cases, to the effect that a parol license is revocable even where the railroad company has expended much money in constructing its tracks, on the faith of the license, there are also many decisions, as shown in a subsequent section, to the effect that such a license so acted upon is irrevocable.

§ 1174 (948). **Title by adverse possession.**—A railroad company may acquire title to land by adverse possession for the full period prescribed by the statute of limitations in the same manner as an individual.<sup>84</sup> But such possession must be continuous

<sup>83</sup> *Nowlin Lumber Co. v. Wilson*, 119 Mich. 406, 78 N. W. 338; *Watson v. Chicago &c. R. Co.*, 46 Minn. 321, 48 N. W. 1129; *Spawn v. South Dakota Cent. R. Co.*, 26 S. Dak. 1, 127 N. W. 648, Ann. Cas. 1912D, 979, and cases there cited in opinion and note.

<sup>84</sup> *Organ v. Memphis, etc. R. Co.*, 51 Ark. 235, 11 S. W. 96; *Sherlock v. Louisville &c. R. Co.*, 115 Ind. 22, 17 N. E. 171; *Shinanck v. Chicago &c. R. Co.* (Iowa), 152 N. W. 574, 575 (citing test); *Myers v. McGavock*, 39 Nebr. 843, 58 N. W. 522, 42 Am. St. 627; *Texas &c. R. Co. v. Gaines* (Tex.), 27 S. W. 266; *Gulf &c. R. Co. v. Brandenburg* (Tex. Civ. App.), 167 S. W. 170; *Cogsbill v. Railway Co.*, 92 Ala. 252, 9 So. 512, and authorities cited in following notes. See also

*Louisville &c. R. Co. v. Smith*, 128 Fed. 1; *Brinker v. Union Pac. R. Co.*, 11 Colo. App. 166, 55 Pac. 207; *St. Louis &c. R. Co. v. Nugent*, 152 Ill. 119, 39 N. E. 263; *Waggoner v. Wabash &c. R. Co.*, 185 Ill. 154, 56 N. E. 1050; *Newcastle v. Lake Erie &c. R. Co.*, 155 Ind. 18, 57 N. E. 516; *Newpoint v. Cleveland &c. R. Co.*, 59 Ind. App. 147, 107 N. E. 560; *Fortune v. Chesapeake &c. R. Co.*, 22 Ky. L. 749, 58 S. W. 711; *McCutcheon v. Texas &c. R. Co.*, 118 La. 436, 43 So. 42; *Perkins v. Maine Cent. R. Co.*, 72 Maine 95; *LeBlanc v. Illinois Cent. R. Co.*, 72 Miss. 669, 18 So. 381; *Turner v. Union Pac. R. Co.*, 112 Mo. 542, 20 S. W. 673; *Boyce v. Missouri Pac. R. Co.*, 168 Mo. 583, 68 S. W. 920, 58 L. R. A. 442; *American Bank Note Co. v. New York &c. R. Co.*,

and under claim of right,<sup>85</sup> and of such a character as to give notice to the land-owner of the company's claim of title to the land.<sup>86</sup> Thus, where a railway company has made no attempt to use for a right of way certain lands adjoining its location, and is possessed of no paper title thereto, the fact that it has dug away some of the soil and piled some ties upon the land will not give it a title under adverse possession where these acts were not

129 N. Y. 252, 29 N. E. 302; *Wolford v. Fisher*, 48 Ore. 479, 84 Pac. 850, 851 (citing text). Compare *Narron v. Wilmington &c. R. Co.*, 122 N. Car. 856, 29 S. E. 356; 40 L. R. A. 415, with *Purifoy v. Richmond &c. R. Co.*, 108 N. Car. 100, 12 S. E. 741. In most instances, however, that which is acquired is only a kind of easement rather than a fee-simple. But see *Connellsville Gas Co. v. Baltimore &c. R. Co.*, 216 Pa. 309, 65 Atl. 669, where it is held that a railroad company taking land for its right of way without compensation can not acquire title by adverse possession. Acts of Congress have made adverse possession of part of a right of way under certain grants have the same effect, when of the duration prescribed by the laws of the state, as if the land within the right of way had been granted absolutely in fee; but retrospective operation will not be given to them. *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U. S. 190, 34 Sup. Ct. 101, 58 L. ed. 179; *Union Pac. R. Co. v. Snow*, 231 U. S. 204, 34 Sup. Ct. 104, 58 L. ed. 184.

<sup>85</sup> *Peck v. Louisville &c. R. Co.*, 101 Ind. 366; *St. Paul v. Chicago &c. R. Co.*, 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458; *Lehigh Valley R. Co. v. McFarlan*,

43 N. J. L. 605. See also *Vandalia R. Co. v. Wheeler*, 181 Ind. 424, 103 N. E. 1069; *Borden v. Southside R. Co.*, 5 Hun. (N. Y.) 184; *Blaisdell v. Portsmouth &c. R. Co.*, 51 N. H. 483; *Peoria &c. R. Co. v. Tamplin*, 156 Ill. 285, 40 N. E. 960. A right to alter the grade of a street and lay additional track can only be acquired by twenty-one years' adverse user. *Little Miami R. Co. v. Hambleton*, 40 Ohio St. 496.

<sup>86</sup> A mere permissive enjoyment of land or of an easement thereon does not confer any adverse right. The claim must be of the entire title, exclusive of the title of any other person. *Jones v. New Orleans &c. R. Co.*, 70 Ala. 227; *Peoria &c. R. Co. v. Tamplin*, 156 Ill. 285, 40 N. E. 960. Where a railroad company entered into possession of land under an agreement for the payment of rent, its successor by purchase or consolidation could not claim to hold by adverse possession until it had given notice to the land-holder of its claim of title. And a mere failure to pay rent is not such a notice. *Wittman v. Milwaukee &c. R. Co.*, 51 Wis. 89, 8 N. W. 6. The right to have and maintain a culvert, so constructed as to cause plaintiff's land to be overflowed,

done under claim of ownership.<sup>87</sup> In the case cited the court said: "Mere acts of trespass upon vacant and unincumbered land, not amounting to an exclusive appropriation thereof, and not made under a bona fide claim of ownership, or under circumstances indicating such a claim, do not constitute an adverse possession within the meaning of the limitation laws. Such adverse possession cannot be inferred, but must be proved."<sup>88</sup> The acts of ownership on the part of the railroad company, however, need be only such as the nature of the property and the condition of the road require. Thus, where a railroad company, under a verbal agreement with the owner of a tract of land, staked off a right of way one hundred feet wide across the tract, and built its road upon the middle twenty-five feet of the strip which it had staked off, and continued in exclusive possession of the twenty-five foot strip for the full period of the statute of limitations, under claim of title to the full width of one hundred feet, and during most of that period maintained a section house at one point within this tract which extended back to the edge of the one-hundred-foot strip originally staked off, it was held that the railroad company acquired title to the entire one hundred feet.<sup>89</sup>

**§ 1175. Adverse possession—Tacking—Extent of right acquired.**—Where a railroad company having the right to exercise

can be acquired by a railroad company by proof of twenty years' user. But the user must have been such as to have subjected the company to an action at any time during the twenty years, and it must be shown that the overflow has, at regular or irregular intervals during the twenty years, covered the very land in controversy. *Emery v. Raleigh &c. R. Co.*, 102 N. Car. 209, 9 S. E. 139, 11 Am. St. 727.

<sup>87</sup> *Chicago &c. R. Co. v. Galt*, 133 Ill. 657, 23 N. E. 425, 44 Am. & Eng. R. Cas. 43. See also *Merritt v. Northern R. Co.*, 12 Barb. (N.Y.)

605. But the possession of the contractors engaged in constructing the road is the possession of the company and starts the running of the statute of limitations if it has not already started. *Snyder v. Chicago &c. R. Co.*, 112 Mo. 527, 20 S. W. 885.

<sup>88</sup> *McClellan v. Kellogg*, 17 Ill. 498; *Ambrose v. Raley*, 58 Ill. 506.

<sup>89</sup> *Hargis v. Kansas City &c. R. Co.*, 100 Mo. 210, 13 S. W. 680. See also *Florida Southern R. Co. v. Loring*, 51 Fed. 932; *Campbell v. Indianapolis &c. R. Co.*, 110 Ind. 490, 11 N. E. 482.

eminent domain takes land as a purchaser from one holding adverse possession, its title will become good when the combined adverse possession of the railroad company and its grantor exceeds the statutory period.<sup>90</sup> Where there is no color of title, and the right claimed depends solely upon user, the general rule is that the easement is measured by the user, and will not extend beyond the *pedis possessio*.<sup>91</sup> This rule has been applied to highways and in other analogous cases, and we do not believe the fact that the statute allows a right of way of a certain width to be condemned necessarily gives a railroad company a right of way of the full statutory width by prescription where it has had adverse possession of a much narrower strip only. But it is doubtful if the general rule to which we have referred can be applied in all its strictness to railroad companies. It certainly cannot be that they are confined to the exact width occupied by their track, for they must have room to safely operate their road. If they have no rights beyond their track, then an abutter might build up to the track and entirely prevent its use. As suggested in the Missouri case already cited, the nature of the road, its necessities, and the character of the use should be taken into consideration, together with the acts of the company, and the extent of the company's claim, as thus shown, should, we think, be deemed to determine the extent of its right. Much must necessarily depend upon the peculiar circumstances of each particular case. What we mean to say is that if the character and extent

<sup>90</sup> *Covert v. Pittsburg &c. R. Co.*, 204 Pa. 341, 54 Atl. 170. See also note in 4 L. R. A. 642.

<sup>91</sup> See *Brinker v. Union Pac. R. Co.*, 11 Colo. App. 166, 55 Pac. 207; *Zahn v. Pittsburgh &c. R. Co.*, 184 Pa. St. 66, 39 Atl. 24; *Leidigh v. Philadelphia &c. R. Co.*, 215 Pa. St. 342, 64 Atl. 539; *Elliott Roads and Streets*, 3d ed. § 193, and authorities there cited. Approved in *Bartlett v. Beardmore*, 77 Wis. 356, 46 N. W. 494, 496, and in *Marchand v. Maple Grove*, 48 Minn. 281, 51 N. W. 606, 607. See also *Wray v.*

*Chicago &c. R. Co.*, 86 Ill. 424; *Illinois Cent. R. Co. v. Indiana &c. R. Co.*, 85 Ill. 211; *Jones v. Erie &c. R. Co.*, 169 Pa. St. 333, 32 Atl. 535, 47 Am. St. 916. So it has been held that the erection, maintenance, and operation of a telegraph line by a railroad corporation are not an appropriation of the strip of land between the poles and the line of the railroad, so as to give the corporation title thereto after 20 years. *Pittsburgh &c. R. Co. v. Beck*, 152 Ind. 421, 53 N. E. 439.

of the possession and the acts of the company, considered with reference to the nature of railroads, are such as to clearly indicate an adverse claim to a right of way of a certain width, a right of way to that extent may be acquired by prescription, although it is not all occupied by the track or any other structure.<sup>92</sup>

**§ 1176 (948a). Adverse possession as against municipality.—**

It is the general rule that the statute of limitations does not run against a municipal corporation as to its streets and public property, and that no right to maintain a permanent obstruction in a street can be acquired by prescription or adverse possession.<sup>93</sup> Thus, it has been held that no lapse of time will give a railroad company a right to maintain an unlawful bridge or structure in a city street.<sup>94</sup> But municipal corporations are generally author-

<sup>92</sup> See *Brinker v. Union Pac. R. Co.*, 11 Colo. App. 166, 55 Pac. 207, 208; *Prather v. Jeffersonville &c. R. Co.*, 52 Ind. 16, 39, 41; *Prather v. Western Union Tel. Co.*, 89 Ind. 501. But compare *Indianapolis &c. R. Co. v. Reynolds*, 116 Ind. 356, 19 N. E. 141; *Ft. Wayne &c. R. Co. v. Sherry*, 126 Ind. 334, 25 N. E. 898, 10 L. R. A. 48; *Peoria &c. R. Co. v. Attica &c. R. Co.*, 154 Ind. 218, 222, 56 N. E. 210; *Louisville &c. R. Co. v. Smith*, 141 Ala. 335, 37 So. 490. A railroad company obtaining title to a twenty-foot strip under a judgment does not thereby obtain color of title outside the strip, and, where its actual possession is limited to such strip it acquires no title to an additional adjoining strip even though the law allows it a right of way one hundred feet wide. *Stone v. Kansas City &c. R. Co.*, 261 Mo. 61, 169 S. W. 88. As to right to accretion, see *Chicago &c. R. Co. v. Groh*, 85 Wis. 641, 55 N. W. 714; *Saunders v. New York &c. R. Co.*,

144 N. Y. 75, 38 N. E. 992, 26 L. R. A. 378, 43 Am. St. 729; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. 110.

<sup>93</sup> See *Elliott Roads & Streets*, (3rd ed.), §§ 1187, 1188, where the authorities are reviewed. See also *People v. Harris*, 203 Ill. 272, 67 N. E. 785, 96 Am. St. 304; *St. Paul &c. R. Co. v. Duluth*, 73 Minn. 270, 76 N. W. 35, 43 L. R. A. 433.

<sup>94</sup> *Hamden v. New Haven &c. Co.*, 27 Conn. 158; *State v. Louisville &c. R. Co.*, 86 Ind. 114; *Philadelphia &c. R. Co. v. State*, 20 Md. 157; *Delaware &c. R. Co. v. Buffalo*, 4 App. Div. 562, 38 N. Y. S. 510; *Windsor v. Delaware &c. Co.*, 92 Hun 127, 36 N. Y. S. 863, affirmed in 155 N. Y. 645, 49 N. E. 1105; *Little Miami &c. R. Co. v. Greene Co.*, 31 Ohio St. 338; *Raht v. Southern R. Co. (Tenn.)*, 50 S. W. 72. See also *Wiltman v. Milwaukee &c. R. Co.*, 51 Wis. 89, 8 N. W. 6; *Knapp &c. Co. v. New York &c. R. Co.*, 76 Conn. 311, 56 Atl. 512, 100 Am. St. 512.

ized to permit or grant the right to railroad companies to run along streets, and, where such is the case, there is, perhaps, good reason for holding that the general rule does not apply. The right to lay tracks in streets is granted by the legislature or authorized by it to be granted by municipalities, so far as the public is concerned, because it is for the public use and benefit, whereas there is no such reason for granting the right to an individual to obstruct a street for a private enterprise. So, in the one case, there never could have been a grant to obstruct the street, whereas in the other such a grant could have been made to the railroad company to lay a track in a street. It has, therefore, been held that a railroad company may acquire the right to maintain a track in a city street by more than twenty years' continuous adverse possession.<sup>95</sup> But it has been held that an entry by a railroad company on a street, under a resolution of the common council reciting that it was owned by the city, is permissive, and is presumed to so continue unless an adverse claim is duly made, and a deed of a portion of the fee of the street by the city's grantor to the railroad company thereafter is not such an adverse claim.<sup>96</sup>

**§ 1177 (949). Rights of railroad company acquired by entry under license.**—A license to enter upon land and construct a railroad thereon operates as a perfect defense to all acts done within the scope of such license, so long as proper skill and care are used,<sup>97</sup> for that which is done under authority given by

<sup>95</sup> *Newcastle v. Lake Erie &c. R. Co.*, 155 Ind. 18, 57 N. E. 516. See also *Wolfard v. Fisher*, 48 Ore. 479, 84 Pac. 850; and compare *Trenton &c. Trac. Corp. v. Inhabitants of Ewing Tp.*, 87 N. J. Eq. 397, 101 Atl. 1037. But compare *Indianapolis &c. R. Co. v. Ross*, 47 Ind. 25; *Noblesville v. Lake Erie &c. R. Co.*, 130 Ind. 1, 29 N. E. 484. And see as to limits of right acquired, *Jones v. Erie &c. R. Co.*, 169 Pa. St. 333, 32 Atl. 535, 47 Am. St. 916.

<sup>96</sup> *Lewis v. New York &c. R. Co.*, 162 N. Y. 202, 56 N. E. 540. But see and compare *Muhlker v. New York &c. R. Co.*, 173 N. Y. 549, 56 N. E. 558, and *Muhlker v. New York &c. R. Co.*, 197 U. S. 544, 25 Sup. Ct. 522, 49 L. ed. 872.

<sup>97</sup> *Foot v. New Haven &c. R. Co.*, 23 Conn. 214; *Louisville &c. Co. v. Thompson*, 18 B. Mon. (Ky.) 735; *Currie v. Natchez &c. R. Co.*, 61 Miss. 725; *Blaisdell v. Portsmouth &c. R. Co.*, 51 N. H. 483; *Miller v. Auburn &c. R. Co.*, 6 Hill (N. Y.)



a man is, in effect, his own act, and he cannot make another responsible to him for his own acts. So, where a railroad has been located and constructed under a parol license which remains unrevoked, the company has the same right to prevent another company from taking its tracks as if it had condemned the land.<sup>98</sup> A license to do a certain act or series of acts carries with it all the incidents necessary to its exercise. Thus, a license to take wood or stone from the grantor's land includes the right to enter with teams to haul it away.<sup>99</sup> And a license to build a railroad across certain lands carries with it the right to make the excavations and embankments which the character of the surface renders necessary.<sup>1</sup> But a railroad company is liable for damages caused by its negligence in the construction or operation of its road under a license from the land-owner.<sup>2</sup> A mere naked parol license to do certain acts upon the land of another does not create a permanent easement therein, but such a license may be revoked at any time before it has been acted upon by the licensee.<sup>3</sup> The death of the licensor before the license is acted upon amounts to a revocation of a license granted by parol.<sup>4</sup>

**§ 1178. When license is irrevocable.**—There is a strong line of cases holding that a parol license to lay railroad tracks, or to

61; *Tompkins v. Augusta &c. R. Co.*, 21 S. Car. 420. See also *Newcastle v. Lake Erie &c. R. Co.*, 155 Ind. 18, 57 N. E. 516. As to the extent of the right acquired, see *Louisville &c. R. Co. v. Smith*, 141 Ala. 335, 37 So. 490.

<sup>98</sup> *Barre R. Co. v. Montpelier &c. R. Co.*, 61 Vt. 1, 17 Atl. 923, 4 L. R. A. 785, and note, 15 Am. St. 877. See also *Omaha Bridge &c. R. Co. v. Whitney*, 68 Nebr. 389, 94 N. W. 513.

<sup>99</sup> *Clark v. Vermont &c. R. Co.*, 28 Vt. 103.

<sup>1</sup> See *Blaisdell v. Portsmouth &c. R. Co.*, 51 N. H. 483.

<sup>2</sup> *Mathews v. St. Paul &c. R. Co.*,

18 Minn. 434; *Selden v. Delaware &c. Canal Co.*, 29 N. Y. 634.

<sup>3</sup> *Messick v. Midland R. Co.*, 128 Ind. 81, 27 N. E. 419; *Northern Pac. R. Co. v. Barnsville &c. R. Co.*, 4 Fed. (2 McC. 203), 298, 1 Am. & Eng. R. Cas. 8; *Minneapolis &c. R. Co. v. Marble*, 112 Mich. 4, 70 N. W. 319; *Minneapolis &c. R. Co. v. Minneapolis &c. R. Co.*, 58 Minn. 128, 59 N. W. 983.

<sup>4</sup> *Eggleston v. New York &c. R. Co.*, 35 Barb. (N. Y.) 162; *Watson v. Chicago &c. R. Co.*, 46 Minn. 321, 48 N. W. 1129, 46 Am. & Eng. R. Cas. 543; *Bridges v. Purcell*, 1 Dev. & B. (N. Car.) 492.

erect other structures for the use of a railway company upon a person's land, is revocable even after the track is laid or the buildings constructed,<sup>5</sup> and that the licensor is not estopped to maintain an action at law for the recovery of the land by the fact that valuable improvements have been made upon the faith of the license.<sup>6</sup> And most of these cases hold that the licensor

<sup>5</sup> Stratton's Independence v. Midland Terminal R. Co., 32 Colo. 493, 77 Pac. 247. Foot v. New Haven &c. R. Co., 23 Conn. 214; Jackson & Sharp Co. v. Philadelphia &c. R. Co., 4 Del. Ch. 180; Woodward v. Seely, 11 Ill. 157, 50 Am. Dec. 445, and note; St. Louis Stock Yards v. Wiggins Ferry Co., 112 Ill. 384, 54 Am. Rep. 243; Irish v. Burlington &c. R. Co., 44 Iowa 380, but in later Iowa cases hereinafter cited; Louisville &c. R. Co. v. Liebfried (Ky.), 50 Am. & Eng. R. Cas. 202; Baltimore &c. R. Co. v. Algire, 63 Md. 319; Stevens v. Stevens, 11 Metc. (Mass.) 251, 45 Am. Dec. 203; Maxwell v. Bay City Bridge Co., 41 Mich. 453, 2 N. W. 639; Mathews v. St. Paul &c. R. Co., 18 Minn. 434; Minneapolis Mill Co. v. Minneapolis &c. R. Co., 51 Minn. 304, 53 N. W. 639; Minneapolis Western R. Co. v. Minneapolis &c. R. Co., 58 Minn. 128, 59 N. W. 983. New Orleans &c. R. Co. v. Moye, 39 Miss. 374; Hoshier v. Kansas City &c. R. Co., 60 Mo. 329; Blaisdell v. Portsmouth &c. R. Co., 51 N. H. 483; Central R. Co. v. Hetfield, 29 N. J. L. 206; Hetfield v. Central R. Co., 29 N. J. L. 571; Johanson v. Atlantic City R. Co., 73 N. J. 767, 64 Atl. 1061; Eggles-ton v. New York &c. R. Co., 35 Barb. (N. Y.) 162; Selden v. Delaware &c. Canal Co., 29 N. Y. 634;

24 Barb. 362; Murdock v. Prospect Park &c. R. Co., 73 N. Y. 579; Richmond &c. R. Co. v. Durham &c. R. Co., 104 N. Car. 658, 10 S. E. 659; Hewlins v. Shippam, 5 B. & C. 221; Cocker v. Cowper, 1 C. M. & R. 418. Where city has no express power to grant a permanent easement in a street, it has been held that a license to a railroad company can not be construed as a grant of a permanent easement. State v. Atlantic &c. R. Co., 141 N. Car. 736, 53 S. E. 290. See also where condition is broken, Edwards v. Pittsburgh &c. R. Co., 215 Pa. St. 597, 64 Atl. 798. In Plazuela Sugar Co. v. Pastenza, 245 Fed. 115, it was held that the defendant only had a license to operate a railroad over the plaintiff's premises and that the license could be revoked and the defendant required to remove the railroad.

<sup>6</sup> Wood v. Michigan Air Line Co., 90 Mich. 334, 51 N. W. 263. In the note to Prince v. Case and Rerick v. Kern, 2 Am. L. Cas., 546, 557, 558, it is said: "An attempt to charge land with the burden of a way or other easement otherwise than by deed will consequently fail, from the insufficiency of the means employed, if the question arises at law, and is determined on strict legal principles. An additional safeguard was, moreover, given by

is not bound, in order to maintain an action of ejectment, to reimburse the company for damages sustained by the revocation.<sup>7</sup> But the courts in most of the states where this rule is followed hold that a land-owner who grants permission to a railroad company to enter upon his lands and construct its road thereon may be enjoined from revoking the license until the company can perfect its title by condemnation,<sup>8</sup> and in Minne-

the statute of frauds, under which no incorporeal hereditament can be granted or assigned without a writing signed by the party to be charged. It follows that no easement or charge on land can be created by an oral license, even when the intent is plain, because the parties choose to rest satisfied with unwritten evidence, while the law requires a writing, signed and under seal. . . . Title is the right to possession and enjoyment, and an irrevocable authority to possess and enjoy is virtually a title. If I can use the land of another for a purpose of my own, under an authority which he can not recall, the ownership relatively to that purpose is in me and not in him. To give an oral license an effect which is denied to a contract is, therefore, virtually to abrogate the statute of frauds." Citing *Desloge v. Pearce*, 38 Mo. 588; *Houston v. Laffee*, 46 N. H. 505. "These principles are so plain as to be indisputable at law, and the only question is how far they should be modified by equity. A chancellor may control the words of the statute in order to prevent it from being used as a cover for the commission of the frauds which it was meant to suppress, but the power to do this belongs solely to equity, and can not be exercised by

a common law tribunal, without confounding jurisdictions which have hitherto been kept separate." *Winslow v. Cooper*, 104 Ill. 235; *Wood v. Michigan Air Line R. Co.*, 90 Mich. 334, 51 N. W. 263.

<sup>7</sup> *Batchelder v. Hibbard*, 58 N. H. 269, and cases in preceding note. The land-owner's right to revoke a parol license and bring an action of ejectment is not impaired by mere inaction or delay in bringing suit, within the time allowed by the statute of limitations. *Kremer v. Chicago &c. R. Co.*, 51 Minn. 15, 52 N. W. 977, 38 Am. St. 468, 51 Am. & Eng. R. Cas. 382; *Galway v. Metropolitan El. R. Co.*, 128 N. Y. 132, 28 N. E. 479, 13 L. R. A. 788. A land-owner is not estopped to maintain an action of ejectment by the mere fact that he granted the company parol license to proceed with the road and occupy the land. *Wood v. Michigan Air Line R. Co.*, 90 Mich. 334, 51 N. W. 263, 52 Am. & Eng. R. Cas. 37. See also *Johanson v. Atlantic City R. Co.*, 73 N. J. 767, 64 Atl. 1061; *Bork v. United N. J. &c. Co.*, 70 N. J. L. 268, 57 Atl. 412, 64 L. R. A. 836, 103 Am. St. 808. *Contra. Baker v. Chicago &c. R. Co.*, 57 Mo. 265.

<sup>8</sup> *Cook v. Pridgen*, 45 Ga. 331, 12 Am. Rep. 582; *Conger v. Burlington &c. R. Co.*, 41 Iowa 419;

sota it is provided by statute that an action of ejectment brought by the land-owner in such case may be converted into condemnation proceedings by the railroad company.<sup>9</sup> In those states of the Union where law and equity are administered by the same court, relief is afforded in any given suit where a case of equitable

Baltimore &c. R. Co. v. Algire, 63 Md. 319, 65 Md. 337, 4 Atl. 293; Detroit &c. R. Co. v. Brown, 37 Mich. 533; Pickert v. Ridgefield Park R. Co., 25 N. J. Eq. 316; New York &c. R. Co. v. Stanley, 35 N. J. Eq. 283; Brown v. Bowen, 30 N. Y. 519, 86 Am. Dec. 406; Lacy v. Arnett, 33 Pa. St. 169; Foster v. Browning, 4 R. I. 47, 67 Am. Dec. 505. But though a parol license, amounting in terms to an easement, is revocable, as to future enjoyment, at law, and is determined by a conveyance of the estate upon which it was to be enjoyed, this is not the rule, in all cases, in courts of equity. In these courts, the future enjoyment of an executed parol license, granted upon a consideration, or upon the faith of which money has been expended, will be enforced at all events, where adequate compensation in damages could not be obtained. This will be done upon the two grounds of estoppel on account of fraud, and specific performance of a party executed contract to prevent fraud. Snowden v. Wilas, 19 Ind. 10, 14, 81 Am. Dec. 370.

<sup>9</sup> Minneapolis Western R. Co. v. Minneapolis &c. R. Co., 58 Minn. 128, 59 N. W. 983. In this case the court said: "The finding, therefore, is of a naked license, carrying no estate in the land, and revocable at the will of the licensor. Johnson v. Skillman, 29 Minn. 95,

12 N. W. 149, 43 Am. Rep. 192, and note; Wilson v. St. Paul &c. R. Co., 41 Minn. 56, 42 N. W. 600, 4 L. R. A. 378; Minneapolis Mill Co. v. Minneapolis &c. R. Co., 51 Minn. 304, 53 N. W. 639. This would seem to be entirely decisive of the case, but defendant claims that, because plaintiff purchased after these tracks had been constructed, therefore it took the premises subject to the incumbrance of an easement in defendant to permanently maintain the tracks. The mere statement of the proposition carries with it its own refutation; for, plainly stated, it is that a conveyance of the premises by the licensor to a third party converts a mere license (which creates no estate in the land) into an easement, which is an interest in the land, and lies only in grant. We do not see why, on this line of reasoning, the same result would not have followed had defendant been a mere intruder or trespasser, for counsel's argument is that the purchaser must be deemed to have taken the land subject to the visible incumbrance then on it. So far from such being the case, the law is that a revocable license is revoked by a conveyance of the land by the licensor. Johnson v. Skillman, supra; Wilson v. Railway Co. supra. Counsel's argument is all based on a false premise, which begs the whole question. He as-

relief is presented.<sup>10</sup> In the case cited the action was, in form, an action at law for damages, and an answer showing a parol license and the expenditure of money on the faith thereof was held good. And in the courts of Maine,<sup>11</sup> New Hampshire,<sup>12</sup>

sumes that when a railway company enters and builds its track on land under a license from the owner, it acquires a permanent easement in the land by virtue of the license thus acted on, and that thereafter the only right of the land-owner is his claim for compensation for the taking of the land for railway purposes. In some states—notably Wisconsin and Illinois—either by statute or by judicial decision, founded on supposed considerations of public policy, this is substantially the law; all actions by the land-owner, whatever their form, being in effect actions to recover compensation for the permanent appropriation of land already taken. If such were the law in this state, there would be at least some plausibility to defendant's contention. But we have repeatedly held that the law is otherwise. *Watson v. Chicago &c. R. Co.*, 46 Minn. 321, 48 N. W. 1129; *Lamm v. Chicago &c. R. Co.*, 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268, and note; *Minneapolis Mill Co. v. Minneapolis &c. R. Co.*, 51 Minn. 304, 53 N. W. 639. Under our statute the land-owner may revoke his li-

cense, and bring ejectment, which the railway company may, if it so elects, turn into a condemnation proceeding, and it is only then, and through that proceeding, that the railroad company acquires any easement in the land, or the land-owner any right to compensation for taking it for railway purposes. The defendant could not acquire title by prescription, because its possession was not adverse."

<sup>10</sup> *Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370; *Perkins, J.* In Indiana a land-owner will not be permitted to revoke a parol license under which the railroad company has actually built its road. *Buchanan v. Logansport &c. R. Co.*, 71 Ind. 265; *Campbell v. Indianapolis &c. R. Co.*, 110 Ind. 490, 11 N. E. 482.

<sup>11</sup> *Ricker v. Kelly*, 1 Maine 117, 10 Am. Dec. 38 and note; *Clement v. Durgin*, 5 Maine 9.

<sup>12</sup> *Ameriscoggin Bridge Co. v. Bragg*, 11 N. H. 102. But see *Batchelder v. Hibbard*, 58 N. H. 269. and *Blaisdell v. Portsmouth &c. R. Co.*, 51 N. H. 483, holding that a parol license is revocable.

Pennsylvania,<sup>13</sup> Ohio,<sup>14</sup> Georgia,<sup>15</sup> Indiana,<sup>16</sup> Iowa,<sup>17</sup> and some other states,<sup>18</sup> it is held that where a parol license has been given, upon the faith of which moneys have been expended, the licensor and those claiming under him, with notice, will be estopped from revoking such license, when the licensee cannot be placed

<sup>13</sup> *Rerick v. Kern*, 14 S. & R. (Pa.) 267, 16 Am. Dec. 497 and note; *Lacy v. Arnett*, 33 Pa. 169; *Campbell v. McCoy*, 31 Pa. St. 263; *Cumberland Valley R. Co. v. McLanahan*, 59 Pa. St. 23.

<sup>14</sup> *Wilson v. Chalfant*, 15 Ohio 248; 45 Am. Dec. 574; *Pierson v. Cincinnati &c. Canal Co.*, 2 Disney (Ohio) 100. See also *Columbus &c. R. Co. v. Williams*, 52 Ohio St. 268, 41 N. E. 261.

<sup>15</sup> *Sheffield v. Collins*, 3 Ga. 82; *Southwestern R. Co. v. Mitchell*, 69 Ga. 114; *Cook v. Pridgen*, 45 Ga. 331, 12 Am. Rep. 582. See also *Charleston &c. R. Co. v. Hughes*, 105 Ga. 1, 30 S. E. 972, 70 Am. St. 17; *Atlanta &c. R. Co. v. Barker*, 105 Ga. 534, 31 S. E. 452.

<sup>16</sup> *Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370; *Buchanan v. Logansport &c. R. Co.*, 71 Ind. 265; *Evansville &c. R. Co. v. Nye*, 113 Ind. 223, 15 N. E. 261; *Newcastle v. Lake Erie &c. R. Co.*, 155 Ind. 18, 26, 56 N. E. 516; *Indianapolis &c. Trac. Co. v. Arlington*, 47 Ind. App. 657, 95 N. E. 280.

<sup>17</sup> *Shinaneck v. Chicago &c. R. Co.* (Iowa), 152 N. W. 574, 575 (citing text); *Beatty v. Gregory*, 17 Iowa 109, 85 Am. Dec. 546; *Wickersham v. Orr*, 9 Iowa 253, 74 Am. Dec. 348. See also *Des Moines &c. R. Co. v. Lynd*, 94 Iowa 368, 62 N. W. 806. But compare *Conger v. Burlington &c. R. Co.*, 41 Iowa 419.

<sup>18</sup> *Ames, C. J.*, in *Foster v. Browning*, 4 R. I. 47, 67 Am. Dec. 505. In the following cases it has been decided that licenses could not be revoked after the expenditure of money on the faith of them. *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358; *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439; *Williams v. Flood*, 63 Mich. 487, 30 N. W. 93; *New Orleans &c. R. Co. v. Moye*, 39 Miss. 374; *Baker v. Chicago &c. R. Co.*, 57 Mo. 265; *Williamston &c. R. Co. v. Battle*, 66 N. Car. 540. See also *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. ed. 873; *Northern Pac. R. Co. v. Smith*, 171 U. S. 260, 18 Sup. Ct. 794, 799, 43 L. ed. 157; *Pryzbylowicz v. Missouri &c. R. Co.*, 17 Fed. 493; *Chicago &c. Co. v. Goodwin*, 111 Ill. 273, 53 Am. Rep. 622; *Louisville &c. R. Co. v. Pittsburgh &c. Co.*, 111 Ky. 960, 64 S. W. 969, 55 L. R. A. 601, 98 Am. St. 447; *Cape Girardeau &c. R. Co. v. St. Louis &c. R. Co.*, 222 Mo. 461, 121 S. W. 300; *Chicago &c. R. Co. v. Englehart*, 57 Nebr. 444, 77 N. W. 1092; *Park Steel Co. v. Allegheny &c. R. Co.*, 213 Pa. 322, 62 Atl. 920; *Texas &c. R. Co. v. Jarrell*, 60 Tex. 267; *Ft. Worth &c. R. Co. v. Sweatt*, 20 Tex. Civ. App. 543, 50 S. W. 162; *Norfolk &c. R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *Taylor v. Chicago &c. R. Co.*, 63 Wis. 327, 24 N. W. 84.

in statu quo.<sup>19</sup> The occupancy and use of a strip of land by a railway company for its roadbed and track, and for the running of its trains, is sufficient notice of its equity to bind a purchaser from the original licensor,<sup>20</sup> and it is held that a land-owner is chargeable with knowledge that a railroad is of such a permanent character that it cannot well be removed or abandoned,<sup>21</sup> and that, when he permits its construction across his land, he thereby waives his remedy by injunction or action for ejectment or trespass for operating the road.<sup>22</sup> and is relegated to a proceeding for damages under the statute.<sup>23</sup> In such a proceeding, it has

<sup>19</sup> *Messick v. Midland R. Co.*, 128 Ind. 81, 27 N. E. 419; *Campbell v. Indianapolis &c. R. Co.*, 110 Ind. 490, 11 N. E. 482; *Midland R. Co. v. Smith*, 113 Ind. 233, 15 N. E. 256; *Currie v. Natchez &c. R. Co.*, 61 Miss. 725. See this subject elaborately discussed in 2 Am. L. Cas. 684. And see also notes to *Munsch v. Stettler*, 109 Minn. 403, 124 N. W. 14, in 25 L. R. A. (N. S.) 727, and to *Johnson v. Barton*, 23 N. Dak. 629, in 44 L. R. A. (N. S.) 557; *Dulin v. Ohio River R. Co.*, 73 W. Va. 166, 80 S. E. 145, Ann. Cas. 1916D, 1182, 1184 (citing text).

<sup>20</sup> *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. ed. 873; *Northern Pac. R. Co. v. Smith*, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. ed. 157; *Campbell v. Indianapolis &c. R. Co.*, 110 Ind. 490, 11 N. E. 482. See also *Harman v. Southern R.*, 72 S. Car. 228, 51 S. E. 689. The habitual use of a pass-way under a railroad, stipulated for in the oral grant of the right of way, is sufficient to charge the purchaser of the road at a judicial sale with knowledge of the grantor's rights therein. *Swan v. Burlington &c. R. Co.*, 72 Iowa, 650, 34 N. W. 457.

<sup>21</sup> *Harlow v. Marquette &c. R. Co.*, 41 Mich. 336, 2 N. W. 48. But see *Wood v. Michigan Air Line R. Co.*, 90 Mich. 334, 51 N. W. 263.

<sup>22</sup> *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. ed. 873; *Reichert v. St. Louis &c. R. Co.*, 51 Ark. 491, 11 S. W. 696, 5 L. R. A. 183 and note; *Provolt v. Chicago &c. R. Co.*, 57 Mo. 256; *McClellan v. St. Louis &c. R. Co.*, 103 Mo. 295, 15 S. W. 546, 46 Am. & Eng. R. Cas. 501; *McAulay v. Western Vt. R. Co.*, 33 Vt. 311, 78 Am. Dec. 627; *Hanlin v. Chicago &c. R. Co.*, 61 Wis. 515, 21 N. W. 623; *Milwaukee &c. R. Co. v. Strange*, 63 Wis. 178, 23 N. W. 432, 20 Am. & Eng. R. Cas. 413; *Taylor v. Chicago &c. R. Co.*, 63 Wis. 327, 24 N. W. 84, 22 Am. & Eng. R. Cas. 123. See *Holloway v. Louisville &c. R. Co.*, 92 Ky. 244, 17 S. W. 572. And see authorities cited and reviewed in *New York v. Pine*, 185 U. S. 93, 22 Sup. Ct. 592, 595, 596, 46 L. ed. 820.

<sup>23</sup> *Denver &c. R. Co. v. School Dist.*, 14 Colo. 327, 23 Pac. 978; *Baker v. Chicago &c. R. Co.*, 57 Mo. 265; *Richards v. Buffalo &c. R. Co.*, 137 Pa. St. 524, 19 Atl. 931, 21 Am. St. 892; *Buchner v. Chi-*

been held that the owner of the land should be awarded damages as of the date that the land was taken, and not the value of his land as increased by reason of the completion and operation of the road.<sup>24</sup> Where a license is granted by contract in writing, for a valuable consideration, and coupled with an interest, the license is generally held to be irrevocable.<sup>25</sup> A license to

cago &c. R. Co., 60 Wis. 264, 19 N. W. 56; Cassidy v. Chicago &c. R. Co., 70 Wis. 440, 35 N. W. 925. "One who permits a railroad company to occupy and use his lands and construct its road (a quasi public work) thereon without remonstrance or complaint, can not afterward reclaim it free from the servitude he has permitted to be imposed upon it. His acquiescence to the company's taking possession, and constructing its works under circumstances which made imperative his resistance, if he ever intended to set up illegality, will be considered a waiver. But while this presumed waiver is a bar to his action to dispossess the company, he is not deprived of his action in damages for the value of the land or for injuries done him by the construction or operation of the road." *St. Julien v. Morgan &c. R. Co.*, 35 La. Ann. 924. That acquiescence in the construction of the road does not bar the land-owner's right to recover damages, see *Harlow v. Marquette &c. R. Co.*, 41 Mich. 336, 2 N. W. 48; *Thornton v. Sheffield &c. R. Co.*, 84 Ala. 109, 4 So. 197, 5 Am. St. 337; *Payne v. Morgan &c. R. Co.*, 43 La. Ann. 981, 10 So. 10; *Perkins v. Mairre Cent. R. Co.*, 72 Maine 95; *Western Pa. R. Co. v. Johnston*, 59 Pa. St. 290; *Galveston &c. R. Co. v. Pfeuffer*, 56 Tex. 66.

<sup>24</sup> *Texas &c. R. Co. v. Sutor*, 56 Tex. 496. See *Baltimore &c. R. Co. v. Algire*, 65 Md. 337, 4 Atl. 293. In *Watson v. Chicago &c. R. Co.*, 46 Minn. 321, 48 N. W. 1129. 46 Am. & Eng. R. Cas. 543, the court held that an action of ejectment could not be maintained against a railroad company for the recovery of land upon which it had constructed its road with the consent of the owner. And that the mesne profits from the date of the revocation of the license by the death of the licensor should be allowed as damages. In *Kremer v. Chicago &c. R. Co.*, 51 Minn. 15, 52 N. W. 977, 38 Am. St. 468, 51 Am. & Eng. R. Cas. 382, an assessment of damages as for a condemnation of the land was had in an action in ejectment for land held by a railroad company under a parol license, the railroad company having put in an answer praying for a condemnation; and the action of the court was approved on appeal.

<sup>25</sup> *Burrow v. Terre Haute &c. R. Co.*, 107 Ind. 432, 8 N. E. 167; *Messick v. Midland R. Co.*, 128 Ind. 81, 27 N. E. 419; *Williamston &c. R. Co. v. Battle*, 66 N. Car. 540. It is a settled rule of law that a license can not be revoked so long as it is essential to the enjoyment of a vested interest created by the licensor. *Provolt v. Chicago &c.*



occupy land for the right of way for a railroad will, in the absence of anything to the contrary, be construed to be a license to occupy the full width which the railroad is authorized by statute to acquire.<sup>26</sup> A railroad company, which has laid a track under a parol license from the land-owner, can enter upon the land and remove the rails and ties used in its construction, after the license is revoked.<sup>27</sup> But it has been held that, where its occupation of the land is wrongful, its track becomes a part of the realty and cannot be removed.<sup>28</sup> The conveyance of an easement by deed cannot be revoked.<sup>29</sup>

R. Co., 57 Mo. 256; *New Jersey &c. R. Co. v. Van Syckle*, 37 N. J. L. 496; *McAulay v. Western Vt. R. Co.*, 33 Vt. 311, 78 Am. Dec. 627.

<sup>26</sup> *Hargis v. Kansas City &c. R. Co.*, 100 Mo. 210, 13 S. W. 680. But see ante, § 1174.

<sup>27</sup> *Northern Central R. Co. v. Canton Co.*, 30 Md. 347; *Dietrich v. Murdock*, 42 Mo. 279, *Justice v. Nesquehoning Valley R. Co.*, 87 Pa. St. 28. See *Richmond &c. R. Co. v. Durham &c. R. Co.*, 104 N. Car. 658, 10 S. E. 659; note in 44 L. R. A. (N. S.) 568.

<sup>28</sup> *Meriam v. Brown*, 128 Mass. 391. In this case the court said: "Not having filed any written location, the corporation has not tak-

en or appropriated the plaintiff's land to its own use in such a sense as to justify its entry upon it or to obtain any legal title or right to use or occupy it. *Hazen v. Boston &c. R. Co.*, 2 Gray (Mass.) 574. It can not enter upon it, except as a trespasser, even for the purpose of removing the rails which it has placed there, and which, by their annexation to the soil, it has lost the right to remove." But see post, §§ 1269, 1270.

<sup>29</sup> *New Jersey &c. R. Co. v. Van Syckle*, 37 N. J. L. 496; *Hudson v. Leeds &c. R. Co.*, 16 Q. B. 796. See also *Galveston &c. R. Co. v. Pfeuffer*, 56 Tex. 66.

## CHAPTER XXXVIII.

### APPROPRIATION UNDER THE EMINENT DOMAIN.

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| <p>Sec.</p> <p>1215. Right may depend on whether two uses can co-exist without impairment.</p> <p>1216. Franchises.</p> <p>1217. Exclusive grants and franchises.</p> <p>1218. Buildings on right of way.</p> <p>1219. Exempt property.</p> <p>1220. Extent of taking.</p> <p>1221. Taking additional property.</p> <p>1222. Title or interest acquired.</p> <p>1223. Reversion on abandonment.</p> <p>1224. Width taken for right of way.</p> <p>1225. Taking right of way of another road—When not allowed.</p> <p>1226. When such taking is allowed.</p> <p>1227. Crossing another road.</p> <p>1228. Condemnation of right of way for other purposes—Highways.</p> | <p>Sec.</p> <p>1229. Condemnation of right of way for other purposes—Reservoir sites — Drainage.</p> <p>1230. Condemnation of right of way for other purposes—Telegraph and telephone lines.</p> <p>1231. What constitutes a taking—Generally.</p> <p>1232. No taking where no property right.</p> <p>1233. What constitutes a taking—Illustrative cases.</p> <p>1234. What constitutes a taking—Other illustrative cases.</p> <p>1235. Property damaged or injured — Constitutional and statutory provisions.</p> <p>1236. Property damaged—Illustrative cases.</p> |
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### § 1185 (950). Definition and nature of the eminent domain.—

In addition to the modes of acquiring a right of way, of which we have already treated, there is another of equal or greater importance, namely, the appropriation of property under the power of eminent domain. Of this power we shall treat generally in the present chapter in so far as it affects railroads. Eminent domain is the right or power of a sovereign state to appropriate private property to particular uses for the purpose of promoting the general welfare.<sup>1</sup> It is distinguished from the power of tax-

<sup>1</sup> See *Pollard v. Hagan*, 3 How. (U. S.) 212, 11 L. ed. 565; *Consumers' &c. Trust Co. v. Harless*, 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505; *East Tennessee &c. R. Co. v. Love*, 3 Head (Tenn.) 63; *Pittsburg &c. Co. v. Benwood Iron Works*, 2 L. R. A. 680 and note; *Mifflin Bridge Co. v. Juniata County*, 13 L. R. A. 431 and note. It is

"the power of the state to apply private property to public purposes on payment of just compensation to the owner." 10 Am. & Eng. Ency. of Law (2d ed.) 1047. See also *United States v. Jones*, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. ed. 1015; *Board of Health v. Van Hoesen*, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114; *Beekman v. Sara-*

ation in that its exercise operates upon an individual without reference to what is exacted from any other individual or class of individuals, and without reference to his ability to contribute toward the necessities of government.<sup>2</sup> It is also distinguished from the police power, by which the state assumes to direct the use that an owner shall make of his property so as not to interfere with the reasonable use and enjoyment by others of their property,<sup>3</sup> and also from the power, exercised by states, of taking or destroying property in the course of actual warfare,<sup>4</sup> for the owner of the property taken or damaged in the exercise of these powers is not entitled to compensation,<sup>5</sup> whereas the power of

toga &c. R. Co., 3 Paige (N. Y.) 72, 22 Am. Dec. 679 and note; Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681, 63 L. R. A. 820, 99 Am. St. 964; note in 102 Am. St. 811. See also definition given in various cases referred to in note in 22 L. R. A. (N. S.) 7 et seq. Where the nature of the power is elaborately considered.

<sup>2</sup> Aurora v. West, 9 Ind. 74; Griffin v. Dogan, 48 Miss. 11; People v. Mayor &c. of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266, and note; Cincinnati &c. R. Co. v. Clinton Co., 1 Ohio St. 77, 102; Hammett v. Philadelphia, 65 Pa. St. 146, 3 Am. Rep. 615. Special assessments for betterments are also referable to the power of taxation and not that of eminent domain. Hagar v. Board of Supervisors, 47 Cal. 222; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; White v. People, 94 Ill. 604; Baltimore v. Greenmount Cemetery, 7 Md. 517; Williams v. Detroit, 2 Mich. 560; Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451; Garrett v. St. Louis, 25 Mo. 505, 69 Am. Dec. 475; State v. Blake, 36 N. J. L. 442, 35 N. J.

L. 208; Hill v. Higdon, 5 Ohio St. 243; Hammett v. Philadelphia, 65 Pa. St. 146, 3 Am. Rep. 615; Woodhouse v. Burlington, 47 Vt. 300.

<sup>3</sup> Chicago &c. R. Co. v. Iowa, 94 U. S. 155, 24 L. ed. 94; Peik v. Chicago &c. R. Co., 94 U. S. 164, 24 L. ed. 97; Munn v. People, 69 Ill. 80; affirmed Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Hine v. New Haven, 40 Conn. 478; Bass v. State, 34 La. Ann. 494; Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694; Roosevelt v. Godard, 52 Barb. (N. Y.) 533; Houston &c. R. Co. v. Dallas, 98 Tex. 396, 84 S. W. 648; Davenport v. Richmond City, 81 Va. 639. Forbidding a railroad company to use its property in a way that would be dangerous to the lives of people is not a taking for public uses. Woodruff v. New York &c. R. Co., 59 Conn. 63, 20 Atl. 17, 45 Am. & Eng. R. Cas. 109, 112, note.

<sup>4</sup> Bell v. Louisville &c. R. Co., 1 Bush (Ky.) 404, 89 Am. Dec. 632; Ford v. Surget, 46 Miss. 130.

<sup>5</sup> See cases in preceding notes; also Aitken v. Wells River, 70 Vt. 308, 40 Atl. 829, 41 L. R. A. 566,

eminent domain can be effectively exercised only where due compensation is made. But the power of eminent domain embraces all cases where, by authority of the state, and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular use, either by the state itself or by a corporation, public or private, or by a private citizen,<sup>6</sup> provided only that the use be a public

67 Am. St. 672. And the right to destroy property to prevent the spreading of a fire, the ravages of a pestilence or other public calamity, is distinct from the right of eminent domain, and the owner can not claim compensation for property destroyed, even though the persons destroying it acted under authority of statute. *American Print Works v. Lawrence*, 23 N. J. L. 9 and 590, 615.

<sup>6</sup> *Westport &c. Co. v. Thomas*, 175 Ind. 319, 94 N. E. 406. The right which belongs to the society or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth in the state, is called the eminent domain. *Vattel*, B. I. C. 20, § 244; *Pollard v. Hagan*, 3 How. (U. S.) 212, 11 L. ed. 565. See *Enfield Toll Bridge v. Hartford &c. R. Co.*, 17 Conn. 40, 42 Am. Dec. 716 and note; *Todd v. Austin*, 34 Conn. 78; *Evansville &c. R. Co. v. Grady*, 6 Bush (Ky.) 144; *Nichols v. Somerset &c. R. Co.*, 43 Maine 356; *Brown v. Beatty*, 34 Miss. 227, 69 Am. Dec. 389; *Orr v. Quimby*, 54 N. H. 590, 611; *Giesy v. Cincinnati &c. R. Co.*, 4 Ohio St. 308; *Edgewood R. Company's Appeal*, 79 Pa. St. 257; *Beekman v. Saratoga &c. R. Co.*, 3 Paige (N. Y.) 45, 22 Am. Dec. 679 and note; *Freedle v.*

*North Carolina R. Co.*, 4 Jones (N. Car.) L. 89; *McLauchlin v. Charlotte R. Co.*, 5 Rich. (S. Car.) 583. Any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed, is a taking, within the constitutional provision that private property shall not be taken or damaged for public use without just compensation, to the extent of the damage suffered, even though the title and possession of the owner remain undisturbed. *Stockdale v. Rio Grande Western R. Co.*, 28 Utah 201, 77 Pac. 849. The property of a railroad company is not arbitrarily taken from it without compensation by a statute which imposed upon it the burden of showing, in proceedings to compel it to provide a station at an incorporated village on its line, that the establishment of a station there is unreasonable and unnecessary. *Judgment, State v. Minneapolis &c. R. Co.*, 87 Minn. 195, 91 N. W. 465, affirmed *Minneapolis &c. R. Co. v. Minnesota*, 193 U. S. 53, 24 Sup. Ct. 396, 48 L. ed. 614. A statute requiring railroads to keep their rights of way clear of dry vegetation and undergrowth,

one.<sup>7</sup> The establishment of a railroad as a purely private enterprise can not be aided by the power of eminent domain.<sup>8</sup> The power of eminent domain has existed in all ages as an acknowledged attribute of sovereignty.<sup>9</sup> It is inherent in every sovereign

so as to prevent fires, and providing that any corporation failing to comply therewith shall incur a penalty and be liable for all damages occasioned by such neglect, does not violate the constitutional inhibitions against taking private property for public use without compensation. *McFarland v. Mississippi River &c. R. Co.*, 175 Mo. 422, 75 S. W. 152. See also to same effect, *Chicago &c. Ry. Co. v. Anderson*, 182 Ind. 140, 105 N. E. 49.

<sup>7</sup> *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *Chicago &c. C. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *County Court v. Griswold*, 58 Mo. 175; *Giesy v. Cincinnati &c. R. Co.*, 4 Ohio St. 308. It rests in the wisdom of the legislature to determine when, and in what manner, the public necessities require its exercise, and with the reasonableness of the exercise of that discretion the courts will not interfere. *Swan v. Williams*, 2 Mich. 427; *Central &c. R. Co. v. Atchison &c. R. Co.*, 28 Kans. 453; *Wilkin v. First Div. St. Paul &c. R. Co.*, 16 Minn. 271; *Seacomb v. Milwaukee &c. R. Co.*, 29 How. Prac. N. Y. 75; *Bachler's Appeal*, 90 Pa. St. 207. Some courts consider the necessity for the taking as an important element in deciding whether the property is to be employed for a public use. And that to justify the exercise of the power, "it must be impossible, or very difficult, at least, to secure the same

public uses and purposes in any other way than by authorizing the condemnation of private property." *Varner v. Martin*, 21 W. Va. 534; *Jordan v. Woodward*, 40 Maine 317; *Ryerson v. Brown*, 35 Mich. 333, 24 Am. Rep. 564; *Dayton Min. Co. v. Seawell*, 11 Nev. 394. But this is decidedly opposed to the weight of authority. It is no objection to the exercise of the power, that lands equally feasible could be obtained by purchase. *Giesy v. Cincinnati &c. R. Co.*, 4 Ohio St. 308. It has been held that a law requiring a railroad company which has purchased the property of another railroad company at a mortgage foreclosure sale to pay a judgment against the latter company is an attempt to require private property to a private purpose. *Woodward v. Central Vermont R. Co.*, 180 Mass. 599, 62 N. E. 1051.

<sup>8</sup> *Maginnis v. Knickerbocker Ice Co.*, 112 Wis. 385, 88 N. W. 300, 69 L. R. A. 833 and note. Nor can a duly chartered commercial railroad exercise the power of eminent domain to acquire property for a private use. *Bradley v. Lithonia &c. R. Co.*, 141 Ga. 741, 82 S. E. 138; See post, §§ 1204, 1207.

<sup>9</sup> "It seems to have been accurately defined, and distinctly recognized, in the Roman empire, in the days of Augustus, and his immediate successors, although, from considerations of policy and personal influence and esteem, they

government,<sup>10</sup> and is not conferred by constitutions, but is limited and regulated by them.<sup>11</sup> It can not be surrendered by grant or contract,<sup>12</sup> since its continued exercise is essential to

did not always choose to exercise the right, to demolish the dwellings of the inhabitants, either in the construction of public roads or aqueducts, or ornamental columns, but to purchase the right of way." 1 Redfield Rail., p. 230. See also *Scudder v. Trenton & Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756.

<sup>10</sup> *United States v. Jones*, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. ed. 1015; *Hollister v. State*, 9 Idaho 8, 71 Pac. 541; *Penn. Mut. & C. Ins. Co. v. Heiss*, 141 Ill. 35, 31 N. E. 138, 33 Am. St. 273; *Water Works Co. v. Burkhart*, 41 Ind. 364; *Noll v. Dubuque & C. R. Co.*, 32 Iowa 66; *Weir v. St. Paul & C. R. Co.*, 18 Minn. 155; *Brown v. Beatty*, 34 Miss. 227, 69 Am. Dec. 389; *Chicago & C. R. Co. v. McCovey*, 273 Mo. 29, 200 S. W. 59; *Beekman v. Saratoga & C. R. Co.*, 3 Paige (N. Y.) 45, 22 Am. Dec. 679 and note; *White v. Nashville & C. R. Co.*, 7 Heisk. (Tenn.) 518; *Baltimore & C. R. Co. v. Pittsburgh etc. R. Co.*, 17 W. Va. 812, 841. Being an attribute of sovereignty, the power of eminent domain does not inhere in a territorial government. *Pratt v. Brown*, 3 Wis. 603; *Newcomb v. Smith*, 1 Chand. (Wis.) 71. But a territory may exercise the power by express delegation of authority from congress. *Warren v. First Div. St. Paul & C. R. Co.*, 18 Minn. 384. The Cherokee Nation is not a sovereign state and, therefore, does not possess the power of eminent domain. *Chero-*

*kee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. ed. 295.

<sup>11</sup> *Elliott Roads and Streets* (3d ed.), § 204, and other authorities there cited. See also *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. ed. 264; *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507, 12 L. ed. 535; *United States v. Jones*, 109 U. S. 518, 3 Sup. Ct. 346, 27 L. ed. 1017; *Central Branch & C. R. Co. v. Atchison & C. R. Co.*, 28 Kans. 453; 10 Am. & Eng. R. Cas. 528; note in 22 L. R. A. (N. S.) 7-17. *Bloodgood v. Mohawk & C. R. Co.*, 18 Wend. (N. Y.) 9, 31 Am. Dec. 313; *In re Rochester*, 224 N. Y. 659, 121 N. E. 859.

<sup>12</sup> *Elliott Roads & Streets* (3d ed.), § 209; *Greenleaf's Cruise Real Property*, Vol. II. p. 67, note; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. ed. 1165; *Alabama & C. R. Co. v. Kenney*, 39 Ala. 307; *Illinois & C. Canal v. Chicago & C. R. Co.*, 14 Ill. 314; *Baltimore & C. Turnpike Co. v. Union R. Co.*, 35 Md. 224, 6 Am. Rep. 397; *People v. Mayor & C. of New York*, 32 Barb. (N. Y.) 102. See *Eastern R. Co. v. Boston & C. R. Co.*, 111 Mass. 125, 15 Am. Rep. 13; *Lock Haven Bridge Co. v. Clinton Co.*, 157 Pa. St. 379, 27 Atl. 726. In his work on Constitutional Limitations Judge Cooley says: "When the existence of a particular power in the government is recognized on the ground

the existence of organized society.<sup>13</sup>

§ 1186. **Power inherent in states—Extent.**—This power exists in each of the states of the Union whether it is expressly conferred by the constitution or not,<sup>14</sup> and may extend to taking public lands of the United States that lie within the borders of the state exercising the power.<sup>15</sup> And it may also be exercised by the United States government in the discharge of constitutional powers to secure land for military roads, light houses, and other conveniences and necessities of government.<sup>16</sup> It extends

of necessity, no delegation of the legislative power of the people can be held to vest authority in the department which holds it in trust, to bargain away such power, or to so tie up the hands of the government as to preclude its repeated exercise, as often and under such circumstances as the needs of the government may require." *Cooley Const. Lim.* (7th ed.) 754.

<sup>13</sup> *Raleigh &c. R. Co. v. Davis*, 2 Dev. & B. Law (N. Car.) 451. "The right of eminent domain, that is, the ultimate right of the sovereign power to appropriate, not only the public property, but the private property of all the citizens within the territorial sovereignty, to public purposes, is inherent in the government; without this power, the state could not establish and open a highway of any kind. No railroad, canal or turnpike could be constructed; no ground upon which to build a public building could be procured by the state or government, in any other way than by contract with the owner." *Water Works Co. v. Burkhart*, 41 Ind. 364, per Osborn, J.

<sup>14</sup> *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *Brown v.*

*Beatty*, 34 Miss. 227, 69 Am. Dec. 389; *State v. Superior Court*, 77 Wash. 585, 137 Pac. 994; *Winona &c. R. Co. v. Watertown*, 4 S. Dak. 323, 56 N. W. 1077. See also *Alabama Interstate Power Co. v. Vernon-Woodberry &c. Co.*, 186 Ala. 622, 65 So. 287.

<sup>15</sup> *United States v. Railroad Bridge Co.*, 6 McL. (U. S.) 517. See and compare § 1201.

<sup>16</sup> *Kohl v. United States*, 91 U. S. 367; 23 L. ed. 449; *United States v. Gettysburg &c. R. Co.*, 160 U. S. 668, 16 Sup. Ct. 427, 40 L. ed. 576; *Chappell v. United States*, 160 U. S. 499, 16 Sup. Ct. 397, 40 L. ed. 510; *United States v. Oregon R. &c. Co.*, 16 Fed. 524, 14 Am. & Eng. R. Cas. 23; *Nahant v. United States*, 136 Fed. 273; *People v. Humphrey*, 23 Mich. 471, 9 Am. Rep. 94; *United States, Matter of*, 96 N. Y. 227; *Darlington v. United States*, 82 Pa. St. 382, 22 Am. Rep. 766; *Elliott Roads and Streets* (3d ed.), §§ 207, 208. But the United States may, and usually does, make use of the officers, tribunals and institutions of the state as its agents, in the accomplishment of its governmental functions, where this can be done with the consent



to taking property for any purpose and in any manner, by which the general welfare may be advanced, excepting so far as it is limited by constitutional restrictions.<sup>17</sup>

of the state. And, in the absence of any declaration to the contrary, the consent of the state will be presumed. *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525-532, 5 Sup. Ct. 995, 29 L. ed. 264; *United States v. Jones*, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. ed. 1015. And in some cases it has been held that the legislature can delegate to the agent of the United States the right of eminent domain for the purpose of obtaining land for a site for a post-office or other public buildings. *Burt v. Merchants' Ins. Co.*, 106 Mass. 356, 8 Am. Rep. 339; *Matter of United States*, 96 N. Y. 227; *Gilmer v. Lime Point*, 18 Cal. 229. *Reddall v. Bryan*, 14 Md. 444, 74 Am. Dec. 550. There is strong authority, however, for holding that a state can not exercise the power of eminent domain on behalf of another sovereignty, and that condemnation proceedings on behalf of the United States must be prosecuted by authority of its own laws. *People v. Humphrey*, 23 Mich. 471, 9 Am. Rep. 94, per Cooley, J.; *Darlington v. United States*, 82 Pa. St. 382, 22 Am. Rep. 766; *Jones v. United States*, Wis. 385, 4 N. W. 519.

<sup>17</sup> The accepted theory upon this subject appears to be this: In every sovereign state there resides an absolute and uncontrolled power of legislation. In Great Britain this complete power rests in the parliament; in the American states it resides in the people themselves

as an organized body politic. But the people, by creating the constitution of the United States, have delegated this power as to certain subjects, and under certain restrictions, to the congress of the Union, and that portion they can not resume, except as it may be done through amendment of the national constitution. For the exercise of the legislative power, subject to this limitation, they create, by their state constitution, a legislative department upon which they confer it; and granting it in general terms, they must be understood to grant the whole legislative power which they possessed, except so far as at the same time they saw fit to impose restrictions. While, therefore, the parliament of Britain possesses completely the absolute and uncontrolled power of legislation, the legislative bodies of the American states possess the same power except, first, as it may have been limited by the constitution of the United States; and, second, as it may have been limited by the constitution of the state. A legislative act can not, therefore, be declared void, unless its conflict with one of these instruments can be pointed out. *Cooley Const. Limit.* (7th ed.) 241; *United States v. Jones*, 109 U. S. 518, 3 Sup. Ct. 346, 27 L. ed. 1017; *Hobart v. Supervisors*, 17 Cal. 23; *Derby Tpk. Co. v. Parks*, 10 Conn. 522, 543, 27 Am. Dec. 700; *Cotten v. County Commissioners*, 6 Fla. 610; *Macon*

**§ 1187 (951). Constitutional provisions and questions.**—The constitution of the United States<sup>18</sup> and the constitutions of nearly

&c. R. Co. v. Davis, 13 Ga. 68; Chicago &c. R. Co. v. Smith, 62 Ill. 268, 14 Am. Rep. 99; Challiss v. Atchison &c. R. Co., 16 Kans. 117; Inhabitants of Durham v. Lewiston, 4 Maine 140; Norris v. Abingdon Academy, 7 Gill & J. (Md.) 7; Williams v. Detroit, 2 Mich. 560; Winona &c. R. Co. v. Waldron, 11 Minn. 515, 539, 88 Am. Dec. 100 and note; Central R. Co. v. Hetfield, 29 N. J. L. 206; People v. New York Cent. R. Co., 34 Barb. (N. Y.) 123, 138; People v. Supervisors, 17 N. Y. 235; Raleigh &c. R. Co. v. Davis, 2 Dev. & B. Law (N. Car.) 451; Butler's Appeal, 73 Pa. St. 448; Yancy v. Yancy, 5 Heisk. (Tenn.) 353, 13 Am. Rep. 5; Gentry v. Griffith, 27 Tex. 461; Danville v. Pace, 25 Grat. (Va.) 1, 18 Am. Rep. 663; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co., 17 W. Va. 812, 841. In some cases it is said that the only limitation upon the exercise of the right of eminent domain—the power of the state to take or authorize the taking of private property for public use—is that contained in the state constitutions. Wilson v. Baltimore &c. R. Co., 5 Del. Ch. 524. But see Elliott Roads and Streets, 142. For cases holding that the legislature can not pass any law opposed to natural right and justice, see Bowman v. Middleton, 1 Bay (S. Car.), 252; Terrett v. Taylor, 9 Cranch (U. S.) 43, 3 L. ed. 650, per Story, J.; Cairo &c. R. Co. v. Turner, 31 Ark. 494, 25 Am. Rep. 564; Doe v. Georgia

R. &c. Co., 1 Ga. 524; Harness v. Chesapeake &c. Canal Co., 1 Md. Ch. 248; Petition of Mount Washington Road Co., 35 N. H. 134; Bradshaw v. Rodgers, 20 Johns. (N. Y.) 103; Johnston v. Rankin, 70 N. Car. 550. The legislature under the power of eminent domain may authorize the condemnation of the stock of minority or dissenting stockholders in railroad corporations and statutes authorizing this procedure in furtherance of a public object are not open to the objection that they impair the obligation of contracts. Spencer v. Seaboard Air Line R. Co., 137 N. Car. 107, 49 S. E. 96; Offield v. New York &c. R. Co., 203 U. S. 372, 27 Sup. Ct. 72, 51 L. ed. 231. The vast extent of this power as to property that may be taken as well as in other respects is shown in the note in 22 L. R. A. (N. S.) 1, where many other cases are cited.

<sup>18</sup> Amendments of 1791, Art. 5. The provision in the constitution of the United States that private property shall not be taken for public use without just compensation, applies only to the operations of the federal government, and is not a limitation upon the power of the states. Pumpelly v. Green Bay Co., 13 Wall. (U. S.) 166, 20 L. ed. 557; Barron v. Baltimore, 7 Pet. (U. S.) 243, 8 L. ed. 672; Winous Point Shooting Club v. Caspersen, 193 U. S. 189, 24 Sup. Ct. 431, 48 L. ed. 675; Bemis v. Guirl Drainage Co., 182 Ind. 36, 105 N. E. 496; Cairo &c. R. Co. v. Turner, 31

all the states of the Union require a just compensation to be made for all property taken for public use, and most of them require the compensation to be paid or secured before the property is taken.<sup>19</sup> It can only be taken pursuant to "the law of the land," and, as constitutions do not create or execute the right of eminent domain, there must be a statute, in some way authorizing the seizure,<sup>20</sup> but, when a valid statute is enacted conferring the right to condemn, and providing for "due process of law," it stands as the law of the land.<sup>21</sup> The constitutional provision that "the right of trial by jury shall remain inviolate" does not require that a jury trial should be provided for in con-

Ark. 494, 25 Am. Rep. 564; Parham v. Justices, 9 Ga. 341; Renthorp v. Bourg, 4 Mart. (O. S.) (La.) 97; Martin v. Dix, 52 Miss. 53, 24 Am. Rep. 661; Concord R. Co. v. Greely, 17 N. H. 47; Livingston v. New York, 8 Wend. (N. Y.) 85, 22 Am. Dec. 622 and note; Raleigh &c. R. Co. v. Davis, 2 Dev. & B. L. (N. Car.) 451. Contra Doe v. Georgia R. &c. Co., 1 Ga. 524; Scudder v. Trenton &c. Co., 1 N. J. Eq. 694, 23 Am. Dec. 756. The fourteenth amendment, however, does seem to apply to state action. Elliott Roads and Streets (3rd ed.), § 212, note; See Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Kentucky Railroad Tax Cases, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. ed. 414; Chappell v. United States, 160 U. S. 499, 16 Sup. Ct. 397, 40 L. ed. 510; Chicago &c. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. ed. 979; Madisonville Tract. Co. v. St. Bernard Min. Co., 196 U. S. 239, 25 Sup. Ct. 251, 256, 49 L. ed. 462; Scott v. Toledo, 36 Fed. 385, 1 L. R. A. 688; Nahant v. United States, 136 Fed. 273, and compare Eldridge v. Binghamton, 120 N. Y.

309, 24 N. E. 462; Wilson v. Baltimore &c. R. Co., 5 Del. Ch. 524.

<sup>19</sup> It is not competent for the legislature to prescribe the amount of compensation to be paid for the property. What is "just compensation" is a judicial question. Pennsylvania R. Co. v. Baltimore &c. R. Co., 60 Md. 263.

<sup>20</sup> Chicago &c. Railroad Co. v. Lake, 71 Ill. 333; Gillette v. Aurora R. Co., 228 Ill. 261, 81 N. E. 1005; Allen v. Jones, 47 Ind. 438; Sisson v. Buena Vista Co., 128 Iowa 442, 104 N. W. 454, 70 L. R. A. 440; Phillips v. Dunkirk &c. R. Co., 78 Pa. St. 177; Galveston &c. R. Co. v. Mud Creek &c. Co., 1 Tex. App. (Civ. Cas.) 169; Elliott Roads and Streets (3rd ed.), §§ 217, 218.

<sup>21</sup> Secombe v. Railroad Co., 23 Wall. (U. S.) 108, 23 L. ed. 67; Alexander &c. R. Co. v. Alexander &c. R. Co., 75 Va. 780, 40 Am. Rep. 743 and note; Cooley's Const. Lim. (7th ed.) 760. See also note to Bank v. Cooper, 24 Am. Dec. 537; Barr v. New Brunswick, 67 Fed. 402.

demnation cases, and the legislature may deny a trial by jury.<sup>22</sup> But the constitutions of some of the states expressly require that the compensation shall be determined by a jury. The constitutional provision against the taking of property for a public use without compensation does not operate to prevent the acquisition of an easement in a right of way by adverse possession.<sup>23</sup>

**§ 1188 (952). Public use and necessity—Who determines.**—The courts almost uniformly agree in holding that property can only be taken under power of eminent domain for some use in which the public interest is involved,<sup>24</sup> unless the power to condemn property for private uses has been expressly delegated

<sup>22</sup> *Backus v. Lebanon*, 11 N. H. 19, 35 Am. Dec. 466; *Copp v. Henninger*, 55 N. H. 179, 20 Am. Rep. 194; *Scudder v. Trenton &c. Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756; *Beekman v. Saratoga &c. R. Co.*, 3 Paige (N. Y.) 45, 22 Am. Dec. 679; *Willyard v. Hamilton*, 7 Ohio 111, 30 Am. Dec. 195; *Elliott Roads and Streets* (3rd ed.), § 220. See also *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. ed. 1165; *United States v. Engerman*, 46 Fed. 176; *State v. Lyle*, 100 N. Car. 497, 6 S. E. 379.

<sup>23</sup> *Boyce v. Missouri Pacific R. Co.*, 168 Mo. 583, 68 S. W. 920, 58 L. R. A. 442.

<sup>24</sup> *Sadler v. Langham*, 34 Ala. 311; *Lorenz v. Jacob*, 63 Cal. 73; *United States v. Baltimore &c. R. Co.*, 27 App. (D. C.) 105; *Hand Gold Min. Co. v. Parker*, 59 Ga. 419; *Bankhead v. Brown*, 25 Iowa 540; *Bangor R. Co. v. McComb*, 60 Maine 290; *New Central Coal Co. v. George's Creek Coal &c. Co.*, 37 Md. 537; *Brown v. Beatty*, 34 Miss.

227, 69 Am. Dec. 389; *Dickey v. Tension*, 27 Mo. 373; *Concord R. Co. v. Greely*, 17 N. H. 47; *Bloodgood v. Mohawk &c. R. Co.*, 18 Wend. (N. Y.) 9, 56, 31 Am. Dec. 313 and note; *Beekman v. Railroad Co.*, 3 Paige (N. Y.) 45, 22 Am. Dec. 679 and note; *McQuillen v. Hatton*, 42 Ohio St. 202; *Witham v. Osborn*, 4 Ore. 318, 18 Am. Rep. 287; *Waddell's Appeal*, 84 Pa. St. 90; *Tyler v. Beacher*, 44 Vt. 648; 8 Am. Rep. 398; *Valley City Salt Co. v. Brown*, 7 W. Va. 191; *Varner v. Martin*, 21 W. Va. 534; *Osborn v. Hart*, 24 Wis. 89, 1 Am. Rep. 161. *Western Union Tel. Co. v. Pennsylvania R. Co.*, 123 Fed. 33. Many additional authorities to the same effect are cited in the note in 22 L. R. A. (N. S.) 24-35. The power can only be exercised to supply some existing public need or to gain some present public advantage; not with a view to contingent results dependent on a projected speculation. *Edgewood R. Co.'s Appeal*, 79 Pa. St. 257.

by a provision in the constitution.<sup>25</sup> They also agree that the power of eminent domain can only be exercised to meet some public necessity; that it is created by and grows out of an existing necessity. But the legislature is the proper authority to determine whether a necessity exists for the exercise of the power, and its determination of the question, within constitutional limits, is conclusive.<sup>26</sup> The propriety of the exercise of the

<sup>25</sup> In *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, 63, the chancellor says: "There is no prohibition in the constitution of this state, or in any of the state constitutions, that I know of, against taking private property for private use. But the power is nowhere granted to the legislature. The constitution vests in the senate and general assembly the legislative or law-making power. They can make laws, the rules prescribed to govern our civil conduct. They are not sovereign in all things; the executive and judicial power is not vested in them. Taking the property of one man and giving it to another is not making a law or rule of action, it is not legislation, it is simply robbery." The provision of the Colorado constitution, recognizing the right to appropriate private property for private ways of necessity, does not include the right to take and use it for the construction of private railroads. *People v. District Court*, 11 Colo. 147, 17 Pac. 298.

<sup>26</sup> *Shoemaker v. United States*, 147 U. S. 282, 13 Sup. Ct. 361, 37 L. ed. 170; *United States v. Oregon R. & Co.*, 16 Fed. 524; *Aldridge v. Tuscumbia & Co. R. Co.*, 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307; *Lent v. Tillson*, 72 Cal. 404, 14

Pac. 71; *Louisville & Co. R. Co. v. Louisville*, 131 Ky. 108, 114 S. W. 743; *Whiteman's Exr. v. Wilmington & Co. R. Co.*, 2 Harr. (Del.) 514, 33 Am. Dec. 411; *Chicago & Co. R. Co. v. Lake*, 71 Ill. 333; *Chicago & Co. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Pittsburgh & Co. R. Co. v. Sanitary Dist.* 218 Ill. 286, 75 N. E. 892, 2 L. R. A. (N. S.) 226; *Water Works Co. v. Burkhart*, 41 Ind. 364; *Consumers & Co. Trust Co. v. Harless*, 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505; *Speck v. Kenoyer*, 164 Ind. 431, 73 N. E. 896, 897, 898; *Westport Stone Co. v. Thomas*, 175 Ind. 319, 94 N. E. 406; *Chicago & Co. R. Co. v. Baugh*, 175 Ind. 419, 94 N. E. 571; *Cherokee v. Sioux City & Co.*, 52 Iowa 279, 3 N. W. 42; *Challiss v. Atchison & Co. R. Co.*, 16 Kans. 117, 126; *Brown v. Gerald*, 100 Maine 351, 61 Atl. 785, 70 L. R. A. 472, 109 Am. St. 526; *Moore v. Sanford*, 151 Mass. 285, 24 N. E. 323, 7 L. R. A. 151 and note; *Savannah v. Hancock*, 91 Mo. 54, 3 S. W. 215; *National Docks R. Co. v. Cent. R. Co.*, 32 N. J. Eq. 755, 763; *Wheeling & Co. R. Co. v. Toledo & Co.*, 72 Ohio St. 368, 74 N. E. 209, 106 Am. St. 622, 2 A. & E. Ann. Cas. 941; *Beekman v. Saratoga & Co. R. Co.*, 3 Paige (N. Y.) 45, 22 Am. Dec. 679 and note; *Buffalo & Co. R. Co. v.*

right of eminent domain is a political or legislative, and not a judicial, question; and the manner of its exercise by the legislature, except as to the matter of compensation, is unrestricted. The legislature is not bound to submit the question of the propriety of the exercise of the right of eminent domain to a judicial tribunal, but may exercise it itself, or delegate it to a jury, commission, or any other body, as it sees fit.<sup>27</sup> It has been held, however, that no more property can be taken than is required to meet the necessity which the legislature has de-

Brainard, 9 N. Y. 100; *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398; *Roanoke City v. Berkowitz*, 80 Va. 616; *Baltimore &c. R. Co. v. Pittsburg &c. R. Co.*, 17 W. Va. 812; *Elliott Roads and Streets*, (3rd ed.), § 212; and note in 22 L. R. A. (N. S.) 64, et seq., citing many additional authorities. Like the power to tax, it resides in the legislative department to which the delegation is made. It may be exercised directly or indirectly by that body, and it can only be restrained by the judiciary when its limits have been exceeded or its authority has been abused or perverted. *Kramer v. Cleveland &c. R. Co.*, 5 Ohio St. 140. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *Chicago &c. R. Co. v. Wiltse*, 116, Ill. 449, 6 N. E. 49; *County Court v. Griswold*, 58 Mo. 175; *Giesy v. Cincinnati &c. R. Co.*, 4 Ohio St. 308. The burden of proving the necessity in the particular case is held to be upon the railroad company seeking to condemn in *Louisiana &c. Co. v. Xavier Realty*, 115 La. Ann. 328, 39 So. 1,

and when a local board or body attempts to exercise a power of eminent domain not conferred on it by the legislature, its action is subject to review and control by the courts, state or federal. *Chicago &c. R. Co. v. Williams*, 148 Fed. 442.

<sup>27</sup> *Chicago &c. R. Co. v. Lake*, 71 Ill. 333; *Challiss v. Atchison &c. Co.*, 16 Kans. 117; *State v. Rapp*, 39 Minn. 65, 38 N. W. 926; *People v. Smith*, 21 N. Y. 595; *State v. Stewart*, 74 Wis. 620, 43 N. W. 947, 6 L. R. A. 394; *Elliott Roads and Streets* (3rd ed.), § 213. See further to the effect that it may be so delegated. *Eastern R. Co. v. Boston &c. R. Co.*, 111 Mass. 125, 15 Am. Rep. 13; *Bemis v. Guirl Drainage Co.*, 182 Ind. 36, 105 N. E. 496; *Richland School Twp. v. Overmeyer*, 164 Ind., 382, 73 N. E. 811; *Wheeling &c. R. Co. v. Toledo &c. Co.*, 72 Ohio St. 368, 74 N. E. 209, 106 Am. St. 622, 2 A. & E. Ann. Cas. 941; *Sears v. Akron*, 246 U. S. 242, 38 Sup. Ct. 245, 62 L. ed. 688 (necessity and extent of taking is legislative question, but legislature may refer the issue to courts). Compare also *Eckart v. Ft. Wayne &c. T. Co.*, 181 Ind. 352, 104 N. E. 762.

clared to exist, and that the legislature can not authorize a corporation to take all of a tract of land without the owner's consent when only a part thereof is necessary for the prosecution of a public enterprise.<sup>28</sup> And the question as to whether the particular use for which property is sought to be taken in any case is a public use, unlike the somewhat similar question of the necessity or expediency of taking property for public use, is a

<sup>28</sup> *Baltimore v. Calumet*, 23 Md. 449; *Albany Street, In re*, 11 Wend. (N. Y.) 149, 25 Am. Dec. 618 and note; *Dunn v. Charleston*, Harp. L. (S. Car.) 189; *Embury v. Conner*, 3 Comst. (N. Y.) 511. In this latter case, Jewett, J., speaking for the court, said: "It needs no argument to show that the end and design of this section was not to take private property for the use of the public. It manifestly goes upon the ground that the property so authorized to be taken is not wanted for the purpose of forming or improving a street, the object in view for which the proceedings are instituted." And he refers with approval to *Albany Street, In re*, supra, in which the court holds that if the provision was meant to authorize the corporation to take additional property not needed for public use, with the consent of the owner, it was valid. "But if it was to be taken literally, that the commissioners might, against the consent of the owner, take the whole lot, when only a part was required for public use, and the residue to be applied to private use, it assumed a power which the legislature did not possess." See also *Louisiana &c. Co. v. Xavier Realty Co.*, 115 La. Ann. 328, 39 So. 1; *Chicago &c. R. Co. v. Williams*, 148 Fed. 442 (holding

that the court may examine into question of necessity of taking property already devoted to a public use). And see authorities reviewed in *Bennett v. Marion*, 106 Iowa 628, 76 N. W. 844; and in note in 22 L. R. A. (N. S.) 72-76. In England, under the statute, where the taking of a part of the premises destroys the value of the remaining portion for the purpose for which it is used, the owner can compel the company to take the whole. Thus a man having his dwelling-house in a tract of two and one-eighth acres of ground, surrounded by brick walls, used part of the land as a nursery garden for trade purposes. It was held that he was entitled under § 92 of the land clause act, 1845, to compel a railway company, proposing, without actually touching the house, to take the greenhouses and a part which had been planted and used for ornamental purposes, to take the whole of the land. *Salter v. Metropolitan District R. Co.*, L. R. 9 Eq. 432. And a manufactory which was run partly by water-power was permitted to compel a railroad company that proposed to take the bed of the stream from which the water-power was obtained, to take the whole manufactory. *Furniss v. Midland R. Co.*, L. R. 6 Eq. 473.

judicial question.<sup>29</sup> And it has been held in Colorado that the question of necessity is not to be determined by commissioners; their duty is merely to determine the quantity of land needed.<sup>30</sup>

<sup>29</sup> *Sears v. Akron*, 246 U. S. 242, 38 Sup. Ct. 245, 62 L. ed. 688; *Denver &c. Co. v. Union Pac. R. Co.*, 34 Fed. 386; *Sadler v. Langham*, 34 Ala. 311; *Mountain Park Terminal R. Co. v. Field*, 76 Ark. 239, 88 S. W. 897, 898 (citing text); *Stockton &c. R. Co. v. Stockton*, 41 Cal. 147; *Consolidated Channel Co. v. Central Pac. R. Co.*, 51 Cal. 269; *Loughbridge v. Harris*, 42 Ga. 500; *Logan v. Stogdale*, 123 Ind. 372, 24 N. E. 135, 8 L. R. A. 58 and note; *Bankhead v. Brown*, 25 Iowa 540; *Brown v. Gerald*, 100 Maine 351, 61 Atl. 785, 70 L. R. A. 472, 109 Am. St. 526; *New Central Coal Co. v. George's Creek Coal &c. Co.*, 37 Md. 537; *Talbot v. Hudson*, 16 Gray (Mass.) 417; *St. Paul &c. R. Co.*, In re, 34 Minn. 227, 25 N. W. 345; *Stewart v. Great Northern R. Co.*, 65 Minn. 515, 68 N. W. 208, 33 L. R. A. 427; *Savannah v. Hancock*, 91 Mo. 54, 3 S. W. 215; *St. Joseph &c. R. Co. v. Hannibal &c. R. Co.*, 94 Mo. 535, 6 S. W. 691; *Dayton &c. Mining Co. v. Seawell*, 11 Nev. 394; *Concord R. Co. v. Greely*, 17 N. H. 47; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54; *Deansville Cemetery Assn., Matter of*, 66 N. Y. 569, 23 Am. Rep. 86; *McQuillen v. Hatton*, 42 Ohio St. 202; *Anderson v. Turbeville*, 6 Coldw. (Tenn.) 150; *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398; *Varner v. Martin*, 21 W. Va. 534, 550; *Pittsburgh &c. R. Co. v. Benwood Iron Works*, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680; *Cozad v. Kanawha &c. Co.*, 139 N.

Car. 283, 51 S. E. 932; 1 *Elliott Roads & Sts.* (3rd ed.), § 214; note in 22 L. R. A. (N. S.) 50-55, where numerous other cases are cited to same effect. In *Bridwell v. Gate City Terminal Co.*, 127 Ga. 520, 56 S. E. 624, 627, it is said: "In determining whether the use to which it is sought to appropriate land of a property owner is a public or a private use, all the facts and circumstances throwing light on that subject may be considered, and the mere fact that the company may have a charter to build a railroad, regular on its face, is not conclusive as to the question of the purpose for which the property is actually sought to be taken." See also *New Orleans Terminal Co. v. Teller*, 113 La. Ann. 733, 37 So. 624, 38 Am. & Eng. R. Cas. 64; 1 *Elliott Roads & Sts.* (3rd ed.), § 214. In one case where no objection was made to the appointment of commissioners, and no attempt was made to submit to the court questions of whether the taking of the land was for a private use, or whether there was a necessity therefore until after the report was filed, it was held that the right to have such questions determined by the court was waived. *Union Pac. R. Co. v. Colorado Postal Tel. Cable Co.*, 30 Colo. 133, 69 Pac. 564.

<sup>30</sup> *Union Pacific R. Co. v. Colorado &c. Cable Co.*, 30 Colo. 133, 69 Pac. 564. See also *Vinegar Bend Lumber Co. v. Oak Grove &c. R. Co.*, 89 Miss. 117, 43 So. 292.



§ 1189. **Effect of legislative determination of public use in first instance.**—The legislature may determine what is a public use in the first instance, and great respect is paid by the courts to such determination.<sup>31</sup> But, as shown in the last preceding section, such determination is not conclusive so as to prevent judicial inquiry and determination. The question is ultimately one for the courts even where the legislature has expressly declared the use to be a public one.<sup>32</sup>

§ 1190 (952a). **Public use and necessity—What constitutes public use.**—The authorities as to what constitutes a public use are hopelessly conflicting, some cases holding that the term “public use” is equivalent to “public benefit,”<sup>33</sup> and that whatever is beneficially employed for the community is of public use,<sup>34</sup> while some other cases hold that, to constitute a public use, the public must assume control of the property taken, or some right

<sup>31</sup> *Farmer v. Treasury Tunnel &c. Co.*, 35 Colo. 593, 83 Pac. 464, 4 L. R. A. (N. S.) 106; *New York &c. R. Co. v. Offield*, 77 Conn. 417, 59 Atl. 510; *Mull v. Indianapolis &c. Trac. Co.*, 169 Ind. 214, 81 N. E. 657 (presumption that it is public use when so declared by legislature); *Sisson v. Buena Vista Co.*, 128 Iowa 442, 104 N. W. 454, 70 L. R. A. 440.

<sup>32</sup> *In re, Madera Irr. Dist. &c.* 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. 106, 14 L. R. A. 755; *San Mateo Co. v. Coburn*, 130 Cal. 631, 63 Pac. 78, 621; *Logan v. Stogsdale*, 123 Ind. 372, 24 N. E. 135, 8 L. R. A. 58; *Van Witsen v. Gutman*, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403; *Waterloo &c. Co. v. Shanahan*, 128 N. Y. 345, 28 N. E. 358, 14 L. R. A. 481; *Highland &c. Min. Co. v. Strickley*, 28 Utah 215, 78 Pac. 296, 1 L. R. A. (N. S.) 976, 107 Am. St. 711; affirmed in *Strickley v. High-*

*land Boy Gold Min. Co.*, 200 U. S. 527, 26 Sup. Ct. 301, 50 L. ed. 581; *Walker v. Shasta Power Co.*, 160 Fed. 856, 19 L. R. A. (N. S.) 725.

<sup>33</sup> *Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221; *Hand Gold Min. Co. v. Parker*, 59 Ga. 419; *Bellona Company's Case*, 3 Bland. Ch. (Md.) 442; *Talbot v. Hudson*, 16 Gray (Mass.) 417; *Beekman v. Saratoga &c. R. Co.*, 3 Paige (N. Y.) 45, 73, 22 Am. Dec. 679 and note; *Seely v. Sebastian*, 4 Ore. 25; *Pittsburgh v. Scott*, 1 Pa. St. 309. But see *Brown v. Gerald*, 100 Maine 351, 61 Atl. 785; *Gaylord v. Sanitary Dist.*, 204 Ill. 576, 68 N. E. 522, 63 L. R. A. 582, 98 Am. St. 235; *Niagara Falls R. Co.*, In re, 108 N. Y. 375, 15 N. E. 429; and note in 22 Am. Dec. 688, 704; and 102 Am. St. 813, 822, et seq.

<sup>34</sup> *Aldridge v. Tuscomb &c. R. Co.*, 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307.

to use the property must pass to the public.<sup>35</sup> The courts have often referred to the fact that this is a perplexing and difficult question,<sup>36</sup> and no exact and arbitrary definition or test has been, or can be, formulated by which the question can be determined in all cases.<sup>37</sup> It would be impossible to reconcile all the authorities upon the general subject, and no attempt will be made here to do so. Indeed, all that we are now interested in, and all that is pertinent to this work, is to determine the question in its relation only to railroads.<sup>38</sup>

**§ 1191. Public use—General rules and illustrations.**—It is generally conceded that, to be public, it is not essential that the user should be such as to directly benefit all, or any considerable part, of the entire community,<sup>39</sup> but the use and benefit must, as

<sup>35</sup> *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507, 546, 12 L. ed. 535; *Sholl v. German Coal Co.*, 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379; *Jenal v. Green Island Drainage Co.*, 12 Nebr. 163, 10 N. W. 547; *Eureka &c. Mfg. Co.*, Matter of, 96 N. Y. 42; *Memphis Freight Co. v. Memphis*, 4 Coldw. (Tenn.) 419; *Varner v. Martin*, 21 W. Va. 534. See also *De Camp v. Hibernia R. Co.*, 47 N. J. L. 43; *Twelfth St. Market Co. v. Philadelphia &c. R.*, 142 Pa. St. 580, 21 Atl. 902, 989. Other courts have been contented to say merely that "public use" means use by the public. *Arnsperger v. Crawford*, 101 Md. 247, 61 Atl. 413, 70 L. R. A. 497; *Slater v. White River &c. Co.*, 39 Wash. 648, 82 Pac. 150, 2 L. R. A. (N. S.) 842.

<sup>36</sup> *Howard Mills Co. v. Schwartz Lumber &c. Co.*, 77 Kans. 599, 95 Pac. 559, 18 L. R. A. (N. S.) 356; *Chicago &c. R. Co. v. Morehouse*, 112 Wis. 1, 87 N. W. 849, 88 Am. St. 918, 56 L. R. A. 240, and cases

cited in next following note.

<sup>37</sup> *Tanner v. Treasury Tunnel &c. Co.*, 35 Colo. 593, 83 Pac. 464, 4 L. R. A. (N. S.) 106; *Sholl v. German &c. Co.*, 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379; *Paxton &c. Co. v. Farmers' &c. Co.*, 45 Nebr. 884, 64 N. W. 343, 50 Am. St. 585; *Re Niagara Falls &c. R. Co.*, 108 N. Y. 375, 15 N. E. 429; *Ryan v. Louisville &c. R. Co.*, 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303; *Valley City Salt Co. v. Brown*, 7 W. Va. 191.

<sup>38</sup> For an elaborate consideration of the general subject, reviewing many cases, see note in 22 L. R. A. (N. S.) 35, et seq.

<sup>39</sup> *Aldridge v. Tuscumbia &c. R. Co.*, 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307; *Sadler v. Langham*, 34 Ala. 311; *Gilmer v. Lime Point*, 18 Cal. 229; *Sherman v. Buick*, 32 Cal. 241, 91 Am. Dec. 577, and note; *O'Reiley v. Kankakee Valley &c. Co.*, 32 Ind. 169; *Chesapeake Stone Co. v. Moreland*, 31 Ky. L. 1075, 104 S. W. 762, 16 L. R. A. (N. S.)

a general rule, be common to all members of the community who choose to avail themselves of it,<sup>40</sup> although it has been held that a union depot company organized to provide depot and terminal facilities for a number of railroads may be authorized to condemn property for that purpose.<sup>41</sup> There is a late decision to the effect that a statute giving a street railroad a right to use a certain

479; *Riche v. Bar Harbor Water Co.*, 75 Maine 91, 28 Alb. L. J. 498; *Talbot v. Hudson*, 16 Gray (Mass.) 417; *Chicago &c. R. Co. v. Porter*, 43 Minn. 527, 2 Am. R. & Corp. Rep. 415 and note on page 425; *Bloomfield &c. Co. v. Richardson*, 63 Barb. (N. Y.) 437; *Shaver v. Starrett*, 4 Ohio St. 494; *McQuillen v. Hatton*, 42 Ohio St. 202; *Warren v. Bunnell*, 11 Vt. 600; *Elliott Roads and Streets* (3d ed.), §§ 215, 216, quoted with approval in *Madison v. Gallagher*, 159 Ill. 105, 42 N. E. 316, 317, and in *Cozad v. Kanawha &c. Co.*, 139 N. Car. 283, 51 S. E. 932, 934. See also *Westport &c. Co. v. Thomas*, 175 Ind. 319, 94 N. E. 406; *Zircle v. Southern R. Co.*, 102 Va. 17, 45 S. E. 802, 102 Am. St. 805; *State v. Superior Court*, 83 Wash. 445, 145 Pac. 421 (it is the nature of the use rather than its extent that determines its public character).

<sup>40</sup> *Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27; *Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221; *Ulmer v. Lime Rock R. Co.*, 98 Maine 579, 57 Atl. 1001, 66 L. R. A. 387; *Brown v. Gerald*, 100 Maine 351, 61 Atl. 785, 70 L. R. A. 472, 109 Am. St. 526. *Township Board v. Hackmann*, 48 Mo. 243; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54; *McQuillen v. Hatton*, 42 Ohio St.

202; *Williams v. School District*, 33 Vt. 271; *Elliott Roads and Streets* (3d ed.), §§ 215, 216. See also note in 102 Am. St. 813. It does not depend upon the amount of business, but upon the right of the public generally to use the road or conduct business with it as a common carrier. *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111, 40 Am. & Eng. R. Cas. 449; *Concord R. Co. v. Greely*, 17 N. H. 47. See also *Westport &c. Co. v. Thomas*, 175 Ind. 319, 94 N. E. 406. But see *Pittsburgh &c. R. Co. v. Benwood Iron Works*, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680 and note. The furnishing of electricity for the use of extensive street surface railroads, constitutes a "public use" within the meaning of that phrase in relation to eminent domain. *Niagara &c. Power Co.*, In re, 111 App. Div. 686, 97 N. Y. S. 853. As to inadequacy of use by the general public as a universal test, see *Clark v. Nash*, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. ed. 1095; *Strickley v. Highland Boy Gold Min. Co.*, 200 U. S. 527, 26 Sup. Ct. 301, 50 L. ed. 581.

<sup>41</sup> *Fort Street Union Depot Co. v. Morton*, 83 Mich. 265, 47 N. W. 228, 3 Am. R. & Corp. Rep. 438; *Riley v. Charleston &c. Co.*, 71 S. Car. 457, 51 S. E. 485.

amount of the tracks of another street railroad company, on payment of damages, is unconstitutional, as an exercise of the right of eminent domain. It was held that the object of the statute was not the benefit of the general public, but a scheme to aid a new corporation in taking possession of the franchises of the old corporation for its own benefit, and a clear violation of the principles underlying the right of eminent domain.<sup>42</sup> But the mere fact that the advantage of the railroad inures to especially a particular individual or class of individuals will not deprive it of its public character.<sup>48</sup> And it has been held that the question of public use does not depend on the length of the road,<sup>44</sup> or whether it is only a branch road,<sup>45</sup> or that its rolling stock is to be furnished by another corporation,<sup>46</sup> or that its stockholders are also stockholders in a corporation which will be primarily benefited by its construction.<sup>47</sup>

**§ 1192 (952b). Public use and necessity—Continued.**—On this subject the New York Court of Appeals has said: "To justify the taking of land, in invitum its owner, for railroad purposes, not only the necessity must exist, but that necessity must be recognized by statute and be provided for in some plain grant of power. That a railroad purpose usually subserves a public use is true; but the precise authority to take the land desired by condemnation proceedings must always be found, and whether it exists, and whether it is available, in the case presented, are questions for judicial determination. The courts are to decide

<sup>42</sup> Philadelphia &c. R. Co., In re, 203 Pa. 354, 53 Atl. 191.

<sup>43</sup> Madera R. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27. See also post, §§ 1204, 1206.

<sup>44</sup> Madera R. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27; Kansas &c. Coal R. Co. v. Northwestern &c. Co., 161 Mo. 288, 61 S. W. 684, 51 L. R. A. 936, 84 Am. St. 717.

<sup>45</sup> Madera R. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27; Rochester &c. Coal &c.

Co. v. Berwin-White &c. Co., 24 Pa. Co. Ct. 104; State v. Superior Ct., 42 Wash. 675, 85 Pac. 669. See also post §§ 1204, 1206.

<sup>46</sup> Madera R. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27. See also Bridal Veil &c. Co. v. Johnson, 30 Ore. 205, 46 Pac. 790, 34 L. R. A. 368, 60 Am. St. 818.

<sup>47</sup> Madera R. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27.

whether the uses, for which the land is demanded, are, in fact, public, and within the intendment of the statute."<sup>48</sup> The question of the right of interurban roads to exercise this power is elsewhere considered, but it is said, in a recent case, that the courts proceed upon the theory that the road must be of benefit to the rural inhabitants along the route traversed, and not that only those living in towns where regular stations shall be maintained shall be the beneficiaries, and the courts, applying this principle, held that, where the country districts are so sparsely settled that the traffic along railroad lines paralleled by such interurban lines will not support the electric railroads, then their construction is not a public necessity, and the power of eminent domain cannot be called into action on their behalf under the Illinois statute.<sup>49</sup> It has been held that the fact that citizens guarantee a railroad company that property needed for its terminal facilities shall not cost beyond a certain amount, does not make use of such terminal facilities a private use so as to prevent the company from taking the property under the power of eminent domain.<sup>50</sup>

**§ 1193 (952c). Exercise of power by corporation exercising both public and private functions.**—The question has been raised whether a corporation authorized to pursue private, as well as public objects, may exercise the right of eminent domain at all. Those raising this question contend that, to permit condemnation by such corporations, would be equivalent to allowing the taking of private property for private purposes. The point seems well taken in cases where it is sought to condemn the property for one of the private objects for which the company was incorporated, but is without force where the property is demanded for a public use under the articles of incorporation.<sup>51</sup> In one of the decisions reaching this conclusion it was said: "If a private use is combined with a public one in such a way that the two can not

<sup>48</sup> *Erie R. Co. v. Steward*, 170 N. Y. 172, 63 N. E. 118.

<sup>49</sup> *Hartshorn v. Illinois &c. T. Co.*, 210 Ill. 609, 71 N. E. 612; But compare *Eckart v. Ft. Wayne &c.*

*T. Co.*, 181 Ind. 352, 104 N. E. 762.

<sup>50</sup> *Louisiana &c. R. Co. v. Moseley*, 117 La. 313, 41 So. 585.

<sup>51</sup> *State v. Centralia-Chehalis &c. Co.*, 42 Wash. 632, 85 Pac. 344.

be separated, then unquestionably the right of eminent domain could not be invoked to aid the enterprise, but it has been said, and it seems to us that it is a better reason, that, where the two are not so combined as to be inseparable, the good may be separated from the bad, and the right exercised for the uses that are public."<sup>52</sup> Another court says: "We see no greater reason for denying to a private corporation the power of eminent domain for the promotion of a public use because, by its charter, it is also authorized to engage in a private enterprise, than to deny to a private person the same power because he is inherently endowed with the same authority."<sup>53</sup> But, where a proceeding is instituted to condemn, for both public and private use, that is, for a purpose part public and part private, the right to proceed is usually denied.<sup>54</sup>

**§ 1194 (953). Delegation of the power of eminent domain.—**The legislature may appropriate property under the power of eminent domain by an act specifying the property required and the use to which it is to be devoted,<sup>55</sup> and when it has declared the necessity for taking certain property by regular enactment such act must be held to be, for this purpose, the law of the land, and no further finding or adjudication on that subject can be essential, unless the constitution of the state expressly so requires;<sup>56</sup> or it may declare the purpose for which property is to

<sup>52</sup> *State v. Centralia-Chehalis & Co.*, 42 Wash. 632, 85 Pac. 344. See also *Brown v. Gerald*, 100 Maine, 351, 61 Atl. 785, 70 L. R. A. 472; *Niagara Falls & C. R. Co., In re*, 108 N. Y. 375, 15 N. E. 429; *Bridwell v. Gate City Terminal Co.*, 127 Ga. 520, 56 S. E. 625.

<sup>53</sup> *Irrigation Co. v. Klein*, 63 Kans. 484, 65 Pac. 684.

<sup>54</sup> *Chicago & C. R. Co. v. Galt*, 133 Ill. 657, 23 N. E. 425, 24 N. E. 674; *Gaylord v. Sanitary Dist.* 204 Ill. 576, 68 N. E. 522, 63 L. R. A. 582, 98 Am. St. 235; *Minnesota & C. Co. v. Koochiching Co.*, 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638.

<sup>55</sup> *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *Mims v. Macon & C. R. Co.*, 3 Ga. 333; *Hingham & C. Tpk. Co. v. County of Norfolk*, 6 Allen (Mass.) 353; *Union Ferry Co., Matter of*, 98 N. Y. 139; *Genet v. Brooklyn*, 99 N. Y. 296; *Application of New York, Matter of*, 99 N. Y. 569 (affirming 34 Hun 441); *Smedley v. Irwin*, 51 Pa. 445; *Towanda Bridge Co., In re*, 91 Pa. St. 216; *Township of Mahoney v. Comry.*, 103 Pa. St. 362; *Baltimore & C. R. Co. v. Pittsburgh & C. R. Co.*, 17 W. Va. 812.

<sup>56</sup> *Secombe v. Railroad Co.*, 23 Wall. (U. S.) 108, 23 L. ed. 67; *Kramer v. Cleveland & C. R. Co.*,

be taken and leave the selection of the property to be taken to whatever agencies it pleases, for it has the sole power to judge what persons, corporations, or other agencies may properly be clothed with this power, subject only to the limitations imposed by the constitution.<sup>57</sup> Thus, the right to take private property for a recognized public use may be conferred upon an individual,<sup>58</sup> or upon a corporation, whether municipal,<sup>59</sup> or

5 Ohio St. 140; *Alexandria &c. R. Co. v. Alexandria &c. R. Co.*, 75 Va. 780, 40 Am. Rep. 743, and note, 10 Am. & Eng. R. Cas. 23.

<sup>57</sup> *Gilmer v. Lime Point*, 18 Cal. 229; *Tide Water Canal Co. v. Archer*, 9 Gill & J. (Md.) 479; *Concord R. Co. v. Greely*, 17 N. H. 47; *Ash v. Cummings*, 50 N. H. 591; *Yost's Report*, 17 Pa. St. 524; *Elliot Roads and Streets*, (3d ed.), §§ 212, 213; note in 22 L. R. A. (N. S.) 17, et seq.

<sup>58</sup> *Morgan v. Louisiana*, 93 U. S. 217, 23 L. ed. 860; *Clark v. Nash*, 198 U. S. 361, 22 Sup. Ct. 676, 49 L. ed. 1085, affirming 27 Utah 158, 75 Pac. 371, 101 Am. St. 953; *Moran v. Ross*, 79 Cal. 159, 21 Pac. 547, 39 Am. & Eng. R. Cas. 1; *Lawrence v. Morgan's La. &c. R. Co.*, 39 La. Ann. 427, 2 So. 69, 4 Am. St. 265; *Lebanon v. Olcott*, 1 N. H. 339; *Petition of Kerr*, Matter of, 42 Barb. (N. Y.) 119; *Plecker v. Rhodes*, 30 Grat. (Va.) 795; *Pratt v. Brown*, 3 Wis. 603. The provision of the Cal. Const. art. 1 § 14, that a corporation can not exercise the right of eminent domain except upon certain conditions, does not imply a prohibition against the exercise of such right by individuals. And it is imma-

terial to the right of an individual to condemn land for a railroad that a railroad corporation had previously located a road on that line, and built on a part of it. *Moran v. Ross*, 79 Cal. 159, 21 Pac. 547, 39 Am. & Eng. R. Cas. 1. But see as to right of courts to examine into question of necessity where only a general power is conferred on the agency of the state which is seeking to retake property already devoted to a public use. *Chicago &c. R. Co. v. Williams*, 148 Fed. 442. An individual has no power to acquire land for railroad purposes in New York, and this is probably true in most states. *People v. Erie R. Co.*, 198 N. Y. 369, 91 N. E. 849, 29 L. R. A. (N. S.) 240, 246. See also *William Cramp & Sons Ship Building &c. Co. v. International &c. Co.*, 246 U. S. 28, 38 Sup. Ct. 271, 62 L. ed. 560.

<sup>59</sup> *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758; *Reddall v. Bryan*, 14 Md. 444, 74 Am. Dec. 550; *Kane v. Baltimore*, 15 Md. 240; *Wayland v. County Commissioners*, 4 Gray (Mass.) 500; *Ham v. Salem*, 100 Mass. 350; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162; *Mayor &c. of New York v. Bailey*, 2 Denio (N. Y.) 433; *Rochester Water*

private,<sup>60</sup> except in so far as the constitution forbids. And it may be conferred by a general act or general incorporation laws upon all individuals or corporations complying with the terms of such laws.<sup>61</sup>

**§ 1195 (954). Delegation of the power to railroad companies—Extent of authority.**—Since railroads are regarded as of public utility, the delegation to a railroad corporation of the power to take, by proceedings in invitum, the necessary lands upon which to build its road, is upheld by all the courts.<sup>62</sup> A general law in regard to the assessment of damages in condemnation proceedings will not supersede the provisions of special charters on the

Commissioners, *In re*, 66 N. Y. 413. The right to condemn property under the laws of the state may be conferred on the United States government. *Gilmer v. Lime Point*, 18 Cal. 229; *Burt v. Merchants' Ins. Co.*, 106 Mass. 356, 8 Am. Rep. 339; ante, § 1185.

<sup>60</sup> *Mims v. Macon &c. R. Co.*, 3 Ga. 333; *Hand Gold Mining Co. v. Parker*, 59 Ga. 419; *Concord R. Co. v. Greely*, 17 N. H. 47; *Bloodgood v. Mohawk &c. R. Co.*, 18 Wend. (N. Y.) 9, 31 Am. Dec. 313 and note; *Buffalo &c. City R. Co. v. Brainard*, 9 N. Y. 100; *Louisville &c. R. Co. v. Chappell*, Rice L. (S. Car.) 383; *Tide-Water Canal Co. v. Archer*, 9 Gill & J. (Md.) 479. The power of legislatures to grant this to railroad companies is well settled. *New York &c. R. Co. v. Offield*, 77 Conn. 417, 59 Atl. 570; *Moody v. Jacksonville &c. R. Co.*, 20 Fla. 597; note in 22 L. R. A. (N. S.) 109, and numerous cases cited in next following and subsequent sections.

<sup>61</sup> *Weir v. St. Paul &c. R. Co.*, 18 Minn. 155; *National Docks R.*

*Co. v. Central R. Co.*, 32 N. J. Eq. 755; *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475. A general statute authorizing the creation of an indefinite number of railroad corporations, making such corporations common carriers, and requiring them to be constantly engaged in such public employment, may also constitutionally authorize them to take private property for their roads on making compensation. *Buffalo &c. R. Co., v. Brainard*, 9 N. Y. 100.

<sup>62</sup> *Bonaparte v. Camden &c. R. Co.*, 1 Bald. (U. S.) 205; *Cairo &c. R. Co. v. Turner*, 31 Ark. 494, 25 Am. Rep. 564; *San Francisco &c. R. Co. v. Caldwell*, 31 Cal. 367; *Enfield Toll Bridge v. Hartford &c. R. Co.*, 17 Conn. 40, 42 Am. Dec. 716 and note; *Lexington &c. R. Co. v. Applegate*, 8 Dana (Ky.) 289, 33 Am. Dec. 497 and note; *Ash v. Cummings*, 50 N. H. 591; *Beekman v. Saratoga R. Co.*, 3 Paige (N. Y.) 45, 22 Am. Dec. 679 and note; *Rensselaer &c. R. Co. v. Davis*, 43 N. Y. 137; *Secomb v. Milwaukee &c. R. Co.*, 49 How.



subject,<sup>63</sup> unless a clear legislative intent to give it that effect is manifested.<sup>64</sup> The extent of the authority depends primarily upon the governing statute, subject to constitutional limitations or provisions, but statutes seldom attempt to fix the precise limits and extent of the power and general statutes could not well do so in such detail as to fit every particular case and determine exactly just what property should be taken and how much, or the like. Considerable discretion is necessarily vested in some agency, and this is often the condemning company itself.

**§ 1196. Extent of authority—Discretion of company to determine particular necessity.**—Where the power to take all necessary lands for use in the construction of a public work is delegated to one or more individuals or to a corporation, the courts are generally concluded, by the good faith determination of such agency, as to the necessity for taking any particular lands,<sup>65</sup> or at least they will not interfere therewith in such a case,

Prac. (N. Y.) 75; *Buffalo, In re*, 68 N. Y. 167; *Kramer v. Cleveland &c. R. Co.*, 5 Ohio St. 140; *Louisville &c. R. Co. v. Chappell*, Rice L. (S. Car.) 383; *Illinois Cent. R. Co. v. East Sioux Falls Quarry Co.*, 33 S. Dak. 63, 144 N. W. 724; *Buffalo Bayou &c. R. Co. v. Ferris*, 26 Tex. 588; *London &c. R. Co. v. Grand Junction Canal Co.*, 1 Eng. R. & Can. Cas. 224. For many additional authorities, see post, § 1204. The legislature can not, in the exercise of the right of eminent domain, provide for the appropriation of private property to a mere private enterprise, in which the public have manifestly no interest. But railroad companies, even when owned by individuals, are not private enterprises merely, and the legislature may authorize such incorporations to take the necessary private property to the

use of their roads in invitum. *Brown v. Beatty*, 34 Miss. 227, 69 Am. Dec. 389.

<sup>63</sup> *North Missouri R. Co. v. Gott*, 25 Mo. 540; *State v. Clarke*, 25 N. J. L. 54; *State v. Trenton*, 36 N. J. L. 198; *Hudson River R. Co. v. Outwater*, 3 Sandf. (N. Y.) 689; *Norfolk &c. R. Co. v. Ely*, 95 N. Car. 77. See *Seaboard Air Line R. Co. v. Olive*, 142 N. Car. 257, 55 S. E. 263.

<sup>64</sup> *McCrea v. Port Royal R. Co.*, 3 S. Car. 381, 16 Am. Rep. 729; *Moore v. Superior &c. R. Co.*, 34 Wis. 173. But a corporation whose charter provides a mode of condemnation may proceed under the general law for the assessment of damages when it chooses to do so. *Cascades R. Co. v. Sohns*, 1 Wash. Ter. 557.

<sup>65</sup> *McKennon v. St. Louis &c. Ry. Co.*, 69 Ark. 104, 61 S. W. 383;

so long as the use to which they are to be devoted is a public

*Zircle v. Southern R. Co.*, 102 Va. 17, 45 S. E. 802, 102 Am. St. 805; *Smith v. Gould*, 59 Wis. 631, 18 N. W. 457, 61 Wis. 31, 20 N. W. 369. See also *New York &c. R. Co. v. Long*, 69 Conn. 424, 37 Atl. 1070; *Savannah &c. R. Co. v. Postal Tel. &c. Co.*, 112 Ga. 941, 38 S. E. 353; *Atlanta &c. R. Co. v. Penny*, 119 Ga. 479, 46 S. E. 665; *Chicago &c. R. Co. v. Lake*, 71 Ill. 333; *Fall River Iron Works v. Old Colony &c. R. Co.*, 5 Allen (Mass.) 221; *State v. National Docks &c. Co.*, 57 N. J. L. 86, 30 Atl. 183; *Re New York &c. R. Co.*, 77 N. Y. 248; *Wilson v. Pittsburgh &c. R. Co.*, 222 Pa. St. 541, 72 Atl. 235; *Pittsburgh &c. R. Co. v. Peet*, 152 Pa. St. 488, 25 Atl. 612, 19 L. R. A. 467; *Baltimore &c. R. Co. v. Pittsburgh &c. R. Co.*, 17 W. Va. 812; *Doe v. North Staffordshire R. Co.*, 16 Q. B. 526. But see *Louisiana R. &c. Co. v. Xavier Realty*, 115 La. Ann. 328, 39 So. 1; *Riley v. Charleston &c. Co.*, 71 S. Car. 457, 51 S. E. 485. In *Deitrichs v. Lincoln &c. R. Co.*, 13 Nebr. 361, 13 N. W. 624, it is said that the question as to the necessity of taking the lands is prima facie a question for the corporation to determine. A large discretion must be accorded to a railroad company in determining its route and the location of its tracks, turnouts, switches, and depot-houses, for which land may be taken, subject, of course, to judicial supervision to prevent abuse of such discretion. *Colorado E. R. Co. v. Union P. R. Co.*, 7 R. & Corp. L. J. 373, 41 Fed. 293. See

also *Zircle v. Southern R. Co.*, 102 Va. 17, 45 S. E. 802, and note, 102 Am. St. 805 and note; *Memphis &c. R. Co. v. Union R. Co.*, 116 Tenn. 500, 95 S. W. 1019, 1027; *United States v. Baltimore &c. R. Co.*, 27 App. (D. C.) 105. In *New York Central R. Co. v. Metropolitan Gas Light Co.*, 5 Hun (N. Y.) 201, *Davis, P. J.*, speaking for the court, said: "Upon the point that the lands proposed to be taken are not necessary, because it might be practicable for the respondents to lay their tracks upon their own lands by adopting another curve, we are not prepared to concur with the appellant's counsel. It is not a question of possibilities, nor of strict practicabilities within the opinion of engineers. No route was ever surveyed for a railroad which was not open to such objections, and if the right to take lands was to be determined by conflicting evidence whether, after all, the tracks might not, with greater or equal convenience, be laid elsewhere, the construction of a road would be attended with the most serious embarrassments. Reasonable necessity must be shown, but a reasonable discretion must be allowed to the officers who locate the tracks of a railroad, for it can not be presumed that the corporation is unnecessarily incurring heavy expenses in obtaining lands, when those it already has would answer its purposes. We think enough has been shown to bring this case within the rule of the authorities in respect to this

use.<sup>66</sup> But courts may interfere where there is an abuse of this discretion under a mere general power and no reasonable necessity exists.<sup>67</sup>

**§ 1197. Limits of rule as to discretion—What is reasonably necessary.**—The rule stated in the last preceding section is also subject to the limitation that the taking must be within the delegated power. Thus an authority to condemn lands "adjoining their road as constructed on their right of way as located," does not include power to take lands which merely adjoin a side-track leading from the railroad route to a freight house,<sup>68</sup> and authority to take necessary lands to "widen" the right of way does not confer power to take adjoining lands upon which to relay the main track at such a distance from the former line as to amount to a relocation.<sup>69</sup> So, where the charter of a railroad company authorized it to take land contiguous to the line of its road for depots and other appurtenances, provided the amount so taken should not exceed five acres, it was held that the company could not take, without the consent of the owner, as a site for a warehouse, a tract of land four hundred yards from the line of their road, together with a narrow strip of land extending from their main track to the site of the proposed warehouse, on which

question. *N. Y. & Harlem R. Co., Matter of, v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385; *Boston & Albany R. Co., Matter of*, 53 N. Y. 574."

<sup>66</sup> Courts have the right to determine whether the use is public or not, and to restrain the appropriation of lands for any other than a public use. *Consolidated Channel Co. v. Central Pacific R. Co.*, 51 Cal. 269; *Sadler v. Langham*, 34 Ala. 311; *Stockton &c. R. Co. v. Stockton*, 41 Cal. 147; *New Central Coal Co. v. George's Creek Coal &c. Co.*, 37 Md. 537; *St. Paul &c. R. Co., In re*, 34 Minn. 227, 25 N. W. 345; *Concord R. Co. v. Greely*, 17 N. H. 47; *McQuillen v. Hatton*, 42 Ohio St. 202.

<sup>67</sup> *Re Boston &c. R. Co.*, 53 N. Y. 574; *Long Island R. Co. v. Sherwood*, 205 N. Y. 1, 98 N. E. 169; *Wilson v. Pittsburgh &c. R. Co.*, 222 Pa. St. 541, 72 Atl. 235. See also *Vallego &c. R. Co. v. Home Sav. Bank*, 24 Cal. App. 166, 140 Pac. 974; *Board v. Johnson*, 86 Conn. 151, 84 Atl. 727, 41 L. R. A. (N. S.) 1024. This is also stated or conceded in most of the cases cited in the last preceding notes.

<sup>68</sup> *State v. United New Jersey &c. R. Co.*, 43 N. J. L. 110. See also *Tudor v. Chicago &c. R. Co.*, 154 Ill. 129, 39 N. E. 136.

<sup>69</sup> *Beck v. United New Jersey &c. R. Co.*, 39 N. J. L. 45.

to build a side-track or branch road, although the whole quantity required for the warehouse and the road leading to it would not exceed five acres.<sup>70</sup> It is said that the power of a railroad to take lands is limited to what is necessary in order that it may fulfill its public duties.<sup>71</sup> But the necessity which will justify a taking is not such an imperative necessity as renders the lands sought to be condemned indispensable to the operation of the road, for the company may take lands which are reasonably requisite to its use.<sup>72</sup> The fact that other lands may be taken by

<sup>70</sup> *Bird v. Wilmington &c. R. Co.*, 8 Rich. Eq. (S. Car.) 46, 64 Am. Dec. 739.

<sup>71</sup> *Tracy v. Elizabethtown &c. R. Co.*, 80 Ky. 259. See *South Carolina R. Co. v. Blake*, 9 Rich. (S. Car.) 228. In the first case cited the court said: "Even where it is conceded that the use is public, the necessity and extent of the exercise of the power of eminent domain belongs to the legislature, subject to two conditions—first, that just compensation shall be made; and, second, that the property desired to be condemned will conduce, to some extent, to the accomplishment of the public object to which it is to be devoted. With the degree of necessity, or the extent to which the property will advance the public purpose, the courts have nothing to do." See also *Western Un. Tel. Co. v. South &c. R. Co.*, 184 Ala. 66, 62 So. 788. And in the case from South Carolina it was held that an application by a railroad company for the appointment of commissioners to assess the value of land sought to be taken should set forth the particular purpose for which it is needed, and should be accompanied by affidavits or other

evidence showing the necessity for the appointment and if the landowner traverses the existence of a necessity justifying the condemnation, a trial and decision must be had.

<sup>72</sup> *Southern Pac. R. Co. v. Raymond*, 53 Cal. 223; *Mansfield &c. R. Co. v. Clark*, 23 Mich. 519; *Hannibal &c. R. Co. v. Muder*, 49 Mo. 165; *New York Central R. Co., Matter of*, 77 N. Y. 248; *Toledo &c. R. Co. v. Daniels*, 16 Ohio St. 390; *Philadelphia &c. R. Co. v. Williams*, 54 Pa. St. 103; *Eldridge v. Smith*, 34 Vt. 484; *Sadd v. Maldon &c. R. Co.*, 6 Exch. 143. See also *Illyes v. White River Light &c. Co.*, 175 Ind. 118, 93 N. E. 670; *Chicago &c. R. Co. v. Baugh*, 175 Ind. 419, 94 N. E. 571 (citing text and numerous cases). A railroad corporation which has full authority to construct its road upon any route which it may adopt, subject to the condition that it shall not cross the streets of a city without permission from the city council, can lay out its road through the city and condemn land for a right of way without first obtaining permission to cross intervening streets. The necessity for the use of certain property in the construc-

which the route of a railway between its charter termini can be shortened,<sup>73</sup> or that another location would do less damage,<sup>74</sup> or that other lands in the vicinity which would answer its purpose just as well could be obtained by purchase,<sup>75</sup> is not sufficient reason for interference by the courts with the action of a railroad corporation in locating its road.<sup>76</sup> So the fact that passengers may rarely, if ever, travel over the tracks of a terminal railroad whose principal business is the shifting of cars from one railroad to another, will not deprive it of the right to exercise the power of eminent domain, if it is, as a matter of fact, organized to do a

tion and operation of a railroad need not be made certain before the property is condemned. *Chicago &c. R. Co. v. Dunbar*, 100 Ill. 110; *Memphis &c. R. Co. v. Union R. Co.*, 116 Tenn. 500, 95 S. W. 1019; *California Southern R. Co. v. Kimball*, 61 Cal. 90; *Gilbert Elevated R. Co., Matter of*, 70 N. Y. 361; *Stoughton v. Paul*, 173 Mass. 148, 53 N. E. 272. Reasonable and not absolute necessity is all that is usually required, and this may include property necessary for future needs. *Miller v. Pulaski*, 114 Va. 85, 75 S. E. 767. See also *Michigan Cent. R. Co. v. Ferguson*, 162 Mich. 220, 127 N. W. 320.

<sup>73</sup> *South Minnesota R. Co. v. Stoddard*, 6 Minn. 150; *Hentz v. Long Island R. Co.*, 13 Barb. (N. Y.) 646.

<sup>74</sup> *New York &c. R. Co. v. Young*, 33 Pa. St. 175; *New York &c. R. Co. v. Metropolitan Gas-Light Co.*, 5 Hun (N. Y.) 201. See also *Union Pac. R. Co. v. Colorado Postal Tel. Co.*, 30 Colo. 133, 69 Pac. 564, 97 Am. St. 106. A particular route sought to be condemned by a railroad company for the use of its road is not rendered

unnecessary because of the existence of another route equally good and convenient, both for the property-owner and the company. *California &c. R. Co. v. Hooper*, 76 Cal. 404, 18 Pac. 599. (But see *Santa Ana v. Gilmacher*, 133 Cal. 399, 65 Pac. 883). See also *Colorado &c. R. Co. v. Union Pac. R. Co.*, 41 Fed. 293.

<sup>75</sup> *Eldridge v. Smith*, 34 Vt. 484; *Ford v. Chicago &c. R. Co.*, 14 Wis. 609, 80 Am. Dec. 791; *Lodge v. Philadelphia &c. R. Co.*, 8 Phila. (Pa.) 345; *New York &c. R. Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385.

<sup>76</sup> See *Colorado Eastern R. Co. v. Union Pac. R. Co.*, 41 Fed. 293; *Pittsburgh &c. R. Co. v. Sanitary Dist.*, 218 Ill. 290, 75 N. E. 892, 2 L. R. A. (N. S.) 226; *Kansas &c. R. v. Northwestern &c. Co.*, 161 Mo. 288, 61 S. W. 684, 51 L. R. A. 936, 84 Am. St. 717; *St. Louis &c. R. Co. v. Hannibal &c. Co.*, 125 Mo. 82, 28 S. W. 483; *Struthers v. Dunkirk &c. R. Co.*, 87 Pa. St. 282; *Cane Belt R. Co. v. Hughes*, 31 Tex. Civ. App. 565, 72 S. W. 1020; *Postal Tel. &c. Co. v. Oregon &c. R. Co.*, 23 Utah 474, 65 Pac. 735,

general railroad business.<sup>77</sup> A railroad company which has leased land to other parties for purposes which increased railroad travel is not required to resume possession of such land under a power reserved by the lease, and employ it for its own necessary structures before it can condemn other land for that purpose. In a recent case, in proceedings to condemn land, it appeared that the petitioner's road ran to a beach much frequented as a summer resort, and furnished the transportation thereto, and that there was great need of a station, for the accommodation of passengers. The petitioner owned land at the beach, which had been leased to persons who had fitted it up as a pleasure ground, for the accommodation of visitors to the beach; and a station built on this land would destroy, in a large measure, the usefulness of the place as a summer resort, whereby the petitioner's business would be injured. It was held that the petitioner was entitled to have land condemned for such station purposes, even though the land owned and leased by it was available.<sup>78</sup> But one court at least has held that a railroad company can not condemn lands for any purpose when it already owns lands equally useful for that purpose.<sup>79</sup>

90 Am. St. 705. The discretion exercised by a railroad corporation in selecting land for its purposes will not be interfered with unless it clearly appears that it has exceeded its powers or acted in bad faith. *Fall River Iron Works v. Old Colony R. Co.*, 5 Allen (Mass.) 221; *Virginia R. Co. v. Elliott*, 5 Nev. 358; *South Carolina R. Co. v. Blake*, 9 Rich. (S. Car.) 228; *Cotton v. Mississippi & C. Co.*, 22 Minn. 372; *Board of Supervisors v. Gorrell*, 20 Grat. (Va.) 484. But see *Rainey v. Red River & C. R. Co.*, 99 Tex. 276, 89 S. W. 768, 3 L. R. A. (N. S.) 590. The general allegation in a petition for the condemnation of certain lands by a railroad company, that "a part of each of said lands is necessary

to petitioner for its right of way, side-tracks, depot and depot grounds, freight yards, shops and appurtenances, for the construction and operation of its road," was held to be a sufficient statement of the purposes for which the land was sought to be condemned. *Suver v. Chicago & C. R. Co.*, 123 Ill. 293, 14 N. E. 12.

<sup>77</sup> *Collier v. Union R. Co.*, 113 Tenn. 96, 83 S. W. 155.

<sup>78</sup> *In re New York Central & C. R. Co.*, 55 Hun 603, 8 N. Y. S. 290, affirmed 121 N. Y. 665, mem. 24 N. E. 1093.

<sup>79</sup> *New Central Coal Co. v. George's Creek Coal Co.*, 37 Md. 537. In *Rainey v. Red River & C. R. Co.*, 99 Tex. 276, 89 S. W. 768, 3 L. R. A. (N. S.) 590, it is held

**§ 1198 (954a). Company may be compelled to condemn.**—It is not only true that the right to condemn may be delegated to a railroad company, but such a corporation may also be required to condemn in order to perform the duties lawfully devolved upon it. This has been so decided by the Supreme Court of the United States. Thus, a statute requiring a company to furnish track connections, when a reasonable regulation in the interests and for the accommodation of the public has been held constitutional, although it necessitated the exercise of the power of eminent domain by the company and the incurring of some slight expense.<sup>80</sup>

**§ 1199 (955). Construction of statutes granting right to condemn.**—The exercise of the power of eminent domain by a railroad or other corporation for public use being against common right, it cannot, ordinarily, be implied or inferred from a mere grant of authority to construct public works,<sup>81</sup> but must be given in express terms or by necessary implication.<sup>82</sup> And it is said

that statutory authority to condemn for machine shops and terminals does not give a railroad company power to act arbitrarily, and that the needless location of such shops and terminals near private property so as to constitute a nuisance, may be enjoined. Citing *Baltimore &c. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. ed. 739; *Ridge v. Pennsylvania R. Co.*, 58 N. J. Eq. 176, 43 Atl. 275; *Louisville &c. Terminal Co. v. Jacobs*, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188; *Willis v. Kentucky &c. Co.*, 104 Ky. 186, 46 S. W. 488. But compare *Dolan v. Chicago &c. R. Co.*, 118 Wis. 362, 95 N. W. 385; *Austin v. Augusta &c. R. Co.*, 108 Ga. 671, 686, 34 S. E. 852, 47 L. R. A. 755.

<sup>80</sup> *Wisconsin &c. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115.

45 L. ed. 194. See also *Worcester v. Norwich &c. R. Co.*, 109 Mass. 112; *Green v. Dutchess &c. R. Co.*, 58 N. Y. 152, 163; *People v. New York &c. R. Co.*, 104 N. Y. 58, 67, 9 N. E. 856, 58 Am. Rep. 484; *Muhlker v. New York &c. R. Co.*, 197 U. S. 544, 25 Sup. Ct. 522, 524, 49 L. ed. 872; *Gates v. Boston &c. R. Co.*, 53 Conn. 333, 5 Atl. 695.

<sup>81</sup> *Allen v. Jones*, 47 Ind. 438; *People v. Rochester*, 50 N. Y. 525. See also *Murphy v. Kingston &c. R. Co.*, 11 Ont. 582; *Leeds v. Richmond*, 102 Ind. 372, 1 N. E. 711; *Boston &c. R. Corp. v. Salem &c. R. Co.*, 2 Gray (Mass.) 1.

<sup>82</sup> *Miami Coal Co. v. Wigton*, 19 Ohio St. 560; *Schmidt v. Densmore*, 42 Mo. 225; *Butler v. Thomasville*, 74 Ga. 570; *Phillips v. Dunkirk &c. R. Co.*, 78 Pa. St. 177. If a particular power is omitted from

that an implication in favor of such right will not control unless it arises from a necessity so absolute that, without it, the grant itself will be defeated.<sup>83</sup> Statutes granting the power of eminent domain to corporations will be strictly construed.<sup>84</sup> But such a construction will be given, if possible, as will carry into effect the manifest purpose for which the act was passed.<sup>85</sup> And gen-

those enumerated this is to be taken as a prohibition against its exercise unless there is an imperative implication of its inclusion. *Connellsville &c. Ry. Co. v. Markleton Hotel Co.*, 247 Pa. St. 565, 93 Atl. 635, Ann. Cas. 1916E, 1213.

<sup>83</sup> *Pennsylvania R. Co.'s Appeal*, 93 Pa. St. 150.

<sup>84</sup> *Southern Pac. R. Co. v. Wilson*, 49 Cal. 396; *Waterbury v. Platt*, 75 Conn. 387, 53 Atl. 958, 96 Am. St. 229; *Alabama Gt. Southern R. Co. v. Gilbert*, 71 Ga. 591; *Chestatee &c. Co. v. Cavers Creek Co.*, 119 Ga. 354, 46 S. E. 422, 100 Am. St. 174 and note; *Chicago &c. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Lieberman v. Chicago &c. R. Co.*, 141 Ill. 140, 30 N. E. 544; *Chicago &c. R. Co. v. Chicago Mechanics' Inst.*, 239 Ill. 197, 87 N. E. 933; *Goddard v. Chicago &c. R. Co.*, 104 Ill. App. 526, aff'd in 202 Ill. 362, 66 N. E. 1066; *Eckard v. Ft. Wayne &c. Trac. Co.*, 181 Ind. 352, 104 N. E. 762; *F. W. Cook Inv. Co. v. Evansville Terminal R. Co.*, 175 Ind. 3, 93 N. E. 279; *Spofford v. Bucksport &c. Co.*, 66 Maine 26; *Jersey City v. Central R. Co.*, 40 N. J. Eq. 417, 2 Atl. 262; *Washington Cemetery v. Prospect &c. R. Co.*, 68 N. Y. 591; *Erie R. Co. v. Steward*, 61 App. Div. 480, 70 N. Y. S. 690; *Lea v. Johnston*, 9 Ired. (N. Car.) 15;

*Pittsburgh &c. R. Co. v. Bruce*, 102 Pa. St. 23; *Norfolk &c. R. Co. v. Lynchburg Cotton Mill Co.*, 106 Va. 376, 56 S. E. 146. "An act of this sort deserves no favor; to construe it liberally would be sinning against the rights of property." *Bland, J., in Binney's Case*, 2 Bland Ch. (Md.) 99. "There is no rule more familiar or better settled than this: that grants of corporate power, being in derogation of common right, are to be strictly construed; and this is especially the case where the power claimed is a delegation of the right of eminent domain, one of the highest powers of sovereignty pertaining to the state itself, and interfering most seriously and often vexatiously with the ordinary rights of property." *Currier v. Marietta &c. R. Co.*, 11 Ohio St. 228. See also *Platt v. Pennsylvania Co.*, 43 Ohio St. 228, 1 N. E. 420; *Puyallup v. Lacey*, 43 Wash. 110, 86 Pac. 215.

<sup>85</sup> *Pittsburgh v. Scott*, 1 Pa. St. 309; *Bellona Company's Case*, 3 Bland Ch. (Md.) 442. Thus it has been recently held that though a statute providing for the sale of property and franchise of a corporation does not expressly declare that the purchaser shall have the right to take lands by eminent domain, a provision therein that it shall be entitled to all the rights,



erally, though the legislative determination that the use for which property authorized to be taken by eminent domain is a public one is subject to review by the courts, they will indulge a reasonable presumption in favor of the legislative decision.<sup>86</sup>

**§ 1200 (956). Right of foreign and consolidated companies to condemn.**—A foreign corporation may be authorized to exercise the power of eminent domain, in the absence of any constitutional provision to the contrary.<sup>87</sup> But foreign corporations are forbidden to exercise that power by the constitutions of some of

liberties, privileges and franchises of the corporation whose property is sold is sufficient to save that right. *Brinkerhoff v. Newark &c. Traction Co.*, 66 N. J. L. 478, 49 Atl. 812. See also for cases in which the right was held to be granted. *Central P. R. Co. v. Feldman*, 152 Cal. 303, 92 Pac. 849 (freight house); *Gillette v. Aurora R. Co.*, 228 Ill. 261, 81 N. E. 1005; *Eckart v. Ft. Wayne &c. Trac. Co.*, 181 Ind. 352, 104 N. E. 762 (street railway company required to permit interurban cars authorized to carry express matter to be transported over its track has power to condemn for necessary terminal for such business). "The power given to a railroad company to condemn private property for its own use is to be exercised within strict limits. The law does not authorize the incorporating of a company with a roving commission to go to any points in the state at will and condemn land in spots. It is required of the parties seeking to be incorporated as a railroad company that they state in their articles of association the places from and to which the road is to

be constructed, and beyond the course between the points named (except as the law authorizes branches) the corporation has no right to go." *Kansas City &c. R. Co. v. Davis*, 197 Mo. 669, 95 S. W. 881.

<sup>86</sup> *Ulmer v. Lime Rock R. Co.*, 98 Maine 579, 57 Atl. 1001, 66 L. R. A. 387.

<sup>87</sup> *Baltimore &c. R. Co. v. Harris*, 12 Wall. (U. S.) 65, 20 L. ed. 354; *Hagerla v. Mississippi River &c. Co.*, 202 Fed. 776; *Southwestern &c. R. Co. v. Southern &c. Co.*, 46 Ga. 43, 12 Am. Rep. 585; *Dodge v. Council Bluffs*, 57 Iowa 560, 10 N. W. 886. *Abbott v. New York &c. R. Co.*, 145 Mass. 450, 15 N. E. 91; *Gray v. St. Louis &c. R. Co.*, 81 Mo. 126; *Peter Townsend, Matter of*, 39 N. Y. 171; *Marks, In re*, 6 N. Y. S. 105; *State v. Sherman*, 22 Ohio St. 411; *New York &c. R. Co. v. Young*, 33 Pa. St. 175; *Baltimore &c. R. Co. v. Pittsburgh &c. R. Co.*, 17 W. Va. 812; *Great Northern R. Co. v. McCord*, 143 Wis. 589, 128 N. W. 432. See also *Deseret Water &c. Co. v. State*, 167 Cal. 147, 138 Pac. 981; *Illinois State Trust Co. v. St. Louis &c. R.*

the states,<sup>88</sup> and a statute conferring the right of eminent domain upon "railroad corporations organized under the laws of this state" has been held to operate as a denial of the right to foreign railroad corporations.<sup>89</sup> So, under the Kentucky statute which

Co., 208 Ill. 419, 70 N. E. 357; *State ex rel. St. Louis &c. R. Co. v. Cook*, 171 Mo. 348, 71 S. W. 829; *Southern Illinois &c. R. Co. v. Stone*, 174 Mo. 1, 32, 73 S. W. 453, 63 L. R. A. 311; *New York &c. R. Co. v. Welsh*, 143 N. Y. 411, 38 N. E. 378, 42 Am. St. 734. That the right does not otherwise exist, see *Illinois State Trust Co. v. St. Louis &c. R. Co.*, 208 Ill. 419, 70 N. E. 357; *Chestatee &c. Co. v. Cavenders Creek Co.*, 119 Ga. 354, 46 S. E. 422, 100 Am. St. 174.

<sup>88</sup> Foreign corporations are forbidden to exercise the right of eminent domain by Arkansas Const. 1874, art. 12, § 11. In Nebraska this restriction applies only to foreign railroad corporations. Const. 1875, art 11, § 8. Under said section, no foreign railroad corporation doing business in the state can exercise the right of eminent domain, or have power to acquire right of way or real estate for depot or other uses, unless it organizes as a corporation under the state laws. *State v. Scott*, 22 Nebr. 628, 36 N. W. 121; *Trester v. Missouri Pac. R. Co.*, 23 Nebr. 242, 36 N. W. 502. A foreign corporation, which has not become a corporation under the laws of Nebraska, can not avail itself of the services of another corporation to acquire a right of way, and may be enjoined from appropriating property for a right of way, although the property has been condemned

in the name of another corporation. *Koenig v. Chicago &c. R. Co.*, 27 Nebr. 699, 43 N. W. 423. The article of the Nebraska constitution which provides that no foreign railroad corporation, doing business in that state, shall exercise the right of eminent domain, or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate, pursuant to and in accordance with the laws of that state, does not prohibit existing companies, one of which is a domestic corporation, from becoming a body corporate by consolidation, providing such consolidation is made pursuant to the laws permitting the same, and by which it became "a body corporate, pursuant to and in accordance with the laws of this state." *State v. Chicago &c. R. Co.*, 25 Nebr. 156, 41 N. W. 125, 2 L. R. A. 564 and note; *State v. Missouri Pac. R. Co.*, 25 Nebr. 164; *State v. Chicago &c. R. Co.*, 25 Nebr. 165, 41 N. W. 128.

<sup>89</sup> *Holbert v. St. Louis &c. R. Co.*, 45 Iowa 23. And it has been held that a statute conferring the right of eminent domain on any mining company does not include foreign companies. *Chestatee &c. Co. v. Cavenders Creek Co.*, 119 Ga. 354, 46 S. E. 422, 100 Am. St. 174. See also *St. Louis &c. R. Co. v. Foltz*, 52 Fed. 627, where it was held that even if the company

provides that no foreign railroad corporation shall have the right to condemn until it shall have first complied with the provisions of the statute, it has been held that the company can not condemn unless it not only files a copy of its articles of incorporation in the office of the secretary of state, but also makes proof that a certain amount per mile has been subscribed, and a certain percentage thereof paid in, as required of domestic corporations.<sup>90</sup> A domestic railroad company does not lose its right to condemn by consolidation, under the laws of its own state, with a foreign railroad company.<sup>91</sup> The consolidated corporation, in such a case, is regarded as a domestic corporation within the meaning of the statutes regulating condemnation proceedings.<sup>92</sup> But, as shown in the next section, there must be some law authorizing or ratifying the consolidation.<sup>93</sup>

**§ 1201 (957). Exercise of the right by de facto corporations.**

—As a rule the legal existence of a de facto corporation can be questioned only by the state in a direct proceeding instituted for that purpose. Accordingly, the courts will not enjoin a corporation from condemning land for a public purpose on the ground that the corporation was irregularly organized,<sup>94</sup> nor will they,

could not condemn land for right of way and depot grounds, it might acquire the same by contract or estoppel.

<sup>90</sup> *Evansville &c. Traction Co. v. Henderson Bridge*, 141 Fed. 51.

<sup>91</sup> *Toledo &c. R. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271; *Mineral Range R. Co. v. Detroit &c. Co.*, 25 Fed. 515. See also *Pittsburgh &c. R. Co. v. Gage*, 280 Ill. 639, 117 N. E. 726; *Trester v. Missouri Pac. R. Co.*, 33 Nebr. 171, 178, 49 N. W. 1110; *Trenton St. R. Co.*, In re (N. J.), 47 Atl. 819. Nor by the fact that its stock is held abroad. *Amoskeag &c. Co. v. Worcester*, 60 N. H. 522.

<sup>92</sup> *St. Paul &c. R. Co.*, In re, 36 Minn. 85, 30 N. W. 432; *State v.*

*Chicago &c. R. Co.*, 25 Nebr. 156, 41 N. W. 125, 2 L. R. A. 564 and note; *Trester v. Missouri Pac. R. Co.*, 33 Nebr. 171, 178, 49 N. W. 1110. See also *California Cent. R. Co. v. Hooper*, 76 Cal. 404, 18 Pac. 599; *Postal Tel. &c. Co. v. Oregon Short Line R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. 705.

<sup>93</sup> *American &c. Co. v. Minnesota &c. R. Co.*, 157 Ill. 641, 42 N. E. 153; post, § 1201, note 97.

<sup>94</sup> *Reisner v. Strong*, 24 Kans. 410; *McAuley v. Columbus &c. R. Co.*, 83 Ill. 348; *Aurora &c. R. Co. v. Miller*, 56 Ind. 88; *Oregon Short Line R. Co. v. Postal Tel. &c. Co.*, 111 Fed. 842. A court of equity will not extend its aid by injunction to an assignee of a lease of

in many jurisdictions, allow the legality of the incorporation of a de facto railroad corporation to be questioned in condemnation proceedings.<sup>95</sup> And it has been held a land-owner should not be

land through which a railroad company seeks to condemn a right of way, when it is shown that the assignee who is denying the power of the company to condemn land under its charter, is the president of a rival road, but he will be left to his remedy at law. *Piedmont &c. R. Co. v. Speelman*, 67 Md. 260, 10 Atl. 77, 293. In *Ward v. Minnesota &c. R. Co.*, 119 Ill. 287, 10 N. E. 365, the court held that the fact that an engineer had been appointed, that the line of the proposed road had been located, and other steps taken toward the building of the road, being corporate acts, tended to show that petitioner was a corporation de facto.

<sup>95</sup> *Niemeyer v. Little Rock &c. R. Co.*, 43 Ark. 111, 20 Am. & Eng. R. Cas. 174; *Cincinnati &c. R. Co. v. Danville &c. R. Co.*, 75 Ill. 113; *Brown v. Calumet Riv. R. Co.*, 125 Ill. 600, 18 N. E. 283; *Illinois State Trust Co. v. St. Louis &c. R. Co.*, 208 Ill. 419, 70 N. E. 357; *Thomas v. South Side Elevated R. Co.*, 218 Ill. 571, 75 N. E. 1058; *Aurora &c. R. Co. v. Miller*, 56 Ind. 88; *National Docks &c. R. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *Oregon Cascade Co. v. Baily*, 3 Ore. 164; *Morrison v. Indianapolis &c. R. Co.*, 166 Ind. 511, 76 N. E. 961 (citing text). In this last case it is said that, while there is conflict among the authorities, the rule stated in the text is supported by the weight of authority and reason, and the following authorities

are cited in its support: *Aurora &c. R. Co. v. Lawrenceburg*, 56 Ind. 80; *Oregon &c. R. Co. v. Postal Tel. &c. Co.*, 111 Fed. 842, 10 Am. & Eng. Enc. L. 1059; *Niemeyer v. Little Rock &c. R. Co.*, 43 Ark. 111; *Spring Valley Waterworks v. San Francisco*, 22 Cal. 434; *Union Pacific R. Co. v. Colorado Postal Co.*, 30 Colo. 133, 69 Pac. 564, 97 Am. St. 106; *Brown v. Calumet River R. Co.*, 125 Ill. 600, 18 N. E. 283; *St. Louis &c. R. Co. v. Belleville St. R. Co.*, 158 Ill. 390, 41 N. E. 916; *Aurora &c. R. Co. v. Miller*, 56 Ind. 88; *Reisner v. Strong*, 24 Kans. 410; *Portland &c. Tpk. Co. v. Bobb*, 88 Ky. 226, 10 S. W. 794; *Briggs v. Cape Cod Ship Canal Co.*, 137 Mass. 71; *Shroeder v. Detroit &c. R. Co.*, 44 Mich. 387, 6 N. W. 872; *Traverse City &c. R. Co. v. Seymour*, 81 Mich. 378, 45 N. W. 826; *Minneapolis &c. R. Co.*, In re, 36 Minn. 481, 32 N. W. 556; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755, and cases cited; *Wellington &c. R. Co. v. Cashie Lumber Co.*, 114 N. Car. 690, 19 S. E. 646; *Farnham v. Delaware &c. Canal Co.*, 61 Pa. St. 265, 271; *Postal Tel. &c. Co. v. Oregon &c. R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. 705. See also *Philadelphia &c. Co. v. Inter City Link R. Co.*, 73 N. J. 86, 62 Atl. 184. But it has been held in Ohio that corporate existence and the right to exercise the power of eminent domain can only be derived from legislative enact-

permitted to prove, as a defense to condemnation proceedings instituted by a regularly organized railroad corporation, that the company was incorporated not for a public use, but for the private purposes of the incorporators only, and that there was no public necessity for the road.<sup>96</sup> But, to constitute even a de facto corporation, there must be some law under which it could legally have been incorporated, and an attempt to consolidate, where there is no law authorizing it, will not enable the consolidated company to acquire a right of way either by condemnation or contract.<sup>97</sup> Furthermore, it is said that a corporation can not "act simultaneously in the dual capacity of a corporation de jure and a corporation de facto." It can not exercise its full powers as a corporation and then act in matters outside these powers and justify the latter action as an act of a de facto corporation. Thus, it has been held that a railroad company authorized to condemn lands for its purposes over specified lines can not use all these powers and then condemn other lands over other

ment. And that a company claiming to act under a special charter must show that both have been conferred upon it by a valid law, and that it has substantially complied with the conditions which that law has annexed to the power, before it can demand a judgment of condemnation. *Atkinson v. Marietta &c. R. Co.*, 15 Ohio St. 21. And that a railroad company organized under the general railroad law of that state must, in order to sustain a proceeding for appropriating land, show the certificate and public record of its organization to be strictly in conformity with the requisitions of the law. *Atlantic &c. R. Co. v. Sullivant*, 5 Ohio St. 276. See also *New York &c. Co. v. New York*, 104 N. Y. 1, 10 N. E. 332; *St. Joseph &c. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. 581; *Brooklyn &c. R. Co.*, Matter

of, 72 N. Y. 245; *Miller v. Prairie &c. R. Co.*, 34 Wis. 533; *Orrick School Dist. v. Dorton*, 125 Mo. 439, 28 S. W. 765. And a de jure corporation can not ignore its statutory entity and limitations "and claim the right to condemn as a de facto corporation beyond its charter limitations. *Boca &c. R. Co. v. Sierra Valley R. Co.*, 2 Cal. App. 546, 84 Pac. 298.

<sup>96</sup> *Powers v. Hazelton &c. R. Co.*, 33 Ohio St. 429. See also *Rudolph v. Pennsylvania &c. R. Co.*, 166 Pa. St. 430, 31 Atl. 131; *Aurora &c. R. Co. v. Lawrenceburg*, 56 Ind. 80.

<sup>97</sup> *American &c. Co. v. Minnesota &c. R. Co.*, 157 Ill. 641, 42 N. E. 153, and authorities cited. See also *New Brighton &c. R. Co. v. Pittsburgh &c. R. Co.*, 105 Pa. St. 14, approved in *Washington &c. R. Co. v. Coeur D'Alene R. &c. Co.*, 160 U. S. 101, 16 Sup. Ct. 231, 40

lines as a de facto corporation.<sup>98</sup> The most recent as well as the earlier cases are practically unanimous in holding that a de facto corporation may exercise the right of eminent domain, or, in other words, that its de jure existence can not be attacked; but its de facto existence may be inquired into, as, for instance, where there is no law under which the company could have been incorporated.<sup>99</sup>

§ 1202 (958). **Right to condemn where road is leased or in hands of a receiver.**—It is said that personal rights and privileges granted to a corporation can only be exercised by its board of directors<sup>1</sup> or other governing body. The power of eminent domain is granted as a personal trust, and can not be delegated or transferred without legislative sanction; accordingly, it is held that neither the purchasers,<sup>2</sup> nor the lessees,<sup>3</sup> of a railroad can

L. ed. 355; American Loan &c. Co. v. Minnesota &c. R. Co., 157 Ill. 641, 42 N. E. 153; Brown v. Atlanta R. &c. Co., 113 Ga. 462, 39 S. E. 71.

<sup>98</sup> Boca &c. R. Co. v. Sierra Valleys R. Co., 2 Cal. App. 546, 84 Pac. 298.

<sup>99</sup> Sisters of Charity v. Morris R. Co., 84 N. J. L. 310, 86 Atl. 954, 50 L. R. A. (N. S.) 236, and note, citing the recent cases, including: Chicago &c. R. Co. v. Heidenrich, 254 Ill. 231, 98 N. E. 567, Ann. Cas. 1913C, 266; Gillette v. Aurora R. Co., 228 Ill. 261, 81 N. E. 1005; Smith v. Cleveland &c. R. Co., 170 Ind. 382, 81 N. E. 501, and others. See also Roaring Springs Transfer Co. v. Paducah &c. Co. (Tex. Civ. App.), 164 S. W. 50.

<sup>1</sup> Eastern R. Co. v. Boston &c. R. Co., 111 Mass. 125, 15 Am. Rep. 13. See also Bridwell v. Gate City Terminal Co., 127 Ga. 520, 56 S. E. 627; but compare State v. Proprietors (N. J.), 33 Atl. 252; Tennessee

Cent. R. Co. v. Campbell, 109 Tenn. 655, 73 S. W. 112.

<sup>2</sup> Atkinson v. Marietta R. Co., 15 Ohio St. 21; Mahoney v. Spring Valley Water Works, 52 Cal. 159; Braslin v. Somerville Horse R. Co., 145 Mass. 64, 13 N. E. 65. See also Little Rock &c. R. Co. v. McGehee, 41 Ark. 202; Platt v. Pennsylvania Co., 43 Ohio St. 228, 1 N. E. 420. But see as to purchaser at judicial sale, North Carolina &c. R. Co. v. Carolina Cent. R. Co., 83 N. Car. 489; Lawrence v. Morgan's &c. R. Co., 39 La. Ann. 427, 2 So. 69, 4 Am. St. 265; Lake Erie &c. R. Co. v. Griffin, 107 Ind. 464, 8 N. E. 451; Brinkerhoff v. Newark &c. Traction Co., 66 N. J. L. 478, 49 Atl. 812; ante, § 595.

<sup>3</sup> Worcester v. Norwich &c. R. Co., 109 Mass. 103; Lewis v. Germantown &c. R. Co., 16 Phila. (Pa.) 608; Western Union Tel. Co. v. Pennsylvania R. Co., 195 U. S. 594, 25 Sup. Ct. 150, 49 L. ed. 332. As a manufacturing company can

exercise the right without express authority.\* And, where its road can not be successfully operated without the acquisition of

not, by lease from a railroad company, acquire the right of eminent domain, a municipal council can not authorize it to build a railroad track on a street, such track being shown to be a nuisance. *Appeal of Hartman Steel Co.*, 129 Pa. 151, 18 Atl. 553.

\* See *Lawrence v. Morgan's La. &c. R. Co.*, 39 La. Ann. 427, 2 So. 69, 4 Am. St. 265, as to the effect of a transfer of its franchises by a corporation under legislative authority. In *Abbott v. New York &c. R. Co.*, 145 Mass. 450, 15 N. E. 91, Holmes, J., speaking for the court, said: "It seems to us clear that a corporation, by consent of the legislature, may take this power as quasi successor of another corporation to which it was originally granted, and it is not very material whether the legislative consent be regarded as authorizing a transfer of the old power, or more strictly as delegating a new power in the same terms as the old. See *State v. Sherman*, 22 Ohio St. 411, 428. The substance of the transaction is seen in the cases of *Boston &c. Railroad Co. v. Midland R. Co.*, 1 Gray (Mass.) 340. But there is reason to confine it to such cases. See *Atkinson v. Railroad Co.*, 15 Ohio St. 21; *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372, 387, 75 Am. Dec. 518 and note; *Hall v. Sullivan Railroad Co.*, 21 Law Rep. 138, 141. When the power is claimed under the form of a transfer, rather than of an original grant, the legislative

consent or grant may be inferred somewhat more readily than when the whole question is new, because the legislature has already adjudicated the use to be public, and has granted a co-extensive power. See *Black v. Delaware &c. Canal Co.*, 22 N. J. Eq. 130, 402. For, while it is very plain that the power could not be transferred to or exercised by a purchaser from the original donee, without such consent or grant in this commonwealth (*Braslin v. Somerville &c. R. Co.*, 145 Mass. 64, 13 N. E. 65; *Commonwealth v. Smith*, 10 Allen 448, 87 Am. Dec. 672), the reasons which have led some courts and judges to doubt the need of such consent for the transfer of franchises show that the *delectus personarum* is of little more than theoretical importance, and is the least determining element in the more common cases where the power is conferred. *Shepley v. Atlantic &c. Railroad Co.*, 55 Maine 395, 407; *Kennebec &c. R. Co. v. Portland &c. R. Co.*, 59 Maine 9, 23; *Miller v. Rutland &c. R. Co.*, 36 Vt. 452, 492; *Bickford v. Grand Junction R. Co.*, 1 Can. Sup. Ct. 696, 738. And this reasoning is of equal force, whether the power to take land by eminent domain is called a franchise or not. *Coe v. Railroad Co.*, 10 Ohio St. 372, 75 Am. Dec. 518, and note; *Chicago &c. R. Co. v. Dunbar*, 95 Ill. 571; *Pierce v. Emery*, 32 N. H. 484, 507, 511, 513. Finally, the legislative consent may be expressed by way of ratification of

the property sought to be condemned, a company which has leased all its property and franchises<sup>5</sup> may exercise the right of eminent domain, even though the lease is for the entire life of the corporation and the property is taken solely for the use of the lessee.<sup>6</sup> It has been held that a railroad company, leasing the property and franchises of another, the corporate identity of the lessor being maintained, may exercise the power of the lessor to widen its roadbed, though the exercise of the power is practically for the benefit of the lessee.<sup>7</sup> As the corporate existence is not terminated by the appointment of a receiver, it would seem that the right to condemn remains in the corporation,<sup>8</sup> and does not, ordinarily, pass to the receiver. But it has been held that a receiver may condemn land for the purpose of completing an un-

what purports to be a transfer already executed. *Shaw v. Norfolk &c. R. Co.*, 5 Gray (Mass.) 162, 180, 16 Gray (Mass.) 407, 410; *Galveston R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459, 20 L. ed. 199. And it may be gathered by implication from a series of acts. *East Boston &c. R. Co. v. Eastern R. Co.*, 13 Allen (Mass.) 422." But it is held that a railroad company which has leased its property and franchises for the entire term of its corporate existence may condemn land to serve the necessities of its lessee. *New York &c. R. Co., Matter of*, 35 Hun 220, affirmed, 99 N. Y. 12, 1 N. E. 27. See *Deitrichs v. Lincoln &c. R. Co.*, 13 Nebr. 361; *Kip v. New York &c. R. Co.*, 67 N. Y. 227; *Chicago &c. R. Co. v. Ill. Cent. R. Co.*, 113 Ill. 156. And a domestic corporation, organized at the instance of a foreign company, which is forbidden to exercise the power of eminent domain, may condemn land for the purpose of leasing it to such foreign corpora-

tion. *Lower v. Chicago &c. R. Co.*, 59 Iowa 563.

<sup>5</sup> *New York &c. R. Co., Matter of*, 99 N. Y. 12, 1 N. E. 27, 35 Hun 220; *Kip v. New York &c. R. Co.*, 67 N. Y. 227; *Metropolitan Elevated R. Co., Re*, 18 N. Y. S. 134, 2 N. Y. S. 278; *Chicago &c. R. Co. v. Ill. Cent. R. Co.*, 113 Ill. 156; *Deitrichs v. Lincoln &c. R. Co.*, 13 Nebr. 361, 13 N. W. 624. See also *New York &c. R. Co., In re*, 63 Hun 629; 17 N. Y. S. 778; *Memphis &c. R. Co. v. Railroad Comrs.*, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. ed. 837; *State ex rel. v. King County Super. Ct.*, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897.

<sup>6</sup> *New York &c. R. Co., Matter of*, 99 N. Y. 12, 1 N. E. 27, 35 Hun 220.

<sup>7</sup> *Glaser v. Glenwood R. Co.*, 208 Pa. 328, 57 Atl. 713.

<sup>8</sup> *Detroit &c. R. Co. v. Campbell*, 140 Mich. 384, 103 N. W. 856, 858, 860 (citing text). See also *Morrison v. Forman*, 177 Ill. 427, 53 N. E. 73.



dertaking already begun,<sup>9</sup> and, if this be true, it would seem that he might condemn land when necessary to the maintenance and operation of a road already completed. He should, however, first obtain authority to do so from the court in which the receivership is pending.<sup>10</sup>

§ 1203 (959). **Right to condemn can not be delegated to contractor or construction company.**—A corporation which is empowered to take materials for the construction of works of a public nature can not delegate this power to a contractor who engages to furnish his own materials.<sup>11</sup> It may, however, appropriate materials by condemnation for the benefit of a contractor who is building its works under such a contract.<sup>12</sup> A construction company can not take land for railway purposes, and if the railroad company adopts its acts in appropriating land it must pay just compensation.<sup>13</sup> But if the railroad company does not authorize or ratify the act of a contractor in taking land his action is not binding upon the company.<sup>14</sup>

§ 1204 (960). **Purposes for which a railroad company may condemn—Generally.**—A railroad company which is charged

<sup>9</sup> Moran v. Lydecker, 27 Hun (N. Y.) 582. See Lehigh &c. Co. v. Cent. R. Co., 35 N. J. Eq. 379.

<sup>10</sup> Minneapolis &c. R. Co. v. Minneapolis &c. R. Co., 61 Minn. 502, 63 N. W. 1035.

<sup>11</sup> Lyon v. Jerome, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; Schmidt v. Densmore, 42 Mo. 225. Contra Leshner v. Wabash Navigation Co., 14 Ill. 85, 56 Am. Dec. 494 and note. See also William Cramp & Sons Ship Bldg. &c. Co. v. International &c. Turbine Co., 246 U. S. 28, 38 Sup. Ct. 271, 62 L. ed. 560. It has been held that the railroad company may authorize the contractor to condemn property in its name. Buchanan &c. Bank v. Cedar Rapids &c. R. Co., 62 Iowa 494.

<sup>12</sup> Ten Broeck v. Sherrill, 71 N. Y. 276. And where the statute authorizes any agent or servant of the corporation to enter upon contiguous lands belonging to private owners and take therefrom materials for use in the construction of its road, the corporation may authorize the contractors to take materials whenever they can not be readily obtained by purchase. Vermont General R. Co. v. Baxter, 22 Vt. 365; Bliss v. Hosmer, 15 Ohio 44.

<sup>13</sup> Bloomfield R. Co. v. Grace, 112 Ind. 128, 13 N. E. 680.

<sup>14</sup> Waltemeyer v. Wisconsin &c. R. Co., 71 Iowa 626, 33 N. W. 140.

with the performance of the duties of a common carrier is, as we have seen, so far a public enterprise that it may be empowered to condemn the lands needed for the construction and maintenance of its line.<sup>15</sup> But experience has shown that corporations are

<sup>15</sup> Enfield Toll Bridge Co. v. Hartford &c. R. Co., 17 Conn. 40, 42 Am. Dec. 716 and note; Brown v. Beatty, 34 Miss. 227, 69 Am. Dec. 389; Ash v. Cummings, 50 N. H. 591; Beekman v. Saratoga R. Co., 3 Paige (N. Y.) 45, 22 Am. Dec. 679 and note; New York &c. R. Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385; Kramer v. Cleveland &c. R. Co., 5 Ohio St. 140. See also Bedford Quarries Co. v. Chicago &c. R. Co., 175 Ind. 303, 94 N. E. 326, 35 L. R. A. (N. S.) 641; Flynn v. New York &c. R. Co., 139 App. Div. 199, 123 N. Y. S. 759; Chapman v. Trinity Val. &c. R. Co. (Tex. Civ. App.), 138 S. W. 440. But it has been held that a private railroad for the carriage of coal or ores from the company's mines can not be built or operated under the power of eminent domain. People v. Pittsburgh &c. R. Co., 53 Cal. 694; McCandless' Appeal, 70 Pa. St. 210; Edgewood R. Co.'s Appeal, 79 Pa. St. 257. See also Sholl v. German Coal Co., 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379; Leigh v. Garysburg Mfg. Co., 132 N. Car. 167, 43 S. E. 632; Breaux v. Bienvenu, 51 La. Ann. 687, 25 So. 321. Under a charter declaring that a corporation may operate a railroad, with necessary lines of telegraph and with power to construct branches, the fact that it is given authority to extend its road to coal lands which it owns has been held not to take away its

character as a public railroad corporation, which can exercise the power of eminent domain. Colorado &c. R. Co. v. Union Pac. R. Co., 7 R. & Corp. L. J. 373, 41 Fed. 293. Where land is taken for its use by a railroad corporation having the right to exercise the power of eminent domain, the question whether the use is public or private depends upon the right of the public to use the road and to require the corporation, as a common carrier, to transport freight or passengers over the same, and not upon the amount of business. Kettle River R. Co. v. Eastern R. Co., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111. If all the people have a right to use it the use is public, although the number who require the use may be small. Chicago &c. R. Co. v. Porter, 43 Minn. 527, 46 N. W. 75, 43 Am. & Eng. R. Cas. 170; Zircle v. Southern Ry. Co., 102 Va. 17, 45 S. E. 802, 102 Am. St. 805 and note; Butte &c. R. Co. v. Montana &c. R. Co., 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. 508. It was held by the court of appeals of New York that a railroad in the gorge of the Niagara River from the falls to the whirlpool, which did not connect with any public highway, which could only be reached by passing over the state reservation or private lands; which could have no habitations along or freight traffic over the road; whose sole

sometimes formed under the general railroad laws for the furtherance of mere private enterprises. Accordingly, it has been held that the corporation which claims the right to exercise the power of eminent domain must not only be able to show a legislative warrant, but it must be able, further, to establish, if the right is challenged, that the particular scheme in which it is engaged is a railroad enterprise within the true meaning of the decisions which justify the taking of private property for railroad purposes; and that the taking of private property for the purposes to which the corporation proposes to devote it is a taking for public use.<sup>16</sup>

**§ 1205. Purposes for which company may condemn—Illustrative cases.**—The question as to what are the legitimate uses which a railroad may make of property in its public character has

business would be to convey sight-seers along Niagara River; and the season of whose operations is confined to four months of the year, could not be built under the general railroad law of that state; and that such a road would not be such a public use as could justify the exercise of the power of eminent domain in its behalf. *Niagara Falls &c. R. Co.*, In re, 108 N. Y. 375, 15 N. E. 429. See *Denver R. &c. Co. v. Union Pac. R. Co.*, 34 Fed. 386; *Split Rock Cable Co.*, Re, 128 N. Y. 408, 28 N. E. 506; *Memphis Freight Co. v. Memphis*, 44 Tenn. (4 Coldw.) 419. See the following authorities in support of the proposition that a railroad is such a public use that the power of eminent domain may be exercised in its behalf. *Bloodgood v. Mohawk &c. R. Co.*, 14 Wend. (N. Y.) 52, 18 Wend. (N. Y.) 9, 31 Am. Dec. 313 and note; *Bonaparte v. Camden &c. R. Co.*, 1 Baldw. (U. S.) 205; *Aldridge*

*v. Tuscumbia &c. R. Co.*, 2 S. & P. (Ala.) 199, 23 Am. Dec. 307; *Contra Costa R. Co. v. Moss*, 23 Cal. 323; *San Francisco &c. R. Co. v. Caldwell*, 31 Cal. 367; *Bradley v. New York &c. R. Co.*, 21 Conn. 294; *Whiteman v. Wilmington &c. R. Co.*, 2 Harr. (Del.) 514, 33 Am. Dec. 411; *O'Hara v. Lexington &c. R. Co.*, 1 Dana (Ky.) 232; *Arnold v. Covington &c. Bridge Co.*, 1 Duv. (Ky.) 372; *Weir v. St. Paul &c. R. Co.*, 18 Minn. 155; *Newby v. Platte County*, 25 Mo. 258; *Concord R. Co. v. Greely*, 17 N. H. 47; *Buffalo &c. R. Co. v. Brainard*, 9 N. Y. 100; *Raleigh &c. Co. v. Davis*, 2 D. & B. L. (N. Car.) 451; *Louisville &c. R. Co. v. Chappell*, Rice L. (S. Car.) 383; *Buffalo Bayou &c. R. Co. v. Ferris*, 26 Tex. 588.

<sup>16</sup> *Niagara Falls &c. R. Co.*, In re, 108 N. Y. 375, 15 N. E. 429; *Denver R. &c. Co. v. Union Pacific R. Co.*, 34 Fed. 386; *Rochester &c. R. Co.*, In re, 59 Hun 617, 12 N. Y. S. 566.

given rise to much litigation. It is held that a railroad company may condemn land for a right of way, not only for its main road, but for any branch or lateral roads which its charter authorizes,<sup>17</sup> that it may take lands for depots,<sup>18</sup> freight houses,<sup>19</sup> turnouts and

<sup>17</sup> *Newhall v. Galena &c. R. Co.*, 14 Ill. 273; *Chicago &c. R. Co. v. Morehouse*, 112 Wis. 1, 87 N. W. 849, 56 L. R. A. 240, 88 Am. St. 918 (reviewing authorities); *Ulmer v. Lime Rock R. Co.*, 98 Maine 579, 57 Atl. 1001, 66 L. R. A. 387; *Zircle v. Southern Ry. Co.* 102 Va. 17, 45 S. E. 802, 102 Am. St. 805 and note. See also *Dubuque &c. R. Co. v. Ft. Dodge &c. R. Co.*, 146 Iowa 666, 125 N. W. 672; *Dodson v. Atchison &c. R. Co.*, 81 Kans. 816, 106 Pac. 1045; *Chicago &c. R. Co., In re*, 152 Wis. 633, 140 N. W. 346; post, § 1206. Where the construction of terminal branches and spur tracks of a railroad to points upon a river front, for the accommodation of business and shipping interests, is essential to any successful operation of a railroad, they must be held to be for public use as much as the main line. *Toledo &c. R. Co. v. East Saginaw &c. R. Co.*, 72 Mich. 206, 40 N. W. 436.

<sup>18</sup> *Hannibal &c. R. Co. v. Muder*, 49 Mo. 165; *Giesy v. Cincinnati &c. R. Co.*, 4 Ohio St. 308; *Small v. Georgia &c. R. Co.*, 87 Ga. 602, 13 S. E. 694. The power of a railroad

company to take lands for a railroad implies the power to take them for depot buildings. *State v. Railroad Comrs.*, 56 Conn. 308, 15 Atl. 756. See also *Carmody v. Chicago &c. R. Co.*, 111 Ill. 69, note in 9 L. R. A. 295; *Chicago &c. R. Co. v. Chicago Mechanics Inst.*, 239 Ill. 197, 87 N. E. 933; *Jager v. Dey*, 80 Iowa 23, 45 N. W. 391, 42 Am. & Eng. R. Cas. 683. The mere fact that other property would derive benefit from the condemnation of property for a freight depot does not alter the character of the public use, neither is it material as affecting such use that part of the compensation is to be paid by a municipality. *Cloth v. Chicago &c. R. Co.*, 97 Ark. 86, 132 S. W. 1005, Ann. Cas. 1912C, 115.

<sup>19</sup> *New York Central R. Co., Matter of*, 77 N. Y. 248; *New York &c. R. Co., Matter of v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385; *New York &c. R. Co., In re*, 77 N. Y. 248. But see *Cumberland Valley R. Co. v. McLanahan*, 59 Pa. St. 23. See *New York Central &c. R. Co. v. Metropolitan Gas Light Co.*, 5 Hun (N. Y.) 201.

side-tracks,<sup>20</sup> yard room,<sup>21</sup> shops to repair cars and engines used

<sup>20</sup> St. Louis &c. R. Co. v. Petty, 57 Ark. 359, 20 L. R. A. 434 and note; Protzman v. Indianapolis &c. R. Co., 9 Ind. 467, 68 Am. Dec. 650; Toledo &c. R. Co. v. Daniels, 16 Ohio St. 390; State v. Toledo &c. Terminal Co., 24 Ohio Cir. Ct. 321; Philadelphia &c. R. Co. v. Williams, 54 Pa. St. 103; Cleveland &c. R. Co. v. Speer, 56 Pa. St. 325, 94 Am. Dec. 84. See also State v. Chicago &c. R. Co., 115 Minn. 51, 131 N. W. 859. In Getz's Appeal, 3 Am. & Eng. R. Cas. 186, 10 W. N. Cas. (Pa.) 453, the court held that the right to condemn land for the construction of sidings to private warehouses and manufacturing establishments is clearly within the constitutional power of the legislature to confer upon railroad companies, because the public interest is thereby subserved by reason of the increased facilities afforded for developing the resources of the state and promoting the general wealth and prosperity of the community. And in South Chicago R. Co. v. Dix, 109 Ill. 237, the court held that: "A side track can surely be none the less such, because, in addition to the purposes of a side track proper, it subserves some other private individual use." But the court admitted that the railroad company could not take land for the construction of an independent branch road to subserve only private interests. And in a later case before the same court, where the question whether a private branch road could be constructed by a railroad under its power of eminent domain

at a point where a switch was not needed, was directly presented and the court held that it could not. The court said: "The fact that the building of collateral branch roads may add to the earnings of the main line and increase its business will not authorize appellant to build the same under its charter and condemn lands therefor . . . Nor is it material to the determination of this question that the proposed track is only a half or three-quarters of a mile in length, or that great loss would occur to the brickworks company, if it be not built. Appellee's land is sought to be taken, and it can, as to his right, make no possible difference whether the proposed line is long or short. If the railroad company may condemn appellee's land for the purposes indicated, why may it not build any distance it may choose for like purposes, or from Danville, its eastern terminus, to St. Louis, if thereby its revenues would be increased, and the interests of the points to which it should build be promoted thereby? The legislature has conferred no such power upon appellant. It is apparent from the proofs that the purpose and use intended was not such a use as is contemplated by the grant of power under which appellant was acting, and that, therefore, no appropriation of appellant's land for such purpose could be made." Chicago &c. R. Co. v. Wiltse, 116 Ill. 449, 6 N. E. 49. See post, §§ 1206, 1221.

<sup>21</sup> Rensselaer &c. R. Co. v. Davis, 43 N. Y. 137; Eldridge v. Smith, 34

for the road,<sup>22</sup> or other similar conveniences which require a particular location with reference to the company's road.<sup>23</sup> And it has been held that a railway company may take lands under the general law for the purpose of laying tracks from its main line to stock-yards which it has established for convenience in handling live stock transported over its road,<sup>24</sup> and the fact that

Vt. 484 and Stockyards, Chicago &c. R. Co. v. Baugh, 175 Ind. 419, 94 N. E. 571.

<sup>22</sup> Southern Pac. R. Co. v. Raymond, 53 Cal. 223; Chicago &c. R. Co. v. Wilson, 17 Ill. 123; Löw v. Galena &c. R. Co., 18 Ill. 324; Hannibal &c. R. Co. v. Muder, 49 Mo. 165; State v. District Court (Mont.), 88 Pac. 44; Virginia &c. R. Co. v. Elliott, 5 Nev. 358; State v. Comrs. of Mansfield, 23 N. J. L. 510, 57 Am. Dec. 409 and note.

<sup>23</sup> Protzman v. Indianapolis &c. R. Co., 9 Ind. 467, 68 Am. Dec. 650; Graham v. Connersville &c. R. Co., 36 Ind. 463, 10 Am. Rep. 56; Dillon v. Kansas City &c. R. Co., 67 Kans. 687, 74 Pac. 251 (water station); Reed v. Louisville Bridge Co., 8 Bush (Ky.) 69; Lawrence v. Morgan &c. Co., 39 La. Ann. 427, 2 So. 69, 4 Am. St. 265; Mansfield &c. R. Co. v. Clark, 23 Mich. 519; Ewing v. Alabama &c. R. Co., 68 Miss. 551, 9 So. 295; Long Island R. Co., In re, 143 N. Y. 67, 37 N. E. 636; South Carolina R. Co. v. Blake, 9 Rich. (S. Car.) 228; Nashville &c. R. Co. v. Cowardin, 11 Humph. (Tenn.) 348; Sadd v. Maldon &c. R. Co., 6 Exch. 143. For water tanks, Wilson v. Pittsburgh &c. R. Co., 222 Pa. St. 541, 72 Atl. 235. Railroads have been permitted to condemn land for parallel tracks along the whole line of a road.

New York Central R. Co., In re, 67 Barb. (N. Y.) 426. For a telegraph line along the right of way. Prather v. Jeffersonville &c. R. Co., 52 Ind. 16. And for stockyards at a station upon the line. New York Cent. R. Co., In re, 63 N. Y. 326. To deny a petition of a railway company for the condemnation of land for a side-track or similar appurtenance, it should appear that the property sought to be taken is not required for the convenient operation of the road. New York Central R. Co., In re, 77 N. Y. 248; Boston &c. R. Co., Matter of, 53 N. Y. 574; South Chicago &c. R. Co. v. Dix, 109 Ill. 237; Smith v. Chicago &c. R. Co., 105 Ill. 511; Cleveland &c. R. Co. v. Speer, 56 Pa. St. 325, 94 Am. Dec. 84. Where a railroad was prohibited from holding land except for the "construction of the road or for depots, toll-houses, and other necessary works," it was held that the railroad had no implied authority to take and hold land for a warehouse. Cumberland Valley R. Co. v. McLanahan, 59 Pa. St. 23.

<sup>24</sup> New York &c. R. Co. v. Metropolitan Gas Light Co., 5 Hun (N. Y.) 201, 6 Hun (N. Y.) 149, affirmed 63 N. Y. 326. See also Covington Stock Yards Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. ed. 73. The first time this case

such tracks will also pass by private business establishments is no objection to the exercise of the power.<sup>25</sup> After the railroad company has taken property it may devote it to any of these or similar uses without incurring a forfeiture or becoming liable to a new assessment of damages.<sup>26</sup> A railroad company may also condemn land over which to divert the course of a stream where it is found necessary in the construction of the road.<sup>27</sup> It may

was before the court, Davis, P. J., speaking for the court, said: "It hardly needs an argument to establish that in a city like New York depots for freight and for the vast number of cattle and other live stock that are constantly being transported to the city, are as much within the purposes for which railroads are constructed, and as necessary to their operation as depots for the accommodation of passenger traffic. The argument, indeed, is more strongly in favor of the former, for while a railroad company might, with safety to itself, leave its passengers upon a public street to take care of themselves upon their individual responsibility, it could not do so with respect to the animals it transported, but must securely keep them from injuring and annoying the public, until proper delivery to owners or consignees. . . . A railroad corporation can not take land under the right of eminent domain for the purpose of founding a town or city on the plea that when founded it will furnish business to the road of the company. But it is quite another question if the company be the lawful owner of lands on which it has founded and erected a city, whether it may not lawfully acquire, under eminent domain, the

lands necessary to connect its tracks, being within its lawful route, within that city. A fortiori would the same reasoning apply where the track to be laid was primarily to erections within the rule of necessity and only incidentally to the those which fall within the class of business conveniences. We are therefore of opinion that the appellants are not protected by the rule that lands can not be taken 'for subsidiary and extraordinary purposes,' but that this case is clearly covered by the ruling of the court of appeals in the matter of the petition of the New York & Harlem R. Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385."

<sup>25</sup> New York Central R. Co. v. Metropolitan Gas Light Co., 5 Hun (N. Y.) 201. See also *Hairston v. Danville &c. R. Co.*, 208 U. S. 598, 28 Sup. Ct. 331, 35 L. ed. 73, 13 Ann. Cas. 1008; *Southern Pac. Co. v. Los Angeles Milling Co.*, 177 Cal. 395, 170 Pac. 829; *Menosha Woodenware Co. v. Railroad Co.*, 167 Wis. 19, 166 N. W. 435.

<sup>26</sup> *Curtis & St. Paul &c. R. Co.*, 20 Minn. 28. See "Right of Way of Rail Road Company," 42 Cent. L. J. 156.

<sup>27</sup> *Baltimore &c. R. Co. v. Magruder*, 34 Md. 79, 6 Am. Rep. 310; *Valley R. Co. v. Bohm*, 34 Ohio St.

take springs near its road for a supply of water for its engines upon making compensation therefor when it can not be otherwise obtained.<sup>28</sup> And it has been held that it may condemn land

114; *Johnson v. Atlantic &c. R. Co.*, 35 N. H. 569, 69 Am. Dec. 560; *Pugh v. Golden Valley R. Co.*, L. R. 12 Ch. Div. 274. An act granting to railroad corporations the right to condemn property for the purpose of diverting a stream of water too frequently crossed by its road, or in any case where the safety and convenience of the operation of the road will be promoted, was upheld by the supreme court of Iowa, in so far as it authorized the condemnation of land to make changes, which would promote the safety of the traveling public, the court holding that taking property for such an object was taking it for public use. But the court refused to decide whether the legislature could constitutionally authorize the taking of land for such a purpose, merely to promote the convenience and economy of the company. *Reusch v. Chicago &c. R. Co.*, 57 Iowa 687, 11 N. W. 647. See also *State v. District Court*, 34 Mont. 535, 88 Pac. 44. It is only in case of necessity that such power exists. Mere convenience of saving of expense to the company will not justify it. *Pugh v. Golden Valley R. Co.*, L. R. 12 Ch. Div. 274; *Scranton Gas &c. Co. v. Northern Coal &c. Co.*, 192 Pa. St. 80, 43 Atl. 470, 73 Am. St. 798. See *Stodghill v. Chicago &c. R. Co.*, 43 Iowa 26, 22 Am. Rep. 211. Under a power to condemn lands it was held that the right to the flow of the stream could

not be taken without taking the bed of the stream. *Watson v. Acquackanonck Water Co.*, 36 N. J. L. 195, and see *Garwood v. New York Cent. R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452. A railroad charter authorizing it to enter upon lands necessary for the construction and maintenance of its road gives it power to take land for railroad purposes only, and not for the purpose of widening or altering streets, and an attempt upon the part of a railroad company to take the land of a citizen for the latter purpose is a nullity. *Chicago &c. R. Co. v. Galt*, 133 Ill. 657, 24 N. E. 674.

<sup>28</sup> *Strohecker v. Alabama &c. R. Co.*, 42 Ga. 509. But see *Connellsville &c. R. Co. v. Markleton Hotel Co.*, 247 Pa. St. 565, 93 Atl. 635, Ann. Cas. 1916E, 1213. Where a spring is destroyed, the owner can recover compensation therefor. *Lehigh Valley R. Co. v. Trone*, 28 Pa. St. 206; *Winkleman v. Des Moines &c. R. Co.*, 62 Iowa 11, 17 N. W. 82; *Peoria &c. R. Co. v. Bryant*, 57 Ill. 473; *Parker v. Boston &c. R. Co.*, 3 Cush. (Mass.) 107, 50 Am. Dec. 709 and note. But damages caused by draining a spring in making excavations to build the road will be presumed to have been included in the sum awarded by the commissioners on condemnation, or agreed upon by the landowner and the company in case the right of way was purchased. *Hougan v. Milwaukee &c.*



for a track to a public landing,<sup>29</sup> or to a public warehouse or elevator.<sup>30</sup> So, it has been held, under a statute granting the power to electric lines and imposing no limitations as to the location of its appurtenances, that an electric railroad may condemn land for power purposes however distant from the line.<sup>31</sup> But it has been held, on the other hand, that a railroad company can not condemn lands for uses not connected with the conduct of its business of a common carrier, such as the erection of dwellings for its employes,<sup>32</sup> or the erection of a manufacturing establishment to supply the road with rolling stock and other necessary equipment,<sup>33</sup> or for the establishment of a pleasure park at its

R. Co., 35 Iowa 558, 14 Am. Rep. 502; *Aldrich v. Cheshire R. Co.*, 21 N. H. 359, 53 Am. Dec. 212.

<sup>29</sup> *Toledo &c. R. Co. v. East Saginaw &c. R. Co.*, 72 Mich. 206, 40 N. W. 436; *Rensselaer &c. R. Co. v. Davis*, 43 N. Y. 137. See also *Collier v. Union Ry. Co.*, 113 Tenn. 96, 83 S. W. 155; *Taussig v. St. Louis Transfer R. Co.*, 133 Fed. 220. Under the Illinois water-craft act of July 1, 1887, a railroad company can not condemn land for a landing for water-craft. *Thomas v. St. Louis &c. R. Co.*, 37 Fed. 839.

<sup>30</sup> *Fisher v. Chicago &c. R. Co.*, 104 Ill. 323; *Chicago &c. R. Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448. See also *Illinois Cent. R. Co. v. East Sioux Falls Quarry Co.*, 33 S. Dak. 63, 144 N. W. 724. A railroad may take land on which to pile lumber to be used on the road and brought to it to be transported thereon. *Eldridge v. Smith*, 34 Vt. 484.

<sup>31</sup> *State v. Centralia - Chehalis Electric &c. Co.*, 42 Wash. 632, 85 Pac. 344.

<sup>32</sup> *Rensselaer &c. R. Co. v. Davis*,

43 N. Y. 137; *State v. Commissioners of Mansfield*, 23 N. J. L. 510, 57 Am. Dec. 409 and note (criticised in *State v. Hancock*, 35 N. J. L. 537); *Eldridge v. Smith*, 34 Vt. 484; *Nashville &c. R. Co. v. Cowardin*, 11 Humph. (Tenn.) 347.

<sup>33</sup> *New York &c. R. Co., Matter of, v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385; *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507, 546, 12 L. ed. 535. In *Eldridge v. Smith*, 34 Vt. 484, 493, the court says: "Is an establishment for the manufacture of railroad cars a legitimate purpose, so that the company would have a right to take land for it against the will of the owner? The defendants say, that as the company must necessarily have cars in order to carry on their business, therefore they must have the right to manufacture them, and have works for that purpose. But this argument proves too much. Railroads must have iron in great quantities, for their track and other purposes. Does this authorize them to take ore beds and lands for forges and foundries, and manufacture their own iron? They must have wood,

terminal.<sup>34</sup> Where expressly authorized, a railroad company may condemn lands lying outside the location to procure materials, if the purpose for which they are taken is disclosed in the petition,<sup>35</sup> but under a general authority to condemn land for the purposes of the road it has been held that no such power can be

sleepers and timber for depots, and large quantities of lumber of various kinds. Does this authorize them to take timbered lands, and sites for mills, against the will of the owners? They must have glass, nails, paint, and many other things. Can they, by compulsory measures, provide themselves the means to manufacture them all? We think it clear they can not. If the company must manufacture their own cars or go without, then, doubtless, their manufacture would be regarded as a necessity of the railroad, but the manufacture of cars and engines is a distinct branch of mechanical industry, carried on wholly independent of any connection with railroads, and is a branch of business in which railroads do not usually engage at all; and in this case it seems to have been quickly demonstrated, that it was better to rely on supplying themselves with cars by purchase from those whose legitimate business it was to make them. Although railroad companies must have engines and cars, iron, lumber, wood and many other things in large quantities, in order to build and operate their roads, it is supposed they can supply themselves as private persons do, by purchase in the ordinary way, and they are not created or designed to be independent of all other branches of

industry and business in the country, but to be additional aids to their successful development. The company must have shops for the repair of cars and engines, as they are so often needed, and as they can not well be moved for repairs, nor can facilities be found for repairs in the country generally, but the company were already supplied with all necessary accommodations for repairs. We are of opinion that an establishment for the manufacture of cars is not a legitimate railroad necessity so that the company could properly condemn land on which to erect one."

<sup>34</sup> *Great Falls Power Co. v. Great Falls &c. R. Co.*, 104 Va. 416, 52 S. E. 172; *Niagara Falls &c. R. Co.*, In re, 108 N. Y. 375, 15 N. E. 429.

<sup>35</sup> *Hopkins v. Florida &c. R. Co.*, 97 Ga. 107, 25 S. E. 452; *Smith v. Cleveland &c. R. Co.*, 170 Ind. 382, 81 N. E. 501; *Valley R. Co. v. Bohm*, 34 Ohio St. 114; *Vermont Central R. Co. v. Baxter*, 22 Vt. 365. The general railroad laws of twenty-seven states authorize the taking of land in addition to the specified width of the railroad right of way for procuring materials, such as stone, gravel and timber. See also *Chicago &c. R. Co. v. Mason*, 23 S. Dak. 564, 122 N. W. 601; *State v. Superior Ct.* 68 Wash. 572, 123 Pac. 996, 40 L. R. A. (N. S.) 793 and note.

exercised.<sup>36</sup> Where the charter of a railroad company authorizes it to enter upon lands adjacent to its roadway and to occupy them "for any purpose useful or necessary in the construction or repair of such roads," upon payment of damages, it has been held that the company, by its servants and employes, has a right to enter upon lands adjoining its roadway, and erect temporary buildings for the use of its workmen, such as stables, wagon houses, blacksmith shops, depots, and the like, provided it takes no more land than is necessary for its purposes.<sup>37</sup>

**§ 1206 (961). Roads to mines or manufacturing establishments—Right to condemn upheld.**—In several of the states provision has been made for the construction of short lateral railroads leading from mills, quarries, mines, or other real estate requiring development, to some navigable stream, railroad or canal, and authorizing the exercise of the power of eminent domain in building them. The most elaborate provision for such roads is made in Pennsylvania,<sup>38</sup> where, as long ago as 1832, an act was passed providing that the owner of any land, mills, quarries, coal mines, lime kilns, or other real estate, might condemn lands for a railroad to any existing railroad, canal or navigable stream, not exceeding a distance of three miles, and imposing upon railroads built under the act the duty of carrying freight for whomsoever would pay a specific compensation.<sup>39</sup> Statutes authoriz-

<sup>36</sup> *New York &c. R. Co. v. Gun-nison*, 1 Hun (N. Y.) 496. A railroad company which constructs a branch line through a man's land under a permissive license from him to construct and use the track thereon, and use the same as long as it shall be used for railroad purposes, acquires no title to stone excavated in building the road but not required in its construction. And it can not remove such stone and devote it to other purposes without his permission. *Chapin v. Sullivan R. Co.*, 39 N. H. 564, 75 Am. Dec. 237. Land required only

for the purpose of excavating materials can not be permanently taken under a power to take the land that may be necessary in constructing the road. *Eversfield v. Mid-Sussex R. Co.*, 3 DeG. & J. 286.

<sup>37</sup> *Lauderbrum v. Duffy*, 2 Pa. St. 398; *Vermont Central R. Co. v. Baxter*, 22 Vt. 365.

<sup>38</sup> See a summary of the legislation and decisions on this subject in *Waddell Appeal*, 84 Pa. St. 90.

<sup>39</sup> *Boyd v. Negley*, 40 Pa. St. 377. Of this act, the supreme court of Pennsylvania speaks as follows: "The truth is, when a lateral rail-

ing the construction of similar roads have been upheld in Maryland and Missouri upon the ground that the roads, when constructed, were charged with the duties of common carriers of all freight and passengers offered for transportation, and were therefore public highways.<sup>40</sup> And in New Jersey the courts have

road is laid upon intervening lands, private property is not taken for private use. . . . The private property is taken for public use,—for clear and definite objects of a public nature which are of sufficient importance to attract the sanction of the sovereign. That an individual expects to gain thereby, and has private motives for risking the whole of the necessary investment and acquires peculiar rights in the work, detracts not a whit from the public aspects of it. . . . It was found, as public improvements penetrated the interior, that many productive mines and manufacturing factories situated near them were still separated by the land of an unneighborly owner, which must be crossed or tonnage lost to the public improvements. To compel such owners to admit a right of passage was not to take away from them a fair participation in the public improvements, and to compensate them for the land occupied was to do all they had a right to claim. They hold their land, as every man does, subject to the call of the government.” *Hays v. Risher*, 32 Pa. St. 169.

<sup>40</sup> *New Central Coal Co. v. George's Creek Coal Co.*, 37 Md. 537; *Dietrich v. Murdock*, 42 Mo. 279. See *Brown v. Corey*, 43 Pa. St. 495; *Colorado Eastern R. Co. v. Union Pacific R. Co.*, 41 Fed.

293, 44 Am. & Eng. R. Cas. 10. In this latter case, Phillips, J., said: “The character of this corporation is first to be determined from the language of its charter. It is declared to be a railroad to be operated as such between given points, with necessary lines of telegraphs and with power to construct branches. As incident to its apparent character, the general statute of the state imposed upon it the burden and duty of acting as a common carrier of freight and passengers. . . . Does the fact that the grant authorizing the company to extend its road from the eastern designated point of Sand Creek to its coal lands, with branches to other lands, *ex vi termini*, destroy or take away its character as a public railroad corporation? I am unable to discover sufficient reason or authority for such conclusion. In the first place, if this extension can be deemed a special power, it in no sense is inconsistent with, or contradictory of, the general terms of the grant, so that they may not stand together; and, second, the power to build to the coal or other lands of the petitioner, without more, should in favor of the legality of the franchise be considered as merely designating the terminus of the eastern extension of the road, or the termini of its branches, and not as a pal-

sustained an act which authorizes the condemnation of land for building short underground railroads leading from mines to points from which the products of such mines can readily be

pable indication that the real motive of its promoters was to develop their coal fields, and conduct a private traffic in their products. If such object in fact existed, it was in pais, and must be found in evidence, *dehors* the record." After stating that the evidence showed the road to extend from Denver to the coal fields, a distance of seventeen miles, and to have been constructed at a cost of \$80,000, by a company with a nominal capital of \$500,000, four-fifths of which consisted of its coal lands, that it was built through a sparsely settled country, in which the population has since increased, and that it had from the first run trains daily, carrying the United States mail, and such passengers and freight as were offered for transportation, he continued: "Its beginning may have been small, but if the right to exercise the power of eminent domain should have been denied in the early history of railroads in this country, because of their small beginnings, it is not too much to say that some of the great, mammoth railroad enterprises which have developed and strengthened the commerce and wealth of the country would have perished in their infancy. In *Chicago &c. R. Co. v. Chicago &c. R. Co.*, 112 Ill. 589, 25 Am. & Eng. R. Cas. 158, the court says: 'The company, as we have just seen, was organized under a valid charter, and is shown to have done cor-

porate acts under it. That was sufficient to establish a *prima facie* right to take the property in question; . . . and this *prima facie* right can not be successfully assailed in a mere collateral proceeding, as is sought to be done here.' And in the later case of *Ward v. Minnesota &c. R. Co.*, 119 Ill. 287, 10 N. E. 365, the chief justice says: 'There is some proof that the petitioner is a corporation *de facto*, and that is all the law requires in this class of cases. There is evidence, although it may be slight, of corporate acts done by petitioner. It appears that an engineer has been appointed, the line of the proposed road has been located, and other steps taken toward the building of the road. . . . These are corporate acts, and tend to show petitioner is a corporation *de facto*.' It does seem to me that the right of eminent domain should not necessarily be denied to a railroad corporation because of the fact that the primary and chief inducement moving its promoters was to develop private coal mines, and bring their products to market. In *Contra Costa R. Co. v. Moss*, 23 Cal. 323, the court says: 'It is urged that the plaintiffs are constructing a railroad from a coal mine in the mountains, through a desolate region, to navigable waters, to enable it to get coal ready to market, and that this is a mere private use, and therefore they have no right to appropriate the

sent to market, and expressly requiring roads built under its provisions to carry freight for any one having occasion to make

property of others to its purposes without its consent. . . . The plaintiffs, in common with other railroad companies organized under this act, are bound by these provisions which make it obligatory upon them to act as common carriers . . . . The fact that their road does not connect points of present commercial importance can not affect the rights of the plaintiffs. Railroads often make commercial points by their construction, and a large and cheap supply of coal . . . . is one of the greatest necessities of the state, and a matter in which the whole state is interested.' In the progress of civilization, municipal existence as well as the maintenance of rural populations without timber supply, may be so dependent upon a large supply of coal for fuel as to render railroads for its transportation alone of imperative public necessity. It would, in fact, be difficult to conceive of an object of greater public use. It is as much so as the freighting of breadstuffs, meats and other necessary supplies for human sustenance in our large cities, or compact communities, depending upon exterior sources for their production. It would be no answer to their claim to be public corporations to say, for instance, that a community like Denver was not wholly dependent upon this road for its supply of fuel, as there are other railroads which may bring such supply. Competition is not only the life of trade (or at least is yet sup-

posed to be by the common people), but the multiplication of products and the facilities for getting them to market, tend to cheapen the necessities of life to the masses; and in the most beneficent and legitimate sense they should retain their character as public necessities. Government itself is maintained to promote the general welfare, and the right of eminent domain has its root in this soil. Be this as it may in the light of adjudications, certainly it comes both within the letter and the spirit of a public railroad corporation where such an object, as above indicated, is coupled with the obligation, inseparably affixed by the statute to the franchise itself, to become also a common carrier of passengers and freight, and the corporation actually performs such duty to the public. The evidence in this case shows that for the greater period, and in the latter years, of the existence and operation of this road, its business has been confined principally to the carrying of passengers and general freight, however small it may have been. What is said by Depue, J., in *Decamp v. Hibernia Underground R. Co.*, 47 N. J. L. 43, respecting a like proceeding, where a railroad began in a mine, is quite pertinent. 'This enterprise does not lose the character of a public use because of the fact that the projected railroad is not a thoroughfare, and that its use may be limited by circumstances to a com-

use of them.<sup>41</sup> In Iowa a mine owner is permitted by statute to condemn land for a "public way" to any highway or railroad. In sustaining a proceeding under this act the supreme court of that state said: "We think that it makes no difference that the mine owner may be the only member of the public who may have occasion to use the way after it has been established. The character of a way, whether it is public or private, is determined by the extent of right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it it is a public way, although the number who have occasion to exercise the right is very small."<sup>42</sup> There would seem no good reason

paratively small part of the public. Every one of the public having occasion to send materials, implements, or machinery for mining purposes into, or to obtain ores from, the several mining tracts adjacent to the location of this road, may use the railroad for that purpose, and of right may require the company to serve him in that respect; and that is the test which determines whether the use is public. Nor will any motive of personal gain which may have influenced the projectors in undertaking the work take from it its public character. . . . A particular improvement palpably for private advantage only will not become a public use because of the theoretical right of the public to use it. But where the franchise is in its nature a public franchise, as the transportation of freight is, and the object to be promoted is one that concerns the public interests, as the development of the mining resources of a state does, the improvement is essentially a public benefit and advantage; and if there be no restriction on the right of

the public to use it, and no inability to use it, except such as arises from the circumstances, the court, in determining whether the improvement is such a public use as that the right of condemnation shall extend to it, will not scan closely the number of individuals profited by it. Indeed, it would not be possible to indicate the number of persons, or define the area of the limits to which the benefit of such an improvement may extend."

<sup>41</sup> *DeCamp v. Hibernia Underground R. Co.*, 47 N. J. L. 43, affirmed 47 N. J. L. 518, 54 Am. Rep. 197. In this case the road constructed was only two-thirds of a mile long.

<sup>42</sup> *Phillips v. Watson*, 63 Iowa 28, 18 N. W. 659. In *Lower v. Chicago &c. R. Co.*, 59 Iowa 563, 13 N. W. 718, the right of the company to build a lateral road, 15 miles long, was sustained, although the road was built at the instigation of private individuals and from motives of private gain. See also *Morrison v. Thistle Coal Co.*, 119 Iowa 705, 94 N. W. 507.

why lateral roads should not be constructed, if they are required to serve the public, as occasion requires. In South Carolina it is held that, under the constitution of that state, corporations created for mining or manufacturing purposes may be authorized by statute to construct and operate a railroad, tramway, turnpike or canal for their own use and purposes, to and from their works, or place of business, or to connect with some navigable stream, or with some existing railroad, turnpike or other public highway, not to exceed ten miles in length, and may be empowered to condemn, for the use of such road, the right of way in lands over which the road may pass, upon making compensation therefor to the owner.<sup>43</sup> And the weight of authority, as well as the better reason, seems to be to the effect that lines of railroad, branches or spurs to mines, manufacturing establishments, and the like, are a public use for which land may be condemned where the general public have the right to use them or to be served without discrimination.<sup>44</sup>

<sup>43</sup> A road or canal constructed by the public or a corporation is a public highway for the public benefit if the public have a right of passage thereon by paying a reasonable, stipulated, uniform toll. *Bonaparte v. Camden &c. R. Co.*, *Baldw.* (U. S.) 205; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *Bacot, Ex parte*, 36 S. Car. 125, 15 S. E. 204, 16 L. R. A. 586, 50 Am. & Eng. R. Cas. 597.

<sup>44</sup> *Bedford Quarries Co. v. Chicago &c. R. Co.*, 175 Ind. 303, 35 L. R. A. (N. S.) 641, 94 N. E. 326 (citing text and numerous authorities); *Ulmer v. Lime Rock R. Co.*, 98 Maine 579, 57 Atl. 1001, 66 L. R. A. 387; *Toledo &c. R. Co. v. East Saginaw &c. R. Co.*, 72 Mich. 206, 40 N. W. 436; *Ochs v. Chicago &c. Ry. Co.*, 135 Minn. 323, 160 N. W. 866, Ann. Cas. 1918E, 337, 339 (and the state may empower a public

service commission to require a railroad company to provide side tracks to adjacent industries at its own expense. See additional cases there cited in note, also note in *L. R. A.* 1918B, 795); *Chicago &c. R. Co. v. Porter*, 43 Minn. 527, 46 N. W. 75; *Butte &c. R. Co. v. Montana &c. R. Co.*, 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. 508; *Illinois Cent. R. Co. v. East Sioux Falls Quarry Co.*, 33 S. Dak. 63, 144 N. W. 724; *Zircle v. Southern R. Co.*, 102 Va. 17, 45 S. E. 802, 102 Am. St. 805; *Chicago &c. R. Co. v. Morehouse*, 112 Wis. 1, 87 N. W. 849, 56 L. R. A. 240, 88 Am. St. 918. See also *Harrold Bros. v. Americus*, 142 Ga. 686, 83 S. E. 534; *Union Lime Co. v. Chicago &c. R. Co.*, 233 U. S. 111, 34 Sup. Ct. 517, 525, 58 L. ed. 924, and authorities there cited; also ante § 1205, n. 25.



§ 1207 (961a). **Right to condemn for road to private enterprise denied.**—On the other hand, the Supreme Court of Illinois has held that a right of way for a short railroad or tramway leading from a coal mine to a railroad can not be taken by condemnation proceedings instituted by the company owning the coal mine, placing its decision on the ground that the business of mining coal is of a strictly private character, and that the coal company would be at liberty to operate the tramway or not, at its pleasure, and without regard to the interests of the public.<sup>45</sup> So, where a company was organized merely to construct and operate a railroad from a coal mine to a navigable river, but carried no passengers, and no freight except coal, it was held that this was a mere private use.<sup>46</sup> And several of the courts have held that railroad corporations have no authority to condemn land for side-tracks or switches leading to private manufacturing establishments, or the like, for their own private benefit.<sup>47</sup>

<sup>45</sup> *Sholl v. German Coal Co.*, 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379. See *Edgewood R. Co.'s Appeal*, 79 Pa. St. 257.

<sup>46</sup> *People v. Pittsburgh R. Co.*, 53 Cal. 694. See also *Chicago & C. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Memphis Freight Co. v. Memphis*, 44 Tenn. (4 Coldw.) 419.

<sup>47</sup> *Chattanooga & C. R. Co. v. Felton*, 69 Fed. 273. See also *Atlanta & C. R. Co. v. Bradley*, 141 Ga. 740, 81 S. E. 1104; *Bradley v. Lithonia & C. R. Co.*, 141 Ga. 741, 82 S. E. 138 (distinguished in 83 S. E. 534, cited in last note to preceding section); *Pere Marquette R. Co. v. United States Gypsum Co.*, 154 Mich. 294, 117 N. W. 733, 22 L. R. A. (N. S.) 181; *In re Grade Crossing Comrs.*, 207 N. Y. 52, 100 N. E. 714, Ann. Cas. 1914C, 271; *Neitzel v. Spokane International R. Co.*, 65 Wash. 100, 117 Pac. 864, 36 L.

R. A. (N. S.) 522. A spur track from the line of a railroad with which it does not connect except at one point, running to mills belonging to private concerns and operated for private profit, is not for a public use which will authorize the condemnation of land for a right of way. *Kyle v. Texas & C. R. Co. (Tex.)*, 4 L. R. A. 275. Evidence that all who wish to avail themselves of a proposed railroad switch, branch road, or lateral work, can do so, is not sufficient to show that the use of the work will be for the benefit of the public. *Pittsburgh & C. R. Co. v. Benwood Iron Works*, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680, 5 R. & Corp. L. J. 324. *In St. Louis & C. R. Co. v. Petty*, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434 and note, which was a case in which a railroad sought to condemn land for a side-track near the lands of a coal com-

The Supreme Court of West Virginia has held that a road from a salt mine was not of such a public character as to permit the

pany, Cockrill, C. J., said: "The vexed question for determination is, is the company seeking to condemn the land for railroad purposes—that is, for public use? The appellee argues that the proof shows that the railway's proceeding to condemn is prosecuted, not for its own use, but for the use and benefit of the Western Coal and Mining Company—a corporation which owns and operates a coal mine near the appellant's line of railway. The managers of the railway were probably instigated by the coal company to institute the condemnation proceedings, and they doubtless intended that the coal company should derive a benefit therefrom. But those facts alone do not furnish a legal reason sufficient to warrant judicial interference with the power delegated to the corporation by the legislature. If the land is needed for legitimate railroad purposes, the motive which influenced the railway managers in undertaking the work will not take from it its public character. A proposed public user will not be enjoined by the courts upon the ground that it will further private interest. *De Camp v. Hibernia &c. R. Co.*, 47 N. J. L. 43; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *South Chicago &c. R. Co. v. Dix*, 109 Ill. 237; *Dunham v. Hyde Park*, 75 Ill. 371. A railway can not exercise the right of eminent domain to establish a private shipping station for an individual shipper. If

the station is for the exclusive use of a single individual, or of a collection of individuals less than the public, that stamps it as a private use, and private property can not be taken for private use. The fact that the railway's business would be increased by the additional private facilities is not enough to make the use public. *Rensselaer &c. R. Co. v. Davis*, 43 N. Y. 137. To the public, the user must concern the public. If it is an aid in facilitating the business for which the public agency is authorized to exercise the power to condemn, or if the public may enjoy the use of it, not by permission, but of right, its character is public. When once the character of the use is found to be public, the court's inquiry ends, and the legislative policy is left supreme, although it appears that private ends will be advanced by the public user. It is common for the interest of some individuals to be advanced, while that of others is prejudiced, by the location of railway stations and switches, when there is no motive on the part of the railway officials to discriminate between them. The same effect is seen in the original location of every line of railway. But the courts do not assume to interfere with the right of the company to locate its line stations, or switches. In this case the railway located its side-tracks contiguous to the mine of the coal company, rather than to that of the appellee, who is a rival miner. The evi-

condemnation of a right of way.<sup>48</sup> And, in a late case,<sup>49</sup> the same court held that even a corporation formed under the general railroad law of the state could not condemn land on which to build a short line of road for the declared purpose of "transporting freight to and from certain steel works." The court said: "The mere declaration in a petition that the property is to be appropriated to public use does not make it so, and evidence that the public will have a right to use it amounts to nothing in the face of the fact that the only incentive to ask for the condemnation was private gain, and it was apparent that the general public

dence is abundant that side-tracks were necessary to facilitate and hasten the business offered to the company at that point. That of itself is sufficient to give public character to the use to which the land was to be devoted. Moreover at that point, upon this very land, as the proof shows, there is established a shipping station for coal. The railway's franchise empowers it to establish none but public stations. It can place no unreasonable restraint on the right of the public to use it. If the railway maintains a coal-shipping station at that point, and unreasonably refuses to accord to the appellee, or others who have occasion to ship coal therefrom, facilities for doing so, the courts can afford a remedy for the wrong; and if the railway abuses the privileges of condemning private property to a public use, by turning the property acquired to a private use, doubtless the easement is acquired by condemnation may be revoked, and the possession restored to the owner of the fee. The fact that the tracks are extended upon the lands of the coal company for its

exclusive use is not a matter to concern the appellee, for the reason before stated; that is, a public use is first subserved. If no use could be made of the side-tracks except to subserve the interest of the coal company, the power to condemn could not be exercised for that purpose. *Sholl v. German Coal Co.*, 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379. But, as we have seen, that is not this case. . . . There are numerous cases holding that a railway built for the purpose of reaching a coal mine or a manufacturing establishment is a public enterprise, entitled to use the power of eminent domain, provided the public has the power to use it. That right makes the use public. *Kettle River R. Co. v. Eastern R. Co. of Minnesota*, 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111; *Phillips v. Watson*, 63 Iowa 28, 18 N. W. 659; *DeCamp v. Hibernia R. Co.*, 47 N. J. L. 43; *Hays v. Risher*, 32 Pa. St. 169, 177."

<sup>48</sup> *Salt Co. v. Brown*, 7 W. Va. 191.

<sup>49</sup> *Pittsburgh &c. R. Co. v. Benwood Iron Works*, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680.

had no interest in it."<sup>50</sup> In a late case in one of the United States courts it was held that a projected railroad twelve miles long, connecting two other railroads, and passing through valuable timber lands from which the projector and principal stockholder expected to procure bark for his tanneries, was a private enterprise, and that the company seeking to construct it was not entitled to exercise the right of eminent domain.<sup>51</sup> The corporation was organized under the general railroad law of the state, and its projectors claimed that it was organized for a public

<sup>50</sup> *Pittsburgh &c. R. Co. v. Benwood Iron Works*, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680 and note, 36 Am. & Eng. R. Cas. 531. This case contains an exhaustive review of the authorities touching the power to condemn land for a railroad leading to a private establishment. And see *Gauley &c. R. Co. v. Vencill*, 73 W. Va. 650, 80 S. E. 1103. See also *Denver R. &c. Co. v. Union Pac. R. Co.*, 34 Fed. 386, where it was said, per Judge Hallett: "The inquiry is not as to what the company was organized for, or whether it will be a public or private corporation, but what the road will be, the structure itself, if any such thing will be made." *Chicago &c. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49.

<sup>51</sup> *Weidenfeld v. Sugar Run R. Co.*, 48 Fed. 615. Judge Reed said: "Whether the use is a public one, for which private property may be taken, is a judicial question. If the use itself is found to be only private, or, further, if the use being public, the appropriation can in no respect be subservient thereto, it is the duty of the judicial department to protect the citizen by proper remedies from the taking of his property, whether attempted

in open disregard of, or under color of law. *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206. . . . In the case of *Edgewood R. Company's Appeal*, 79 Pa. St. 257, it appeared, as in this case, that a number of persons had procured a charter for a railroad company, and, under cover of constructing a railroad for public use, were engaged in the construction of a railroad from a tract of coal owned by themselves, to the Pennsylvania Railroad. A bill was filed by a property-owner to restrain the appropriation, by virtue of the power of eminent domain conferred upon the railroad company, of a portion of his property for its uses. The supreme court of Pennsylvania, finding the facts to be that the railroad was projected and constructed with the primary object of connecting the coal mines with the Pennsylvania Railroad, held that the railroad was being constructed for private purposes under cover of a charter obtained under the general railroad laws of the state; that there appeared a perversion of an enactment passed for one purpose in order to subserve other and inconsistent purposes; that the charter of the defendant

purpose, but failed, on the trial, to show any public use or necessity for the railroad, or that it would obtain any public traffic when constructed.<sup>52</sup> It has been held by the Court of Appeals of New York that a company organized under the general laws of that state for the formation of elevated tramway corporations, and owning a road one terminus of which was upon private property, and could only be reached by means of a private road, and which was used solely for the transportation of stone for a private corporation in which the incorporators were financially interested, could not exercise the power of eminent domain. The fact that the corporation was ready to carry freight offered to it by any person, providing that such freight was suitable for transportation in the overhead buckets with which the road was provided in lieu of cars, to the extent of its surplus capacity after supplying the wants of the private corporation, was held insufficient to show that it was a public use.<sup>53</sup> Some of these cases, it seems to us, are contrary to the weight of authority, but most of them can be distinguished.

company did not warrant the appropriation of the land of the plaintiff for the purpose to which the defendant had applied it; and that it did not possess the right or franchise to do the acts which had resulted in the injury of which the plaintiff complained." In *Western Pennsylvania R. Company's Appeal*, 104 Pa. St. 399, the same court, commenting upon the *Edge-wood R. Co. Case*, said: "A charter authorizing the building of a public railroad did not warrant the construction of a purely private one. . . . The question was one of corporate power, and that question was determined by the inspection of the charter of the company proposing to exercise the power."

<sup>52</sup> It would seem that this point made by the court was not well

taken, as it had been shown to the court that another railroad company was seeking to build a railroad over nearly the same route chosen by the *Sugar Run Co.*, and it was as one of the stockholders of that other company that the plaintiff claimed the right to sue.

<sup>53</sup> *Split Rock Cable Road Co.*, *In re*, 128 N. Y. 408, 28 N. E. 506. See also *Leigh v. Garysburg Mfg. Co.*, 132 N. Car. 167, 43 S. E. 632. To be public, the user must concern the public. If it is an aid in facilitating the business for which the public agency is authorized to exercise the power to condemn, or if the public may enjoy the use of it, not by permission, but of right, its character is public. *St. Louis &c. R. Co. v. Petty*, 57 Ark. 359, 21 S. W. 359, 20 L. R. A. 434 and note.

§ 1208 (962). **Condemnation of land for future use—Second appropriation.**—It has been held that a railroad company may take lands that will be required in the future to accommodate a growing business, where it acts in good faith.<sup>54</sup> But it can not, under pretense of acquiring lands for future use, take them for purposes of speculation, or to prevent their acquisition by competing lines.<sup>55</sup> Nor will a collateral enterprise remotely connected with the operation of the road ordinarily justify the assertion of the right of eminent domain without authority other than a general law to condemn for railroad purposes.<sup>56</sup> Thus, in New York, it has been held that the railroad law of that state, giving power to condemn land necessary for the construction, operation and maintenance of a railroad, does not authorize a railroad corporation having a completed line through an incorporated village to condemn land for a new and straighter line through the town, to be used as a cut-off and an additional line.<sup>57</sup> In determining the quantity to be taken, however, where the authority exists, the prospective needs of the company may be considered to a reasonable extent.<sup>58</sup> As a general rule, a single appropriation does not exhaust the power,<sup>59</sup> and new appropria-

<sup>54</sup> *Lodge v. Philadelphia &c. R. Co.*, 8 Phila. (Pa.) 345. See also *Michigan Cent. R. Co. v. Ferguson*, 162 Mich. 220, 127 N. W. 320; *Chew v. Philadelphia*, 257 Pa. St. 589, 101 Atl. 915, L. R. A. 1918A, 96, 990; *Miller v. Pulaski*, 114 Va. 85, 75 S. E. 767.

<sup>55</sup> *Rensselaer &c. R. Co. v. Davis*, 43 N. Y. 137; *New York Cent. &c. R. Co.*, In re, 59 Hun 7, 8 N. Y. S. 290. See also In re *New Haven Water Co.*, 86 Conn. 361, 85 Atl. 636; *Webster v. Susquehanna &c. Co.*, 112 Md. 416, 76 Atl. 259; *Long Island R. Co. v. Sherwood*, 136 N. Y. S. 752; *Scranton Gas &c. Co. v. Northern Coal &c. Co.*, 192 Pa. St. 80, 43 Atl. 470, 73 Am. St. 798.

<sup>56</sup> *Rochester &c. R. Co.*, In re,

110 N. Y. 119, 17 N. E. 678. But, as already shown, some purposes that seem more or less of a collateral nature may be authorized when a public use. A statute giving a railroad company the right to use streets for a right of way does not authorize such an appropriation for a railroad yard. *Rockford v. Cleveland &c. R. Co.*, 85 Ohio St. 73, 97 N. E. 133.

<sup>57</sup> *Erie R. Co. v. Steward*, 170 N. Y. 172, 63 N. E. 118. But compare *Bierly v. Philadelphia &c. R. Co.*, 225 Pa. St. 182, 74 Atl. 27.

<sup>58</sup> *New York &c. R. Co.*, In re, 77 N. Y. 248; *Lodge v. Philadelphia &c. R. Co.*, 8 Phila. (Pa.) 345. See also note 54 ante.

<sup>59</sup> *Elliott Roads and Streets* (3rd ed.), § 260; *Ewing v. Alabama &c.*

tions may be made from time to time as the necessities of the road may require.<sup>60</sup> So, of course, a futile effort to condemn does not exhaust the power and prevent the company from afterwards proceeding in the proper manner to condemn.<sup>61</sup> A re-organized company can not, however, condemn lands where the company it succeeds has exhausted all this power given it by its charter.<sup>62</sup>

**§ 1209 (963). What may be appropriated—Generally.**—All kinds of property, and every variety and degree of interest in property, may be taken under the power of eminent domain by the state, or by a corporation acting under the authority of the

R. Co., 68 Miss. 551, 9 So. 295. See also *Chicago &c. R. Co. v. McCovey*, 273 Mo. 29, 200 S. W. 59; *Yadkin River &c. Co. v. Wissler*, 160 N. Car. 469, 76 S. E. 267; *Burkhard v. Penna. Water Co.*, 234 Pa. St. 41, 82 Atl. 1120; *State v. Superior Ct.*, 68 Wash. 397, 123 Pac. 529.

<sup>60</sup> *Chicago &c. R. Co. v. Wilson*, 17 Ill. 123; *Fisher v. Chicago &c. Co.*, 104 Ill. 323; *Prather v. Jeffersonville &c. R. Co.*, 52 Ind. 16; *Peck v. Louisville &c. R. Co.*, 101 Ind. 366; *Atchison &c. R. Co. v. Patch*, 28 Kans. 470; *Deitrichs v. Lincoln &c. R. Co.*, 13 Nebr. 361, 13 N. W. 624; *Virginia &c. Co. v. Lovejoy*, 8 Nev. 100; *New York &c. R. Co., In re*, 67 Barb. (N. Y.) 426; *New York &c. R. Co. v. Welsh*, 69 Hun 619, 23 N. Y. S. 195; *South Carolina &c. R. Co. v. Blake*, 9 Rich. (S. Car.) 228. See also *Kenny v. Pittsburgh &c. R. Co.*, 208 Pa. St. 30, 57 Atl. 74; *Gardner v. Georgia &c. R. Co.*,

117 Ga. 522, 43 S. E. 863; *Hopkins v. Philadelphia &c. R. Co.*, 94 Md. 257, 51 Atl. 404; *Middlesex &c. Traction Co. v. Metlar*, 70 N. J. L. 98, 56 Atl. 142; post, § 1221. But see *Mason v. Brooklyn &c. Co.*, 35 Barb. (N. Y.) 373; *Kenton Co. v. Bank Lick Tpk. Co.*, 10 Bush (Ky.) 529; *Brigham v. Agricultural &c. Co.*, 1 Allen (Mass.) 316; *Morris &c. R. Co. v. Central &c. Co.*, 31 N. J. L. 205.

<sup>61</sup> *State v. Dover &c. R. Co.*, 43 N. J. L. 528, 14 Am. & Eng. R. Cas. 87; *Cincinnati &c. R. Co. v. Haas*, 42 Ohio St. 239, 22 Am. & Eng. R. Cas. 164; *Williams v. Hartford &c. R. Co.*, 13 Conn. 397. See also *Bouvier v. Baltimore &c. R. Co.*, 51 N. J. L. 781, 53 Atl. 1040. But compare *New York &c. R. Co. v. Boston &c. R. Co.*, 36 Conn. 196; *Brooklyn &c. R. Co., Matter of*, 72 N. Y. 245; *Peavy v. Calais R. Co.*, 30 Maine 498.

<sup>62</sup> *Erie R. Co. v. Steward*, 170 N. Y. 172, 63 N. E. 118.

legislature.<sup>63</sup> Mortgaged property,<sup>64</sup> easements,<sup>65</sup> property in the hands of a receiver,<sup>66</sup> and property held by the petitioner under a lease, may all be taken by a railroad corporation under a general grant of power to condemn property necessary for its use.<sup>67</sup> The fact that the petitioner has confirmed certain rights to a land-owner by contract does not preclude it from condemning those rights.<sup>68</sup> So, land taken from the possession of the railroad company for breach of a condition subsequent in a deed conveying same may be repossessed in condemnation proceedings.<sup>69</sup> Thus, where a land-owner had contracted with a rail-

<sup>63</sup> Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. ed. 1165; Alabama &c. R. Co. v. Kenney, 39 Ala. 307; New York &c. R. Co. v. Boston &c. R. Co., 36 Conn. 196; Metropolitan City R. Co. v. Chicago West. Div. R. Co., 87 Ill. 317; Water Works Co. v. Burkhardt, 41 Ind. 364; Eastern R. Co. v. Boston &c. R. Co., 111 Mass. 125, 15 Am. Rep. 13; People v. Baltimore &c. R. Co., 117 N. Y. 150, 22 N. E. 1026. See also Pittsburgh &c. R. Co. v. Hunt, 171 Ind. 189, 86 N. E. 328. Louisiana &c. R. Co. v. Louisiana R. Co., 125 La. Ann. 756, 51 So. 712. In New York &c. R. Co. v. Offield, 77 Conn. 417, 59 Atl. 510, it is held that the legislature may authorize stock in one railroad to be condemned by another under certain circumstances where it is for the public interest.

<sup>64</sup> Alabama &c. R. Co. v. Kenney, 39 Ala. 307; Long Island Dock &c. Co. v. Morris &c. R. Co. (N. J.), 30 Am. & Eng. R. Cas. 431, and note. See also State v. St. Louis &c. R. Co. (Tex. Civ. App.), 165 S. W. 491.

<sup>65</sup> Buffalo &c. R. Co. v. Overton, 35 Hun (N. Y.) 157; Rensselaer v. Leopold, 106 Ind. 29; Johnston v. Old Colony R. Co., 18 R. I. 642, 29 Atl. 594, 49 Am. St. 800. See also Whiterocks Irr. Co. v. Moose-

man, 45 Utah 79, 141 Pac. 459. Rights of way may be taken. Galena &c. R. Co., In re, 73 Ill. 494; Boston Gas Light Co. v. Old Colony R. Co., 14 Allen (Mass.) 444; Baltimore &c. R. Co. v. Reaney, 42 Md. 117; Sixth Ave. R. Co. v. Kerr, 72 N. Y. 330; Brown v. Corey, 43 Pa. St. 495. But there must be compensation. Central Pass. R. Co. v. Philadelphia &c. Ry. Co., 95 Md. 428, 52 Atl. 752; Southern Kans. R. Co. v. Oklahoma City, 12 Okla. 82, 69 Pac. 1050.

<sup>66</sup> Western Union Tel. Co. v. Atlantic &c. Tel. Co., 7 Biss. (U. S.) 367; Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475.

<sup>67</sup> De Camp v. Hibernia Underground R. Co., 47 N. J. L. 43; Coster v. New Jersey &c. R. Co., 24 N. J. L. 730; Kip v. New York &c. R. Co., 6 Hun 24, affirmed, 67 N. Y. 227; Secomb v. Milwaukee &c. R. Co., 49 How. Prac. (N. Y.) 75. But usufructuary interest of lessee of a railroad belonging to the state is held not subject to condemnation as an independent interest in land. Western Un. Tel. Co. v. Western &c. R. Co., 142 Ga. 532, 83 S. E. 135.

<sup>68</sup> Brimmer v. Boston, 102 Mass. 19.

<sup>69</sup> Bouvier v. Baltimore &c. R. Co., 69 N. J. L. 149, 53 Atl. 1040.



road company for the construction of a particular crossing, his right to have it constructed was held subject to condemnation,<sup>70</sup> and where one railroad accepted from another a grant of a right of way across the grantor's road thirty feet wide, on condition that it should only be used for two tracks, it was held that the grantee could condemn an additional twenty feet to be occupied by two more tracks.<sup>71</sup> And the fact that the land was granted, with covenants for quiet enjoyment by the state or municipality which seeks to condemn it, does not affect the power,<sup>72</sup> since it can not be surrendered by grant or contract,<sup>73</sup> and all grants by the state are held to be made upon the implied condition that the property conveyed shall be subject to the power of eminent domain.<sup>74</sup> Land or any estate therein may be taken although the owner is under legal disabilities.<sup>75</sup> Dwelling-houses and other buildings may also be taken when necessary, under statutory authority.<sup>76</sup>

<sup>70</sup> New York &c. R. Co., *Matter of*, 44 Hun (N. Y.) 194. The right of eminent domain can not be impaired or defeated by any private contract between a corporation and the owner of property which the legislature may subsequently deem necessary for public use. *Cornwall v. Louisville &c. R. Co.*, 87 Ky. 72, 9 Ky. L. 924, 7 S. W. 553.

<sup>71</sup> *Chicago &c. R. Co. v. Illinois Cent. Co.*, 113 Ill. 156. Where land is dedicated for the use of a railroad, upon the condition that no greater width than that dedicated shall ever be taken, the condition will not prevent the condemnation of other land subsequently needed; but equity may compel the company to compensate the owner for all the land, both that dedicated and that condemned, as a condition of allowing more land to be taken. *Cornwall v. Louisville &c. R. Co.*, 87 Ky. 72, 7 S. W. 553.

<sup>72</sup> *Brimmer v. Boston*, 102 Mass.

19; *Philadelphia &c. R. Co. v. Philadelphia*, 9 Phila. (Pa.) 563; *Beekman v. Saratoga &c. R. Co.*, 3 Paige (N. Y.) 45, 22 Am. Dec. 679 and note; *Young v. McKenzie*, 3 Ga. 31; *Jackson v. Winn's Heirs*, 4 Littell (Ky.) 322.

<sup>73</sup> Ante, § 1185.

<sup>74</sup> *Beekman v. Saratoga &c. R. Co.*, 3 Paige (N. Y.) 45, 22 Am. Dec. 679; *Todd v. Austin*, 34 Conn. 78; *Harding v. Goodlett*, 3 Yerg. (Tenn.) 41.

<sup>75</sup> *Alabama &c. R. Co. v. Kenney*, 39 Ala. 307; *Indiana &c. R. Co. v. Brittingham*, 98 Ind. 294; *Hotchkiss v. Auburn &c. R. Co.*, 36 Barb. (N. Y.) 600; *Watson v. New York Central R. Co.*, 47 N. Y. 157; *North Pennsylvania R. Co. v. Davis*, 26 Pa. St. 238; *East Tennessee &c. R. Co. v. Love*, 3 Head (Tenn.) 63.

<sup>76</sup> *Wells v. Somerset &c. R. Co.*, 47 Maine 345; *Forney v. Fremont &c. R. Co.*, 23 Nebr. 465, 36 N. W.

§ 1210 (964). **Property of other corporations.**—The property of a corporation, as well as that of an individual, is liable to be taken under the right of eminent domain, when authorized by the legislature, upon payment of just compensation.<sup>77</sup> Thus, the property of colleges may be taken,<sup>78</sup> and so, also, may the property of turnpikes<sup>79</sup> or toll-bridge companies,<sup>80</sup> railroad companies,<sup>81</sup> and other corporations of a public or quasi public char-

806; *Marlor v. Philadelphia &c. R. Co.*, 166 Pa. St. 524, 31 Atl. 255. But, as we shall hereafter see, it is frequently provided that such property shall not be taken. And the right of one railroad company to condemn the depots of another railroad company has been denied. *St. Louis &c. R. Co. v. Memphis &c. R. Co.*, 102 Ark. 492, 143 S. W. 107; *Commonwealth v. Norfolk &c. R. Co.*, 111 Va. 59, 68 S. E. 551.

<sup>77</sup> *Alabama &c. R. Co. v. Kenney*, 39 Ala. 307; *East &c. R. Co. v. East Tennessee &c. R. Co.*, 75 Ala. 275; *Bridgeport &c. R. Co. v. New York &c. R. Co.*, 36 Conn. 255, 4 Am. Rep. 63; note in 9 Am. St. 137; *Lake Shore &c. R. Co. v. Chicago &c. R. Co.*, 97 Ill. 506, 2 Am. & Eng. R. Cas. 440; *Chicago &c. R. Co. v. Metropolitan &c. R. Co.*, 152 Ill. 519, 38 N. E. 736; *Terre Haute v. Evansville &c. R. Co.*, 149 Ind. 174, 46 N. E. 77 (citing text); *Eastern R. Co. v. Boston &c. R. Co.*, 111 Mass. 125, 15 Am. Rep. 13; *Old Colony R. Co. v. Framingham &c. Co.*, 153 Mass. 561, 27 N. E. 662, 13 L. R. A. 332 and note; *Toledo &c. R. Co. v. Detroit &c. R. Co.*, 62 Mich. 564, 29 N. W. 500, 4 Am. St. 875; *New York &c. R. Co. v. Metropolitan &c. Co.*, 63 N. Y. 326, notes to 24 Am. Rep. 551, 10 Am. & Eng. R.

Cas. 31, 14 Am. & Eng. R. Cas. 42; *White's Supp. to Thomp. Corp.* §§ 2750-2752, and authorities cited in following notes, *infra*.

<sup>78</sup> *St. Paul &c. R. Co.*, *In re*, 34 Minn. 227, 25 N. W. 345; *University of Minnesota v. St. Paul &c. R. Co.*, 36 Minn. 447, 31 N. W. 936; *Belfast Academy v. Salmond*, 11 Maine 109. So may the cemetery of a religious corporation. *New York Street &c.*, *Re*, 133 N. Y. 329, 31 N. E. 102, 16 L. R. A. 180, 28 Am. St. 640.

<sup>79</sup> *Lafayette Plank Road Co. v. New Albany &c. R. Co.*, 13 Ind. 90, 74 Am. Dec. 246; *Armington v. Barnett*, 15 Vt. 745, 40 Am. Dec. 705; *Backus v. Lebanon*, 11 N. H. 19, 35 Am. Dec. 466; *Baltimore &c. Turnp. v. Baltimore &c. R. Co.*, 81 Md. 247, 31 Atl. 854.

<sup>80</sup> *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507, 12 L. ed. 535; *Enfield Toll Bridge Co. v. Hartford &c. R. Co.*, 17 Conn. 454, 44 Am. Dec. 556, and note; *Northampton Bridge Case*, 116 Mass. 442; *Crosby v. Hanover*, 36 N. H. 404; *Red River Bridge Co. v. Clarksville*, 1 Sneed (Tenn.) 176, 60 Am. Dec. 143.

<sup>81</sup> *Northern Pac. Co. v. St. Paul &c. R. Co.*, 3 Fed. 702; *New York &c. R. Co. v. Boston &c. R. Co.*, 36 Conn. 196; *Chicago &c. R. Co.*

acter<sup>82</sup> where such taking is authorized by the legislature, but not otherwise.<sup>83</sup> Any property may be taken of either a private

v. Lake, 71 Ill. 333; Pittsburgh &c. R. Co. v. Sanitary Dist., 218 Ill. 286, 75 N. E. 892, 2 L. R. A. (N. S.) 226 (strip of railroad land taken for Chicago drainage); Baltimore &c. R. Co. v. North, 103 Ind. 486, 3 N. E. 144; Terre Haute v. Evansville &c. R. Co., 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189 (citing text); Pennsylvania R. Co. v. Baltimore &c. R. Co., 60 Md. 263; St. Paul Union Depot Co. v. St. Paul, 30 Minn. 359, 15 N. W. 684; Sixth Avenue R. Co. v. Kerr, 45 Barb. 138, affirmed 72 N. Y. 330; Iron R. Co. v. Ironton, 19 Ohio St. 299. This rule, it is said, is subject to the limitation that property can only be taken from the hands of one individual or corporation and placed in the hands of another under the power of eminent domain to serve a different public use. And whether the new use is different from the present one is a judicial question for the courts to decide. Lake Shore &c. R. Co. v. Chicago &c. R. Co., 100 Ill. 21. Taking the property of one man and giving it to another, is not making a law, or rule of action; it is not legislation, it is simply robbery. Coster v. Tide Water Co., 18 N. J. Eq. 54, 63. In Googins v. Boston &c. R. Co., 155 Mass. 505, 30 N. E. 71, it was held competent for the legislature to authorize one railroad company to appropriate the land on which another railroad was constructed. And that, by such authority the second company could take the land absolutely, and

not merely the rights of the first company therein. Compare also Ex parte Montgomery Light &c. Co., 187 Ala. 376, 65 So. 403.

<sup>82</sup> Hyde Park v. Oakwoods Cemetery Assn., 119 Ill. 141, 7 N. E. 627; White v. South Shore R. Co., 6 Cush. (Mass.) 412; Hazen v. Essex Co., 12 Cush. (Mass.) 475; West Boston Bridge Co. v. County Comrs., 10 Pick. (Mass.) 270; Boston Water Power Co. v. Boston &c. R. Co., 23 Pick. (Mass.) 360; New York Central &c. R. Co. v. Metropolitan Gas Light Co., 63 N. Y. 326; Brooklyn, In re, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270; Opening Twenty-second Street, In re, 15 Phila. 409, affirmed 102 Pa. St. 108.

<sup>83</sup> Enfield Toll Bridge Co. v. Hartford &c. R. Co., 17 Conn. 454, 44 Am. Dec. 556, and note; Kenton County Court v. Bank Lick Turnpike Co., 10 Bush (Ky.) 529; Board of Supervisors v. McFadden, 57 Miss. 618; Barber v. Andover, 8 N. H. 398; Smith v. Conway, 17 N. H. 586; State v. Newark, 28 N. J. L. 529 (canal can not be condemned); State v. Montclair R. Co., 35 N. J. L. 328. The proprietary right which a street railway has in its track is subject to the right of eminent domain. Canal &c. R. Co. v. Crescent City R. Co., 41 La. Ann. 561, 6 So. 849. A contract by a railroad company giving a street railway the exclusive right to build its road over its land to its depot, is not a monopoly, but an easement granted by the owner of

or a quasi public corporation not used or needed for the transaction of its business,<sup>84</sup> or in which the necessary easement can be taken without detriment to the public interests.<sup>85</sup> General au-

the fee, and can be taken for public use by due process of law. *Fort Worth St. R. Co. v. Queen City R. Co.*, 71 Tex. 165, 9 S. W. 94. The statute of Virginia, which provides that telegraph companies may construct their lines "along and parallel to any of the railroads of the state," does not authorize the condemnation of a right of way by a telegraph company along and upon the right of way of a railroad company. *Lewis, P., and Hinton, J.*, dissenting. *Postal Telegraph Cable Co. v. Norfolk &c. Co.*, 88 Va. 920, 14 S. E. 803.

<sup>84</sup> *Oregon &c. R. Co. v. Baily*, 3 Ore. 164; *Peoria &c. R. Co. v. Peoria &c. R. Co.*, 66 Ill. 174; *Iron R. Co. v. Ironton*, 19 Ohio St. 299; *New York Central &c. R. Co., Matter of, v. Metropolitan &c. Co.*, 63 N. Y. 326; *Atchison &c. R. Co. v. Kansas City &c. R. Co.*, 67 Kans. 569, 70 Pac. 939. "Lands held by a corporation or by a public body, but not used for or necessary to a public purpose, but simply as a proprietor and for any private purpose to which they may be lawfully applied, may be taken as if held by an individual owner. The property rights of a corporation in lands not held in trust for a public use, are no more sacred than those of individual proprietors. The law only protects from condemnation for public purposes lands actually held by authority of the sovereign power for or necessary to some public purpose or use. Lands

held upon a special trust for a public use can not be appropriated to another public use without special authority from the legislature." *Matter of Rochester Water Comrs.*, 66 N. Y. 413; *Cincinnati &c. R. Co. v. Belle Centre*, 48 Ohio St. 273, 27 N. E. 464.

<sup>85</sup> *Rochester Water Works, Matter of*, 66 N. Y. 413; *Morris R. Co. v. Central R. Co.*, 31 N. J. L. 205; *New York Central &c. R. Co., Matter of v. Metropolitan &c. R. Co.*, 63 N. Y. 326. When the latter case was first before the supreme court sub nom *New York Central R. Co. v. Metropolitan Gas Light Co.*, 5 Hun (N. Y.) 201, the court said: "The courts will act circumspectly and only on strong necessity, in allowing property devoted to uses of great public benefit to be taken; but where such necessity is shown to exist the power to act seems entirely clear. In this case the property sought to be taken is not, and never has been, in actual use for the purposes of the gas company. Doubtless, the use of their lands in the future, when the appellants come to need them, as they anticipate will be more convenient without the additional tracks of the railroad than with them; but the railroad now crosses their land with several tracks, and the addition of two or three more, on land adjoining the present tracks does not strike us as necessarily destructive of the uses to which the appellants wish to put

thority to condemn is usually deemed sufficient in such cases;<sup>86</sup> but where the property is already devoted to the public use, and

their lands. The injury can not be, as it seems to us, so greatly enhanced beyond what is already done, that their remaining land becomes useless to them. It is to be presumed that they will be protected to the extent that the act provides for, in their facilities of crossing and enjoying access to and from the divided parcel of their land, by the commissioners, or by the court, on the coming in of their report. And this, we think, is all, under the circumstances they are entitled to claim."

<sup>86</sup> *New York &c. R. Co. v. Boston &c. R. Co.*, 36 Conn. 196; *Boston Water &c. Co. v. Boston &c. R. Co.*, 23 Pick. (Mass.) 360; *St. Louis &c. R. Co. v. Hannibal &c. Co.*, 125 Mo. 82, 28 S. W. 483; *New York &c. R. Co., Matter of*, 99 N. Y. 12, 1 N. E. 27; *North Carolina &c. R. Co. v. Carolina Cent. R. Co.*, 83 N. Car. 489; *Pittsburg &c. R. Co. v. Southwest &c. R. Co.*, 77 Pa. St. 173; *Baltimore &c. R. Co. v. Pittsburg &c. R. Co.*, 17 W. Va. 812, 852; *Wheeling Bridge &c. v. Wheeling &c. Co.*, 34 W. Va. 155, 11 S. E. 1009, and authorities cited in last two notes, *supra*. See also *Atlanta &c. R. Co. v. Atlanta &c. R. Co.*, 124 Ga. 125, 52 S. E. 320, 322, where it is said: "Where property is already dedicated to a public use, it may, under the exercise of the power of eminent domain, be subjected to another use, but with the restriction that it can not generally be so subjected if the second use either

destroys or seriously impairs the first use. A condemnation having such an effect can only be had when there is expressed, unequivocal legislative authority permitting it. A general legislative authority to condemn will not be construed to give power to take, when such taking will be inconsistent with a prior public use to which the property has been dedicated. Under a general power to condemn property, a railroad company can not condemn the property of another company, already used by it for railroad purposes, when the effect of such condemnation would be to destroy the use of the property by the former company, or to seriously impair the rights of the former company therein. *City Council v. Georgia R. Co.*, 98 Ga. 161, 26 S. E. 499. Under a general power to condemn, one railroad company can not acquire property of another railroad company, already set apart for use as a depot or as a yard for the drilling of cars, when it is manifest that the appropriation by the second company would be either to destroy the rights of the first company, or seriously impair the first company in the use of its property for the purpose of which it was set apart. Where a company has acquired property for the purpose of enlarging its depot, or its yard, or its terminal facilities, and is presently proceeding to adapt such newly-acquired property to the use for which it was acquired, such

is reasonably necessary to enable the corporation to perform all its duties to the public, general authority is not, ordinarily, sufficient to justify its taking for an inconsistent use.<sup>87</sup>

**§ 1211 (965). Property of state or United States.**—Property held by the state,<sup>88</sup> or by the United States,<sup>89</sup> for sale or settle-

newly-acquired property would, under such circumstances, as to the rights of another company to condemn, be fully safeguarded by the same restrictions as if the plans which were actually in progress had become completed when the condemnation proceedings were instituted. But where a railroad company, in anticipation of its future needs, acquires property, and it is not in use, and not presently needed, and it is merely held to be used in the future at such times as the needs of the company may require it, the right of condemnation exists in favor of another company, which can only be defeated by showing that the condemnation would interfere with a present necessity of the company which owned the property."

<sup>87</sup> *Lake Shore &c. R. Co. v. New York &c. R. Co.*, 8 Fed. 858; *Armistron &c. R. Co. v. Jacksonville &c. R. Co.*, 82 Ala. 297, 2 So. 710; *Evergreen Cemetery Assn. v. New Haven*, 43 Conn. 234; *Baltimore &c. R. Co. v. North*, 103 Ind. 486; *Housatonic R. Co. v. Lee &c. R. Co.*, 118 Mass. 391; *Providence &c. R. Co. v. Norwich &c. R. Co.*, 138 Mass. 277, 279; *Suburban R. &c. Co. v. New York*, 128 N. Y. 510, 28 N. E. 525; *Pitts. Junction R. Co.*, Appeal of, 122 Pa. St. 511, 6 Atl. 564, 9 Am. St. 128; *Dublin &c. R. Co. v. Navan &c. R. Co.*, 5 Ir. R. Eq. 393. See also post. § 1213.

The authority must be expressly granted or implied from "a necessity so absolute," it is said, "that, without it the grant itself will be defeated." *Sharon R. Co.*, Appeal of, 122 Pa. St. 533, 17 Atl. 234, 9 Am. St. 133 and note; *Springfield v. Connecticut &c. R. Co.*, 4 Cush. (Mass.) 63; *Milwaukee &c. R. Co. v. Faribault*, 23 Minn. 167; *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255; *Pennsylvania R. Co.'s Appeal*, 93 Pa. St. 150; *Barre R. Co. v. Montpelier &c. R. Co.*, 61 Vt. 1, 17 Atl. 923, 15 Am. St. 877, 4 L. R. A. 785 and note.

<sup>88</sup> See *Indiana Central R. Co. v. State*, 3 Ind. 421. Most of the states in which public lands are still held for sale provide by statute for the assessment of damages for lands of the state taken for railroad uses. See also *Burbank v. Fay*, 65 N. Y. 57; *New York &c. R. Co.*, In re, 29 Hun (N. Y.) 269; *New York &c. R. Co.*, In re, 77 N. Y. 248; *Hobart v. Ford*, 6 Nev. 77; *Benson v. Mayor*, 10 Barb. (N. Y.) 223. But in some states there is a prohibition against taking state property under ordinary circumstances, and a general statute may not include state lands. See *Seattle &c. R. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 22 L. R. A. 217, 38 Am. St. 866 (tide lands).

<sup>89</sup> *United States v. Railroad Bridge Co.*, 6 McL. (U. S.) 517;

ment, may be taken for railroad purposes, but not that devoted to particular uses of the government.<sup>90</sup> In Indiana it has been held, erroneously, as we are inclined to think, that where the legislature authorizes a company to construct its road between two designated points the company has a right to take any land of the state between such points, on the authorized line, which may be necessary for its purpose, and the court refused to enjoin a company which had located its road across a portion of the land which had been purchased by the state for its institution for educating the deaf and dumb.<sup>91</sup> In Illinois, however, it has been held that a charter giving authority "to enter upon, take possession of, and use any lands, streams, and materials of every kind," and granting to the company "all such lands, materials and privileges belonging to the state," did not give such company a right to take land owned by the state as a site for its institution for the education of the blind.<sup>92</sup> It is said that, "if it is necessary that the United States government should have an eminent domain still higher than that of the state, in order that it may fully carry out the objects and purposes of the constitution, then

Union Pacific R. Co. v. Burlington &c. R. Co., 3 Fed. 106; *Grinter v. Kansas Pac. R. Co.*, 23 Kans. 642; *Hendricks v. Johnson*, 6 Porter (Ala.) 472. See also *Flint &c. R. Co. v. Gordon*, 41 Mich. 420, 2 N. W. 648; *Texas &c. R. Co. v. Kirk*, 115 U. S. 12, 5 Sup. Ct. 1113, 29 L. ed. 323.

<sup>90</sup> *United States v. Amès*, 1 W. & M. (U. S.) 76; *United States v. Chicago*, 7 How. (U. S.) 185, 12 L. ed. 660; *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. ed. 264. See also *Edwardsville v. Madison County*, 251 Ill. 265, 96 N. E. 238, 37 L. R. A. (N. S.) 101; *Barrett v. Palmer*, 135 N. Y. 336, 17 L. R. A. 720 and note, 31 Am. St. 835. But compare *United States v. Railroad*

*Bridge Co.*, 6 McL. (U. S.) 517.

<sup>91</sup> *Indiana Cent. R. Co. v. State*, 3 Ind. 421. Most of the cases cited in the next note and also *City of Edwardsville v. Madison Co.*, 251 Ill. 265, 96 N. E. 238, 37 L. R. A. (N. S.) 101, and most of the cases there cited in the note are contrary in effect to this Indiana decision.

<sup>92</sup> *St. Louis &c. R. Co. v. Illinois Inst. for the Blind*, 43 Ill. 303. See also *Oregon R. Co. v. Portland*, 9 Ore. 231; *State v. Cincinnati &c. R. Co.*, 37 Ohio St. 157, 10 Am. & Eng. R. Cas. 83; *Seattle &c. R. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 22 L. R. A. 217, 38 Am. St. 866; *Atlanta v. Central R. Co.*, 53 Ga. 120; *Ninth Ave., Matter of*, 45 N. Y. 729.

it has it.”<sup>93</sup> But, as a general rule, “while a grant from one government may supersede and abridge franchises and rights held at the will of the grantor, it can not abridge any property rights of a public character, created by the authority of another sovereignty,” and property of a state, although devoted to a public use, such as a street or road, “is property devoted to the public uses of the state, and it is not within the competency of the national government to dispossess the state of such control and use or appropriate the same to its own benefit, or the benefit, if any, of its corporations or grantees, without suitable compensation to the state.”<sup>94</sup> A railroad company chartered by congress is not such a federal agency that its property can not be taken under the eminent domain of a state.<sup>95</sup>

§ 1212 (965a). Tide lands.—In New Jersey, no grant or license can be made by the state riparian commissioners to any other person than the riparian proprietor of lands under the tidal rivers of the state, until the expiration of six calendar months after the riparian proprietor shall have been personally notified in writing by the applicant for such grant or license, and the riparian proprietor shall have neglected to apply for such grant or license and failed to pay the price fixed by the commissioners.<sup>96</sup> The interest acquired by the grantee from the state under this provision is as absolute as the words of the grant import.<sup>97</sup> And it has been held, that another law of that state, providing that no railroad shall be authorized to condemn land belonging to the state does not operate to prohibit a railroad from acquiring these tide lands by grant after the owner of the shore has failed to take the same, upon the expiration of six months’ notice given to him by the railroad, nor will it prevent the condemnation

<sup>93</sup> *Stockton v. Baltimore &c. R. Co.*, 32 Fed. 9. See also *United States v. Boston Elevated R. Co.*, 176 Fed. 963.

<sup>94</sup> *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. ed. 380.

<sup>95</sup> *North Pac. R. Co. v. St. Paul &c. Co.*, 3 Fed. 702; *Union Pac.*

*R. Co. v. Burlington &c. Co.*, 1 McCr. (U. S.) 452; *Union Pac. R. Co. v. Leavenworth &c. R. Co.*, 29 Fed. 728.

<sup>96</sup> *Shamberg v. Board of Riparian Comrs.*, 72 N. J. 132, 60 Atl. 43.

<sup>97</sup> *Woodcliff v. New Jersey Shore Line R. Co.*, 72 N. J. 137, 60 Atl. 44.



of such lands after the owner of the shore has acquired the same by grant from the riparian commissioners.<sup>98</sup>

§ 1213 (966). **Property devoted to another public use—General rule.**—It is a general rule that lands once taken for a public use, or dedicated to such a use by the owner can not, without an express grant of authority by the legislature for that purpose, be appropriated by proceedings in invitum to a different public use.<sup>99</sup> This does not mean, however, that where there is an express grant of the power the particular kind of property or use must be specifically mentioned in the statute, for, while the right to exercise the power over such property is not usually implied from a mere general grant, at least where the uses are inconsistent, there are cases in which it is clearly and necessarily implied from the language and evident intent or purpose of the statute. In the absence of some such statute it can not be presumed that the legislature intended to authorize the seizure of property which had once been appropriated to the public use, and, in practice, such a course would be intolerable if one corporation after another could seize such property and destroy or materially impair the earlier use without any higher necessity for the second or subsequent use. One court has thus stated the principle: "While it may be true that the enterprise of petitioner is public in its nature, the public necessity which must be shown to exist before it can entirely deprive respondents

<sup>98</sup> *Shamberg v. New Jersey Shore Line R. Co.*, 72 N. J. 140, 60 Atl. 46. See also generally as to tide lands, *New York Cent. &c. R. Co., Matter of*, 77 N. Y. 248; *State v. King Co.*, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897 and note.

<sup>99</sup> *Oregon Short Line R. Co., v. Postal Tel. &c. Co.*, 111 Fed. 842; *St. Louis &c. R. Co. v. Haller*, 82 Ill. 208 (street); *Illinois Cent. R. Co. v. Chicago &c. R. Co.*, 122 Ill. 473, 13 N. E. 140; *Baltimore &c. R. Co. v. North*, 103 Ind. 486, 3 N. E. 144; *Ft. Wayne &c. R. Co. v.*

*Lake Shore &c. R. Co.*, 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367 and note, 32 Am. St. 277; *Terre Haute v. Evansville &c. R. Co.*, 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189 (citing text); *Indianapolis &c. R. Co. v. Indianapolis &c. Transit Co.*, 33 Ind. App. 337, 67 N. E. 1013; *State v. Montclair &c. R. Co.*, 35 N. J. L. 328 (city reservoir); *Boston & Albany R. Co., Matter of*, 53 N. Y. 574 (park); *Prospect Park &c. R. Co. v. Williamson*, 91 N. Y. 552; *Little Miami &c. R. Co. v. Dayton*, 23 Ohio St.

of their lands is the necessity of the public to be in some manner served by the projected enterprise, and not the necessities of the projector, in order to make such enterprise a success. So far as the authority to exercise the right of eminent domain for the public uses is concerned, it is based upon the theory that the property granted the subject is upon the condition that it may be retaken to serve the necessities of the sovereign power, and to this end agencies created by the state, the purpose of which is to serve the public, may exercise this right. Where, however, land is already devoted to a public use, it would be wholly unreasonable to permit it to be taken for another public use which would nullify and defeat the one to which it is already devoted, except in cases where the overwhelming necessities of the public were such that, in order to serve their needs, or supply their necessities, the taking of such property became necessary. Unless so limited, no rule governing the rights of those engaged in conducting a business for the benefit of the public could be formulated which would afford them protection against others desiring to also engage in the transaction of a public business. While corporations engaged in business of a nature which requires them to serve the public are said to be public corporations, they are, in fact, but private enterprises, inaugurated for the benefit of their stockholders; and if one such corporation may take the property of another so as to deprive the latter of the use to which it is devoted, except public necessity demands such taking, there would be no reasonable limit to the conditions under which the power of eminent domain might be exercised. Without the limitation suggested, the most absurd result could

210; *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255 and note; *Petition of Providence &c. R. Co.*, 17 R. I. 324, 21 Atl. 965. In *Lake Erie &c. R. Co. v. Board of Comrs.*, 57 Fed. 945, it was held that in Ohio the rule is well established that a second appropriation of lands formerly appropriated to public use can not be made when the second appropriation is inconsis-

ent with the first, and tends to deprive the corporation first acquiring such public use of the full and free enjoyment thereof. So held in *Pennsylvania R. Co.'s Appeal*, 93 Pa. St. 150; and *Lake Shore &c. R. Co. v. Chicago &c. R. Co.*, 100 Ill. 21. See also ante, § 1210. *Elliott Roads and Streets*. (3rd ed.), § 245.

follow. The second might take from the first, others take from the latter, and the first turn about and retake, and thus the process go on ad infinitum."<sup>1</sup>

**§ 1214. Where right to take property already devoted to public use exists.**—Authority to build a railroad across streets,<sup>2</sup> canals,<sup>3</sup> railroad tracks,<sup>4</sup> or street railway tracks,<sup>5</sup> lying between the termini of a proposed road is necessarily implied from a grant of authority to build a railroad between such termini.<sup>6</sup> The same is true as to navigable waters which must necessarily be

<sup>1</sup> *Denver Power &c. Co. v. Denver &c. R. Co.*, 30 Colo. 204, 69 Pac. 568. See upon the general subject, cases and notes in 37 L. R. A. (N. S.) 104, 24 L. R. A. (N. S.) 1213, 42 L. R. A. (N. S.) 215, 44 L. R. A. (N. S.) 1204; also *Virginia &c. R. Co. v. Seaboard Air Line R. Co.*, 161 N. Car. 531, 78 S. E. 68; *St. Louis &c. R. Co. v. Tulsa*, 213 Fed. 87.

<sup>2</sup> *Lewis v. Germantown &c. R. Co.*, 16 Phila. (Pa.) 608; *Elliott Roads and Streets* (3rd ed.), § 248, quoted in *Lake Erie &c. R. Co. v. Kokomo*, 130 Ind. 224, 29 N. E. 780.

<sup>3</sup> *Morris Canal Co. v. State*, 24 N. J. L. 62.

<sup>4</sup> *Union Pacific R. Co. v. Burlington &c. R. Co.*, 1 McCr. (U. S.) 452; *New York &c. R. Co. v. Boston &c. R. Co.*, 36 Conn. 196; *Bridgeport v. New York &c. R. Co.*, 36 Conn. 255, 4 Am. Rep. 63; *St. Louis &c. R. Co. v. Springfield &c. R. Co.*, 96 Ill. 274; *Lake Shore &c. R. Co. v. Chicago &c. R. Co.*, 97 Ill. 506; *East St. Louis &c. R. Co. v. East St. Louis Union R. Co.*, 108 Ill. 265; *Springfield v. Connecticut &c. R. Co.*, 4 Cush. (Mass.) 63; *Worcester &c. R. Co. v. Railroad*

*Comrs.*, 118 Mass. 561; *Massachusetts Central R. Co. v. Boston &c. R. Co.*, 121 Mass. 125; *Fitchburg R. Co. v. New Haven &c. R. Co.*, 134 Mass. 547; *Grand Rapids &c. R. Co. v. Grand Rapids &c. R. Co.*, 35 Mich. 265, 24 Am. Rep. 545 and note; *Morris &c. R. Co. v. Central R. Co.*, 31 N. J. L. 205; *Lehigh Valley R. Co. v. Dover &c. R. Co.*, 43 N. J. L. 528; *Boston &c. R. Co. Matter of*, 79 N. Y. 64, 69; *Lake Shore &c. R. Co. v. Cincinnati &c. R. Co.*, 30 Ohio St. 604; *South Carolina R. Co. v. Columbia &c. R. Co.*, 13 Rich. Eq. (S. Car.) 339; *Baltimore &c. R. Co. v. Pittsburgh &c. R. Co.*, 17 W. Va. 812.

<sup>5</sup> *Lynn &c. R. Co. v. Boston &c. R. Co.*, 114 Mass. 88. See *Market St. R. Co. v. Central R. Co.*, 51 Cal. 583.

<sup>6</sup> But such implication arises only when requisite to the enjoyment of the powers expressly granted, and can be extended no further than such necessity requires. *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255 and note; *Little Miami &c. R. Co. v. Dayton*, 23 Ohio St. 510. See *Buffalo Matter of*, 68 N. Y. 167, 175.

crossed in order to build a line of road between the points named in the charter.<sup>7</sup> But authority to bridge a navigable stream will be strictly construed, and the authority conferred or necessarily implied can not be exceeded.<sup>8</sup> And a general authority to bridge a navigable stream does not authorize an interference with navigation which can reasonably be avoided by the construction of draws or otherwise.<sup>9</sup> Neither will authority to build a railroad longitudinally along a public highway<sup>10</sup> or the right of way of

<sup>7</sup> *Union Pacific R. Co. v. Hall*, 91 U. S. 343, 23 L. ed. 428; *Hughes v. Northern Pac. R. Co.*, 18 Fed. 106; *People v. Potrero &c. R. Co.*, 67 Cal. 166, 7 Pac. 445; *Springfield v. Connecticut &c. R. Co.*, 4 Cush. (Mass.) 63; *Mohawk Bridge Co. v. Utica &c. R. Co.*, 6 Paige (N. Y.) 554; *People v. Rensselaer &c. R. Co.*, 15 Wend. (N. Y.) 114. See *Smith v. Louisville &c. R. Co.*, 62 Miss. 510; *Brown v. Preston*, 38 Conn. 219; *Weathersfield v. Humphry*, 20 Conn. 218.

<sup>8</sup> *Silver v. Missouri Pac. R. Co.*, 101 Mo. 79, 13 S. W. 410; *Missouri River Packet Co. v. Hannibal &c. R. Co.*, 79 Mo. 478; *Cape Elizabeth v. County Comrs.*, 64 Maine 456.

<sup>9</sup> *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255 and note; *Sweeney v. Chicago &c. R. Co.*, 60 Wis. 60, 18 N. W. 756. A general authority to build a railroad between two points, the natural and convenient route of which would pass over several navigable streams, authorizes the corporation to construct bridges over such streams, in a manner that will not destroy the navigation of them. But the power must be exercised with a due regard to the privileges of others. *Attorney-General v. Stevens*, 1 N. J. Eq. 369, 22 Am. Dec. 526. But the right of a railroad company to

construct a bridge at any particular point on a navigable river lying in its course is subject to the judgment of the proper court as to whether it is being constructed without unnecessary injury to the navigability of such water, upon the complaint of any one specially injured thereby, or likely to be so injured. *Hughes v. Northern Pac. R. Co.*, 18 Fed. 106, 13 Am. & Eng. R. Cas. 157.

<sup>10</sup> *Kaiser v. St. Paul &c. R. Co.*, 22 Minn. 149; *Springfield v. Connecticut River R. Co.*, 4 Cush. (Mass.) 63; *State v. Montclair R. Co.*, 35 N. J. L. 328; *Savannah &c. R. Co. v. Shiels*, 33 Ga. 601; *Elliott Roads and Streets* (3rd ed.), § 247. As to power of congress and requiring changes in bridges, see *United States v. Union Bridge Co.*, 143 Fed. 377; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. ed. 629; *Lake Shore &c. R. Co. v. Ohio*, 165 U. S. 365, 17 Sup. Ct. 357, 41 L. ed. 747; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 334, 13 Sup. Ct. 622, 37 L. ed. 463; *United States v. Parkersburg &c. Co.*, 134 Fed. 969. See also *Kansas City &c. R. Co. v. Wingul*, 82 Miss. 223, 33 So. 965, 61 L. R. A. 578; *Floyd v. Rome St. R. Co.*, 77 Ga. 614, 3 S. E. 3.

another railroad,<sup>11</sup> be implied from a general authority to build the road between certain points, unless it is absolutely necessary to give effect to the grant.<sup>12</sup>

§ 1215. **Right may depend on whether two uses can coexist without impairment.**—Where the power to condemn is conferred in general terms, the presumption is against the right to take property which is already devoted to a public use, unless both uses may stand together with a tolerable interference which may be compensated for by damages paid.<sup>13</sup> If such uses are not in-

<sup>11</sup> *California Pac. R. Co. v. Central Pac. R. Co.*, 47 Cal. 549; *Atlanta v. Central R. Co.*, 53 Ga. 120; *Davis v. East Tenn. &c. R. Co.*, 87 Ga. 605, 13 S. E. 567; *Crossley v. O'Brien*, 24 Ind. 325; *Ft. Wayne v. Lake Shore &c. R. Co.*, 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367 and note, 32 Am. St. 277; *Northern Cent. R. Co. v. Baltimore*, 46 Md. 425; *Housatonic &c. R. Co. v. Lee &c. R. Co.*, 118 Mass. 391; *Hannibal v. Hannibal &c. R. Co.*, 49 Mo. 480; *Albany &c. R. Co. v. Brownell*, 24 N. Y. 345; *Alexandria &c. R. Co. v. Alexander &c. R. Co.*, 75 Va. 780, 40 Am. Rep. 743 and note. See also *Gold v. Pittsburgh &c. R. Co.*, 153 Ind. 232, 53 N. E. 285; *South Dakota Cent. R. Co. v. Chicago &c. R. Co.*, 141 Fed. 578.

<sup>12</sup> *Housatonic &c. R. Co. v. Lee &c. R. Co.*, 118 Mass. 391; *Springfield v. Connecticut River R. Co.*, 4 Cush. (Mass.) 63. See also *Portland &c. R. Co. v. Portland*, 181 Fed. 632. Where land has been acquired by one company under the right of eminent domain, it can not, in the absence of express or necessarily implied statutory authority, be taken by another company, to whom it would be

convenient, but not necessary. *Barre R. Co. v. Montpelier &c. R. Co.*, 61 Vt. 1, 17 Atl. 923, 4 L. R. A. 785 and note 15 Am. St. 877. The Alabama Declaration of Rights, which provides that the general assembly may authorize the granting of the right of way by one person or corporation over the lands of another, upon just compensation being made, does not permit the condemnation of land in the actual use of one railroad company for the benefit of another, unless it is reasonably essential to the construction of the second road to its proposed terminus by the only practical route. But the taking is essential when, the public convenience being equally served, the financial interests of the second company will gain more thereby than the first company would probably be injured. *Mobile & G. R. Co. v. Alabama Midland Ry. Co.*, 87 Ala. 501, 6 So. 404.

<sup>13</sup> *Buffalo, Matter of*, 68 N. Y. 167; *Chicago &c. R. Co. v. Chicago &c. R. Co.*, 112 Ill. 589. See also *Seymour v. Jeffersonville &c. R. Co.*, 126 Ind. 466, 467, 26 N. E. 188, citing *Elliott Roads and Streets*, 167, 168; *Baltimore &c. R. Co. v.*

consistent and the second does not interfere with or impair the first, general authority for the second use may be sufficient,<sup>14</sup> but if they can not coexist without materially impairing the first use, authority to take for the second use can not be implied from a general grant of authority to condemn.<sup>15</sup> The general rule under this head has been thus expressed: "Property dedicated to a public use can not be taken for another public use under the general law conferring the right of eminent domain, where the second use will destroy or injure the use to which the property is already devoted. To authorize a second condemnation of such

Pittsburgh &c. R. Co., 17 W. Va. 812; Augusta v. Georgia &c. Co., 98 Ga. 161, 26 S. E. 499; Boston &c. R. Co. v. Cambridge, 166 Mass. 224, 44 N. E. 140.

<sup>14</sup> Boston v. Brookline, 156 Mass. 172, 30 N. E. 611. See also Chicago &c. R. Co. v. Starkweather, 97 Iowa 159, 66 N. W. 87, 31 L. R. A. 183, 59 Am. St. 404; Bridgeport v. New York &c. R. Co., 36 Conn. 255, 4 Am. Rep. 63.

<sup>15</sup> Lake Erie &c. R. Co. v. Boswell, 137 Ind. 336, 36 N. E. 1103; Cincinnati &c. R. Co. v. Anderson, 139 Ind. 490, 38 N. E. 167, 47 Am. St. 285 and authorities there cited; Milwaukee &c. R. Co. v. Faribault, 23 Minn. 167; St. Paul &c. R. Co. v. St. Paul, 30 Minn. 359, 15 N. W. 684; Hannibal &c. R. Co. v. Muder, 49 Mo. 165; New Jersey &c. R. Co. v. Long Branch Comrs., 39 N. J. L. 28; Paterson &c. R. Co. v. Paterson, 72 N. J. L. 112, 60 Atl. 47; Albany &c. R. Co. v. Brownell, 24 N. Y. 345; Prospect Park &c. R. Co. v. Williamson, 91 N. Y. 552; Winona &c. R. Co. v. Watertown, 4 S. Dak. 323, 56 N. W. 1077; Richmond &c. R. Co. v. Johnston, 103 Va. 456, 49 S. E. 496. But see Chi-

cago &c. R. Co. v. Morrison, 195 Ill. 271, 63 N. E. 96; Portland R. &c. Co. v. Portland, 181 Fed. 632, 634 (citing text); Terre Haute v. Evansville &c. R. Co., 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189; Parks &c. Comrs. v. Michigan Cent. R. Co., 90 Mich. 385, 51 N. W. 447. See also numerous cases cited in note to Southern R. Co. v. Memphis, 126 Tenn. 267, 148 S. W. 662, in Ann. Cas. 1913E, 153, 163. In most of these cases it was held that a street could not be extended through depot grounds and buildings under a mere general grant of power to condemn. So, it is held that lands in use by one company for its road can not be taken by another without legislative authority. Louisiana &c. Ry. Co. v. Vicksburgh &c. R. Co., 112 La. Ann. 915, 36 So. 803; Atchison &c. Ry. Co. v. Kansas City &c. R. Co., 67 Kans. 569, 73 Pac. 899. See also Western Union Tel. Co. v. Louisville &c. R. Co., 183 Ind. 258, 108 N. E. 951; Chicago, M. & St. P. Ry. Co. v. Incorp. Town Lost Nation, 237 Fed. 709 (city can not condemn railroad depot for street).

property to a second use which is subversive of the first, there must be express legislative authority."<sup>16</sup> And it is another expression of the principle to say: The general rule that expresses legislative authority is generally requisite, except where the proposed appropriation would not destroy or greatly injure the franchise, or render it difficult to prosecute the subject of the franchise, when a general grant would be sufficient. Land already devoted to another public use can not be taken under the general laws, when the effect would be to extinguish a franchise. If, however, the taking would not materially injure the prior holder, the condemnation may be sustained.<sup>17</sup>

§ 1216 (967). **Franchises.**—In the absence of an enactment in express terms, a corporation will only be justified in condemning the franchise of another public or quasi public corporation, where it appears by necessary implication that the legislature intended to grant it the power to do so. It must appear from the statute that the legislature recognized the franchise as private property, and provision must be made for the payment of just and reasonable compensation to the owner, for a grant of authority to take private property without compensation is void. If the grant of power to take property rests only in implication, and the act which is claimed to confer such power contains no provisions as to compensating the owner whose rights are injuriously affected, the courts will generally presume that it was not the intent of the legislature to exercise the right of eminent domain, but simply to confer a right to do the act, or exercise the power

<sup>16</sup> Oregon Short Line R. Co. v. Postal Tel. Cable Co., 111 Fed. 842; Steele v. Empsom, 142 Ind. 397-406, 41 N. E. 822; Baltimore &c. R. Co. v. Board of Comrs. of Jackson Co., 156 Ind. 260, 58 N. E. 837, 59 N. E. 856; Northwestern Tel. Co. v. Chicago &c. R. Co., 76 Minn. 334, 79 N. W. 315-317; Winona &c. R. Co. v. Watertown, 56 S. Dak. 1077, 56 N. W. 1077; Sabine &c. R. Co. v. Gulf &c. R. Co., 92 Tex. 162, 46 S. W. 784; Baltimore

&c. R. Co. v. Pittsburg &c. R. Co., 17 W. Va. 812-852. See also Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. 362, affirmed in 123 Fed. 33; Chicago &c. R. Co. v. Morrison, 195 Ill. 271, 63 N. E. 96; Atchison &c. R. Co. v. Kansas City &c. R. Co., 67 Kans. 569, 73 Pac. 899.

<sup>17</sup> Northwestern Tel. &c. Co. v. Chicago &c. R. Co., 76 Minn. 334, 79 N. W. 315.

given, on first obtaining the consent of those affected.<sup>18</sup> It is well-settled, however, that corporate franchises although held and enjoyed under a charter which contains no reserved power of alteration or repeal,<sup>19</sup> may be taken under the power of eminent domain.<sup>20</sup> The only question is as to the authority to exercise the power in the particular instance. It must be granted in express terms or by necessary implication.<sup>21</sup> The entire fran-

<sup>18</sup> *Boston &c. R. Co. v. Salem &c. R. Co.*, 2 Gray (Mass.) 1; *Hamilton Avenue, Matter of*, 14 Barb. (N. Y.) 405; *Flatbush Avenue, Matter of*, 1 Barb. (N. Y.) 286. See also *Elkins Electric R. Co. v. Western Md. R. Co.*, 163 Fed. 724.

<sup>19</sup> *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507, 532, 12 L. ed. 535, affirming 16 Vt. 446; *Central Bridge Co. v. Lowell*, 4 Gray (Mass.) 474.

<sup>20</sup> *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. ed. 463; *Enfield Toll Bridge Co. v. Hartford &c. R. Co.*, 17 Conn. 454, 44 Am. Dec. 556 and note; *Lafayette Plank R. Co. v. New Albany &c. R. Co.*, 13 Ind. 90, 74 Am. Dec. 246; *Canal &c. St. R. Co. v. Crescent City R. Co.*, 41 La. Ann. 561, 6 So. 849; *Boston Water Power Co. v. Boston &c. R. Co.*, 23 Pick. (Mass.) 360; *Sunderland Bridge Case*, 122 Mass. 459; *Grand Rapids &c. R. Co. v. Grand Rapids &c. R. Co.*, 35 Mich. 265, 24 Am. Rep. 545 and note; *Dunlap v. Toledo &c. R. Co.*, 50 Mich. 470, 15 N. W. 555; *Crosby v. Hanover*, 36 N. H. 404; *Stockton v. Central R. Co.*, 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97; *Petition of Ker, Matter of*, 42 Barb. (N. Y.) 119; *North Carolina &c. R. Co. v.*

*Carolina Cent. R. Co.*, 83 N. Car. 489; *Lewis v. Germantown &c. R. Co.*, 16 Phila. (Pa.) 621; *Towanda Bridge Co., In re*, 91 Pa. St. 216; *Philadelphia &c. Co.'s Appeal*, 102 Pa. St. 123, 20 Am. & Eng. R. Cas. 1 and note; *Red River Bridge Co. v. Clarksville*, 1 Sneed (Tenn.) 176, 60 Am. Dec. 143; *Armington v. Barnet*, 15 Vt. 745, 40 Am. Dec. 705; *White River Turnpike Co. v. Vermont Cent. R. Co.*, 21 Vt. 590; *Brainard v. Missisquoi R. Co.*, 48 Vt. 107; *James River &c. Co. v. Thompson*, 3 Grat. (Va.) 270; *Elliott Roads and Streets* (3rd ed.), §§ 241, 242, 243; 8 Elliott on Contracts, § 2736; ante, § 1130. See also *Cincinnati v. Louisville &c. R. Co.*, 223 U. S. 390, 32 Sup. Ct. 267, 56 L. ed. 481; *State v. Suffield Bridge Co.*, 81 Conn. 56, 70 Atl. 55; *New York Cent. &c. R. Co. v. Buffalo*, 200 N. Y. 113, 93 N. E. 520; *Rutland &c. R. Co. v. Clarendon Power Co.*, 86 Vt. 45, 83 Atl. 332, 44 L. R. A. (N. S.) 1204; *Kanaroha Cent. R. Co. v. Brown*, 71 W. Va. 738, 77 S. E. 360. But compare *Miller v. Cincinnati &c. St. R. Co.*, 43 Ind. App. 540, 88 N. E. 102.

<sup>21</sup> *Boston &c. R. Co., Matter of*, 53 N. Y. 574; *Central City &c. R. Co. v. Fort Clark &c. R. Co.*, 81 Ill. 523. "When a franchise is



chise may be appropriated if the public necessity requires,<sup>22</sup> but a part only may be taken if that is all that is required, and the corporation can not compel compensation to be paid to it for the entire franchise if part of it remains unimpaired.<sup>23</sup>

§ 1217 (968). **Exclusive grants and franchises.**—The fact that a right or privilege possessed by a corporation is exclusive,<sup>24</sup> and

granted with power to take or acquire property for public use, it is a fair and just implication that, where large sums are invested in the enterprise, it shall not be destroyed by another company armed with power to condemn for exactly the same use and to take away the same business already done by the older company. This is inherently unjust, and is bad policy, as tending to prevent solid and solvent enterprises in the state. *Mobile &c. R. Co. v. Alabama Midland R. Co.*, 87 Ala. 501, 520, 6 So. 404, 407; *Ft. Wayne v. Lake Shore &c. R. Co.*, 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367 and note, 32 Am. St. 277; *Illinois Cent. R. Co. v. Chicago &c. R. Co.*, 122 Ill. 473, 13 N. E. 140; *Postal Tel. Cable Co. v. Norfolk &c. R. Co.*, 88 Va. 920, 14 S. E. 803; *Groff v. Bird-in-hand Tpk. Co.*, 144 Pa. St. 150, 22 Atl. 834; *Davis v. East Tenn. &c. R. Co.*, 87 Ga. 605, 13 S. E. 567; *Appeal of Pittsburg Junction R. Co.*, 122 Pa. St. 511, 6 Atl. 564, 9 Am. St. 128; *Appeal of Sharon R. Co.*, 122 Pa. St. 533, 17 Atl. 234, 9 Am. St. 133; *Fidelity T. &c. Co. v. Mobile St. R. Co.*, 53 Fed. 687; *Lake Erie &c. Co. v. Seneca Co.*, 57 Fed. 945; *Minneapolis &c. R. Co. v. Minneapolis, R. Co.*, 61 Minn. 502, 63 N. W.

1035; *St. Louis &c. R. Co. v. Hannibal &c. Co.*, 125 Mo. 82, 28 S. W. 483. Cases may be found apparently holding otherwise, but, where the result does not depend on special legislation, such cases are not sound in principle, and should not be followed." *Chattanooga &c. R. Co. v. Felton*, 69 Fed. 273, 280. See also *Moline v. Greene*, 252 Ill. 475, 96 N. E. 911, 37 L. R. A. (N. S.) 104.

<sup>22</sup> *Crossley v. O'Brien*, 24 Ind. 325, 87 Am. Dec. 329. See also *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. ed. 463; *Philadelphia &c. R. Co.'s Appeal*, 120 Pa. St. 90, 13 Atl. 708.

<sup>23</sup> *Elliott Roads and Streets* (3rd ed.), § 242.

<sup>24</sup> *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 683, 6 Sup. Ct. 252, 29 L. ed. 516; *New Orleans &c. R. Co. v. Southern &c. Co.*, 53 Ala. 211; *Salem &c. Co. v. Lyme*, 18 Conn. 451; *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160, 38 Am. Rep. 781 and note; *Metropolitan &c. R. Co. v. Chicago &c. R. Co.*, 87 Ill. 317; *Hyde Park v. Oakwood &c. Assn.*, 119 Ill. 141, 7 N. E. 627; *Baltimore &c. Tel. Co. v. Morgan's Louisiana &c. R. Co.*, 37 La. Ann. 883; *Grand Rapids Street R.*

that the legislature has attempted to bind itself by contract to permit such exclusive right to be exercised for a certain period of time<sup>25</sup> only affects its value, and does not prevent it from being subject to the power of eminent domain, upon the payment of just compensation, like all other property.<sup>26</sup> The mere grant of a right to maintain a toll-bridge, ferry, turnpike, railroad, or the like, at a certain place or over a certain route, confers no exclusive franchise to conduct such business in the vicinity, and the mere diminution of business caused by the grant of a similar right to a competing or rival company is not a taking of the property or franchise of the former, so as to require compensation, nor does the latter grant impair the obligation of a contract.<sup>27</sup> But where an exclusive franchise or right to carry on such business within certain limits is granted to one company, the grant of similar rights to another company to carry on a like

Co. v. West Side Street R. Co., 48 Mich. 433, 12 N. W. 643; Piscataqua Bridge Co. v. New Hampshire Bridge, 7 N. H. 35; Philadelphia &c. R. Co.'s Appeal, 102 Pa. St. 123.

<sup>25</sup> Eastern R. Co. v. Boston &c. R. Co., 111 Mass. 125, 15 Am. Rep. 13; East Hartford v. Hartford Bridge Co., 17 Conn. 79; Piscataqua Bridge Co. v. New Hampshire Bridge Co., 7 N. H. 35.

<sup>26</sup> The state can not grant away its right to resume possession of property when it is needed for public use. Alabama &c. R. Co. v. Kenney, 39 Ala. 307; Eastern R. Co. v. Boston &c. R. Co., 111 Mass. 125, 15 Am. Rep. 13.

<sup>27</sup> Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773; Turnpike Co. v. State, 3 Wall. (U. S.) 210, 18 L. ed. 180; Trustees &c. v. Atlanta, 93 Ga. 468, 21 S. E. 74; Illinois &c. R. Canal Co. v. Chicago &c. R. Co., 14 Ill. 314; Lafayette &c. Co. v.

New Albany &c. R. Co., 13 Ind. 90, 74 Am. Dec. 246; State v. Noyes, 47 Maine 189; Baltimore &c. Turnp. v. Baltimore &c. R. Co., 81 Md. 247, 31 Atl. 854; Commonwealth v. Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555; New York &c. R. Co. v. Forty-second St. R. Co., 50 Barb. (N. Y.) 285; Mohawk Bridge Co. v. Utica &c. R. Co., 6 Paige (N. Y.) 554; White River Tpk. Co. v. Vermont Cent. R. Co., 21 Vt. 590; Thorpe v. Rutland &c. R. Co., 27 Vt. 140, 62 Am. Dec. 625; Tuckahoe Canal Co. v. Tuckahoe &c. R. Co., 11 Leigh (Va.) 42, 36 Am. Dec. 374. But there may, perhaps, be an exclusive grant or "physical monopoly," in such a case of the land actually used. See Citizens' Coach Co. v. Camden &c. R. Co., 33 N. J. Eq. 267, 36 Am. Rep. 542; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 613, 9 L. ed. 773; Union Ferry Co., Matter of, 98 N. Y. 139; Indianapolis &c. St.

business within those limits, without providing for compensation to the former, may impair the obligation of the contract between the state and the first grantee and amount to the taking of its property or franchise.<sup>28</sup> It is, otherwise, however, if, as is sometimes the case, it is found, upon a strict construction of the grant of the exclusive franchise that there is no impairment of it by the second grant and use, notwithstanding somewhat similar privileges may have been given to each company.<sup>29</sup>

§ 1218 (968a). **Buildings on right of way.**—Unless specially exempted by statute, it is no obstacle to the condemnation of land for right of way purposes, that there are buildings on such land.<sup>30</sup> A recent writer on the subject says: "The term 'land' in statutes conferring power to condemn, is to be taken in the legal sense, and includes both the soil and the buildings and other structures on it, and any and all interest therein."<sup>31</sup> When the

R. Co. v. Citizens' St. R. Co., 127 Ind. 369, 389, 24 N. E. 1054, 8 L. R. A. 539 and note; Elliott Roads and Streets (3rd ed.), § 943 et seq. And property actually taken must be paid for. Pittsburgh &c. R. Co. v. Jones, 111 Pa. St. 204, 2 Atl. 410, 56 Am. Rep. 260; Baltimore &c. Co. v. Union R. Co., 35 Md. 224, 6 Am. Rep. 397; Fayette &c. Co. v. New Albany &c. R. Co., 13 Ind. 90, 74 Am. Dec. 246.

<sup>28</sup> Bridge Proprs. v. Hoboken Co., 1 Wall. (U. S.) 116, 17 L. ed. 571; The Binghamton Bridge, 3 Wall. (U. S.) 51, 18 L. ed. 137; St. Tammany Water Works v. New Orleans Water Works, 120 U. S. 64, 7 Sup. Ct. 405, 30 L. ed. 563; California &c. Tel. Co. v. Alta. &c. Tel. Co., 22 Cal. 398; Enfield Toll Bridge Co. v. Hartford &c. R. Co., 17 Conn. 40, 42 Am. Dec. 716; St. Louis &c. R. Co. v. Northwestern &c. R. Co., 69 Mo. 65;

Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35; Raritan &c. R. Co. v. Delaware &c. Co., 18 N. J. Eq. 546; Aikin v. Western R. Co., 20 N. Y. 370; Regina v. Cambrian R. Co., L. R. 6 Q. B. 422.

<sup>29</sup> Richmond &c. R. Co. v. Louisa R. Co., 13 How. (U. S.) 71, 14 L. ed. 55 (exclusive franchise to carry passengers not impaired by carrying freight); Bridge Proprs. v. Hoboken, 1 Wall. (U. S.) 116, 17 L. ed. 571 (exclusive franchise for toll-bridge not impaired by railroad bridge); Lake v. Virginia &c. R. Co., 7 Nev. 294; Thompson v. New York &c. R. Co., 3 Sandf. Ch. (N. Y.) 625; Philadelphia &c. R. Co.'s Appeal, 102 Pa. St. 123.

<sup>30</sup> Pierce v. Somersworth, 10 N. H. 369.

<sup>31</sup> See Brocket v. Ohio &c. R. Co., 14 Pa. St. 241, 53 Am. Dec. 534.

land is condemned the condemnation usually carries with it all the erections on it. There is a presumption that the award of the appraisers includes the value of the buildings on the right of way, and this presumption is particularly strong in cases where the land-owner fails to appeal, or take other steps to review the action of the appraisers.<sup>32</sup> In a recent case it was held that the facts, if true, that a railroad only acquires an easement in the land condemned, and that a dwelling-house of a property owner thereon did not pass to the railroad company by virtue of the condemnation, but remained in the former owner, and that the appraisers made their award without reference to the value of the building, on the theory that it did not pass to the railroad company, did not give the property owner a right to go on the land and remove the building.<sup>33</sup> But the foregoing view is not everywhere recognized. In North Carolina the courts hold, that the railroad company acquires only an easement in the land condemned, with the right to actual possession of so much only thereof as is necessary for the operation of the railroad and to protect it against contingent damages, and the conclusion was reached that a house situated on the right of way at the time of the condemnation proceedings did not become the absolute property of the railroad company.<sup>34</sup>

§ 1219 (969). **Exempt property.**—Statutes sometimes prohibit the taking of particular kinds of property for railroad purposes, such as dwelling-houses,<sup>35</sup> or the yard, kitchen or garden adjoin-

<sup>32</sup> *Stauffer v. Cincinnati &c. R. Co.*, 33 Ind. App. 356, 70 N. E. 543.

<sup>33</sup> *Stauffer v. Cincinnati &c. R. Co.*, 33 Ind. App. 356, 70 N. E. 543.

<sup>34</sup> *Shields v. Norfolk &c. R. Co.*, 129 N. Car. 1, 39 S. E. 582; citing *Raleigh &c. R. Co. v. Sturgeon*, 120 N. Car. 225, 26 S. E. 779; *Blue v. Aberdeen &c. R. Co.*, 117 N. Car. 644, 23 S. E. 275. And see *Raleigh &c. R. Co. v. Mecklenburg Mfg. Co.*, 166 N. Car. 168, 82 S. E. 5. See, however, where improvements are made after notice or

knowledge that the property would be taken, notes in 5 L. R. A. (N. S.) 922, 36 L. R. A. (N. S.) 273-278.

<sup>35</sup> The Pennsylvania statute prohibiting the location of a railroad through any dwelling-house in the occupancy of the owner, without his consent, is not to be construed as prohibiting the occupation of grounds which are merely ornamental or pleasant as surroundings. *Lyle v. McKeesport &c. R. Co.*, 131 Pa. 437, 18 Atl. 1111, 25 W. N. C. 228. But see as to yard

ing, or cemeteries or churches,<sup>36</sup> without the consent of the owners. Proceedings in violation of such a statute are said to be

or curtilage, *Swift's Appeal*, 111 Pa. St. 516, 2 Atl. 539. Dwelling house must have been erected in good faith. *Hagner v. Pennsylvania &c. R. Co.*, 154 Pa. St. 475, 25 Atl. 1082; *Morris v. Winchester &c. R. Co.*, 4 Bush (Ky.) 448. The right of a railway company to condemn buildings not exempted by statute and situated on real estate necessary for its use is an incident to the right to condemn the land. *Forney v. Fremont &c. R. Co.*, 23 Nebr. 465, 36 N. W. 806; *Wells v. Somerset &c. R. Co.*, 47 Maine 345. And see to the effect that there can be no irrevocable exemption. *Boston &c. R. Co. v. York County*, 79 Maine 386, 10 Atl. 113; *Peru v. Gleason*, 91 Ind. 566; *Butchers' Union &c. Co. v. Crescent City Live Stock &c. Co.*, 111 U. S. 746, 4 Sup. Ct. 652, 28 L. ed. 585. The exemption of the "dwelling house, yard, garden and other appurtenances" in the Louisiana statute is held not to apply to a tenement bought and held merely as an investment and which the owner has never occupied as a dwelling. *Louisiana &c. R. Co. v. Moseley*, 117 La. Ann. 313, 41 So. 585.

<sup>36</sup> In the absence of such a statute, the property of a church is subject to condemnation for railroad purposes. *Macon &c. R. Co. v. Riggs*, 87 Ga. 158, 13 S. E. 312. In Tennessee a railroad company can not condemn lands set apart for cemeteries though such lands are not, at the time, improved or

used for burial purposes. *Memphis &c. R. Co. v. Forest Hill Cemetery Co.*, 116 Tenn. 400, 94 S. W. 69. In North Carolina where gardens are exempted it is held that where lands on the right of way are not used as a garden at the time the company completes its road thereon, and thus acquires constructive possession of the whole strip, it is immaterial that they are used for a garden when the company subsequently takes actual possession. *Dargan v. Carolina Cent. R. Co.*, 131 N. Car. 623, 42 S. E. 979. In Pennsylvania it is held that land belonging to a toll bridge corporation, but not in its actual use, or necessary to the proper or convenient exercise, present or prospective, of its franchise, may be condemned by a railroad company for its tracks. *Youghiogheny Bridge Co. v. Pittsburgh &c. R. Co.*, 201 Pa. 457, 51 Atl. 115. A constitutional provision that any association shall have the right to construct a railroad between any points in the state does not, by implication, repeal an existing statute exempting specified kinds of property from condemnation by railroad companies. *Weigold v. Pittsburgh &c. R. Co.*, 208 Pa. 81, 57 Atl. 188. See also *Dryden v. Pittsburgh &c. R. Co.*, 208 Pa. 316, 57 Atl. 710; *Glaser v. Glenwood R. Co.*, 208 Pa. 330, 57 Atl. 1134 (statute inapplicable where railroad company authorized to widen right of way).

void,<sup>37</sup> but the benefit of the statute may be waived by the owner to be affected by any acts which amount to an implied consent.<sup>38</sup> And where it appears that the railroad company can efficiently locate its road between the termini without invading public grounds, such as parks, there is no necessity for warranting the condemnation of such lands and an application to do so should be refused.<sup>39</sup> We have elsewhere considered the subject of this section in treating of the location of railroads, and it is sufficient, in this connection, to refer to what has already been written.<sup>40</sup>

**§ 1220 (970.) Extent of taking.**—Where the statute giving a corporation the right to exercise the power of eminent domain prescribes the estate and exact quantity that shall be taken, no other estate or amount of land than that prescribed can be seized under such authority.<sup>41</sup> But where the statute does not definitely declare what estate or what quantity of property shall be taken, the general rule is the corporation may take so much, and only so much, as is reasonably necessary for its corporate purposes.<sup>42</sup> Thus, where only part of a lot or parcel of land is needed for a railroad or a street, the entire lot or tract can not be taken for such purpose. In other words, no more can be taken than is needed for the road itself, or for some purpose legitimately connected with its use and enjoyment by the public and within the scope of the statutory grant of authority to con-

<sup>37</sup> Clapper, *Ex parte*, 3 Hill (N. Y.) 458; Cuyler v. Rochester, 12 Wend. (N. Y.) 165; Extension of Second Street, 23 Pa. St. 346.

<sup>38</sup> Chesapeake &c. R. Co. v. Pack, 6 W. Va. 397.

<sup>39</sup> Milwaukee Southern R. Co., *In re*, 124 Wis. 490, 102 N. W. 401.

<sup>40</sup> See ante, § 1133.

<sup>41</sup> Hingham &c. Co. v. Norfolk, 6 Allen (Mass.) 353; Watson v. Acquackanonck Water Co., 36 N. J. L. 195; De Camp v. Hibernia &c. R. Co., 47 N. J. L. 43; Hill v. Mohawk &c. R. Co., 7 N. Y. 152; Union Ferry Co., *Matter of*, 98

N. Y. 139; Currier v. Marietta &c. R. Co., 11 Ohio St. 228; Miller v. Windsor Water Co., 148 Pa. St. 429, 23 Atl. 1132; Roanoke City v. Berkowitz, 80 Va. 616; Elliott Roads and Streets (3rd ed.), § 250; post, § 1222.

<sup>42</sup> Lockie v. Mutual Union Tel. Co., 103 Ill. 401; Johnston v. Chicago &c. R. Co., 58 Iowa 537, 12 N. W. 576; Tyler v. Hudson, 147 Mass. 609, 18 N. E. 582; Forney v. Fremont &c. R. Co., 23 Nebr. 465, 36 N. W. 806; South Beach &c. R. Co., *In re*, 119 N. Y. 141, 23 N. E. 486; Oregon &c. R. Co. v. Owsley,

demn.<sup>43</sup> In the absence of a statutory determination of the amount, no precise rule can be laid down for determining exactly what quantity of land may be taken, as the needs of the company in any particular case must necessarily depend very largely upon the peculiar facts and circumstances of that case.<sup>44</sup> It is said that the selection of the land and the amount to be taken usually rests in the discretion of the company, within statutory and constitutional limitations and this in general is true.<sup>45</sup> It is also said in general terms, that the legislature may leave the determination of the particular property and the amount needed "to the discretion of those upon whom the authority is conferred, with

3 Wash. Ter. 38. See also *O'Hare v. Chicago &c. R. Co.*, 139 Ill. 151, 28 N. E. 923; *United States v. Baltimore &c. R. Co.*, 27 App. (D. C.) 105; ante, §§ 1195, 1196, 1197.

<sup>43</sup> *Chesapeake &c. Co. v. Mason*, 4 Cranch (U. S. C. C.) 123; *Baltimore &c. R. Co. v. Pittsburg &c. R. Co.*, 17 W. Va. 812, 10 Am. & Eng. R. Cas. 444; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325 and note; *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. ed. 513; *Georgia Pac. R. Co. v. Wilks*, 86 Ala. 478, 6 So. 34.

<sup>44</sup> *Nashville &c. R. Co. v. Cowardin*, 11 Humph. (Tenn.) 348; *Virginia &c. R. Co. v. Elliott*, 5 Nev. 358; *Chicago &c. R. Co. v. People*, 4 Ill. App. 468. Yet, in a general sense, the necessity which justifies the condemnation relates rather to the nature of the property and the uses to which it is to be applied, than to the circumstances of the particular case. It may include future necessities, and material for construction and repair. *Cleveland &c. R. Co. v. Hadley*, 179 Ind. 429, 101 N. E. 473, 45 L. R. A. (N. S.) 796 and note reviewing cases as to

right to use material elsewhere in track construction or repair.

<sup>45</sup> *Colorado &c. R. Co. v. Union Pac. R. Co.*, 41 Fed. 293; *Smith v. Chicago &c. R. Co.*, 105 Ill. 511; *O'Hare v. Chicago &c. R. Co.*, 139 Ill. 151, 28 N. E. 923; *Chicago &c. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Chicago &c. R. Co. v. Pontiac*, 169 Ill. 155, 48 N. E. 485; *Richland School Tp. v. Overmyer*, 164 Ind. 382, 73 N. E. 811; *Southern &c. R. Co. v. Stoddard*, 6 Minn. 150; *Deitrichs v. Lincoln &c. R. Co.*, 13 Nebr. 361, 13 N. W. 624; *Lodge v. Philadelphia &c. R. Co.*, 8 Phila. (Pa.) 345; *Eldridge v. Smith*, 34 Vt. 484. See also *Hayford v. Bangor*, 102 Maine 340, 66 Atl. 731, 11 L. R. A. (N. S.) 940, and note; *Coit v. Owenby &c. Co.*, 166 N. Car. 136, 81 S. E. 1067. Other cases to the same effect are cited ante § 1412, et seq. Compare also ante, § 1127, et seq. But see *Postal Tel. Cable Co. v. Louisville &c. Co.*, 43 La. Ann. 522, 9 So. 119; *Louisiana &c. R. Co. v. Xavier Realty*, 115 La. Ann. 328, 39 So. 1; *Riley v. Charleston Union Station Co.*, 71 S. Car. 457, 51 S. E. 485.

or without limitations."<sup>46</sup> But even if it be true that the legislature can make the determination of a company conclusive as to the amount of property necessary to be taken for its use, it is seldom that any legislature has attempted to do so without limitation. It is usually provided that the question shall be tried and determined by appraisers, commissioners, or a jury, or some other tribunal.<sup>47</sup> The company may have a right to exercise its discretion in the first instance and its determination may be *prima facie* evidence that all the land taken or sought to be condemned is necessary for the use of the road, but it seems to us that the company should not have a right to act as final judge in its own case and conclusively determine the question, and that its discretion is subject both to such statutory and constitutional provisions as may be applicable and also to the jurisdiction and right of the courts to prevent its abuse.<sup>48</sup>

<sup>46</sup> *Dewitt v. Duncan*, 46 Cal. 342; *Boston Water Power Co. v. Boston &c. R. Co.*, 23 Pick. (Mass.) 360; *Board of Supervisors v. Gorrell*, 20 Grat. (Va.) 484. See also to the same effect *Worcester Gas Light &c. Co. v. County Comrs.*, 138 Mass. 289; *Ford v. Chicago &c. R. Co.*, 14 Wis. 609, 80 Am. Dec. 791; *Lynch v. Forbes*, 161 Mass. 302, 37 N. E. 437, 42 Am. St. 402. But compare the authorities cited in the note in the last report above referred to.

<sup>47</sup> *Comrs. Court v. Bowie*, 34 Ala. 461; *Southern Pac. R. Co. v. Raymond*, 53 Cal. 223; *Illinois Cent. R. Co. v. Chicago*, 138 Ill. 453, 28 N. E. 740; *Lecoul v. Police Jury*, 20 La. Ann. 308; *New Central &c. Co. v. George's &c. Co.*, 37 Md. 537; *Power's Appeal*, 29 Mich. 504; *Thompson, Matter of*, 57 Hun (N. Y.) 419; *Rensselaer &c. Co. v. Davis*, 43 N. Y. 137; *New York Cent. R. Co., Matter of*, 66 N. Y. 407; *Carolina Cent. R. Co. v. Love*, 81 N. Car. 434; *Bal-*

*timore &c. R. Co. v. Pittsburg &c. R. Co.*, 17 W. Va. 812, 10 Am. & Eng. R. Cas. 444.

<sup>48</sup> *Coe v. Aiken*, 61 Fed. 24; *Southern Pac. R. Co. v. Raymond*, 53 Cal. 223; *O'Hare v. Chicago &c. R. Co.*, 139 Ill. 151, 28 N. E. 923; *Reed v. Louisville Bridge Co.*, 8 Bush. (Ky.) 69; *Tracy v. Elizabethtown R. Co.*, 80 Ky. 259; *New York &c. R. Co. v. Metropolitan &c. Co.*, 63 N. Y. 326; *Hays v. Risher*, 32 Pa. St. 169; *South Carolina R. Co. v. Blake*, 9 Rich. (S. Car.) 228; *Riley v. Charleston Union Station Co.*, 71 S. Car. 457, 51 S. E. 485; *Baltimore &c. R. Co. v. Pittsburgh &c. R. Co.*, 17 W. Va. 812, 10 Am. & Eng. R. Cas. 444; *Webb v. Manchester &c. R. Co.*, 4 M. & Cr. 116. See also *Dellaware &c. R. Co. v. Tobyhanna &c. Co.*, 232 Pa. St. 76, 81 Atl. 132; *Chicago &c. R. Co. v. Mason*, 23 S. Dak. 564, 122 N. W. 601; *Chicago &c. R. Co. v. Williams*, 148 Fed. 442. And ante, §§ 1412, 1413.



§ 1221 (971). **Taking additional property.**—The power of a railroad company to take lands by eminent domain is not exhausted by a single exercise, nor does it expire with the completion of the road so far as to put it in running order. Additional land may be taken from time to time, as may be required by the increased necessities of the company, due to growth of business, or demands for greater accommodation for the public.<sup>49</sup> Thus, where the necessities of the road required a terminal depot and turntable at a certain point, it was held that the company could condemn land for a side track or branch line leading to the lot on which it had erected them.<sup>50</sup> The company may condemn land for the construction of additional side tracks,<sup>51</sup> or depots,<sup>52</sup> where the accommodation of the public demands them.<sup>53</sup> Land for additional shops for the repair of engines and cars used on the

<sup>49</sup> *Florida Central &c. R. Co. v. Bell*, 43 Fla. 359, 31 So. 259; *Chicago &c. R. Co. v. Wilson*, 17 Ill. 123; *Fisher v. Chicago &c. R. Co.*, 104 Ill. 323; *Prather v. Jeffersonville &c. R. Co.*, 52 Ind. 16; *Peck v. Louisville &c. R. Co.*, 101 Ind. 366; *Hopkins v. Philadelphia &c. R. Co.*, 94 Md. 257, 51 Atl. 404; *Childs v. Central R. &c. Co.*, 33 N. J. L. 323; *Beck v. United &c. R. Co.*, 39 N. J. L. 45; *New York Cent. &c. R. Co., In re*, 67 Barb. (N. Y.) 426; *Toledo &c. R. Co. v. Daniels*, 16 Ohio St. 390; *Philadelphia &c. R. Co. v. Williams*, 54 Pa. St. 103; *South Carolina &c. R. Co. v. Blake*, 9 Rich. (S. Car.) 228. See ante, § 1208.

<sup>50</sup> *New Orleans &c. R. Co. v. Second Municipality*, 1 La. Ann. 128; *Knight v. Carrollton R. Co.*, 9 La. Ann. 284. See also *Chicago &c. Electric R. Co. v. Chicago &c. R. Co.*, 211 Ill. 352, 71 N. E. 1017. Terminal facilities may be condemned at any point which the

needs of the road may dictate. *Central Branch &c. R. Co. v. Atchison &c. R. Co.*, 26 Kans. 669. See also *Eckart v. Ft. Wayne &c. T. Co.*, 181 Ind. 352, 104 N. E. 762.

<sup>51</sup> *St. Louis &c. R. Co. v. Petty*, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434 and note; *Philadelphia &c. R. Co. v. Williams*, 54 Pa. St. 103. See *New Cent. Coal Co. v. George's Creek Coal Co.*, 37 Md. 537; *Sherman v. Buick*, 32 Cal. 241, 91 Am. Dec. 577 and note; *Fisher v. Chicago &c. R. Co.*, 104 Ill. 323; *Chicago &c. Electric R. Co. v. Chicago &c. R. Co.*, 211 Ill. 352, 71 N. E. 1017.

<sup>52</sup> *Deitrichs v. Lincoln &c. R. Co.*, 13 Nebr. 361, 13 N. W. 624.

<sup>53</sup> See *Pittsburg &c. R. Co. v. Benwood Iron Works*, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680 and note, for a discussion of the question as to what is such a public necessity as will justify the exercise of this power.

road may be condemned,<sup>54</sup> and where the right of way as originally acquired was not so wide as the company is permitted to hold for that purpose, its width may be increased, when necessary, by condemnation to the statutory limit.<sup>55</sup> The fact that the charter required the railroad to be "completed" by a certain time, does not necessarily limit its right to condemn additional necessary lands after expiration of that time.<sup>56</sup> Other phases of this subject have already been considered.<sup>57</sup>

**§ 1222 (972). Title or interest acquired.**—The legislature is the sole judge of the estate to be taken in lands required for the construction of a public work, and may authorize the taking of the fee,<sup>58</sup> or of any less interest. But where, as is usually true in the case of railroads, an easement only is required, no greater estate can be taken unless the power to take the fee is expressly conferred.<sup>59</sup> Thus, where the act provided that the corporation

<sup>54</sup> *Chicago &c. R. Co. v. Wilson*, 17 Ill. 123.

<sup>55</sup> *Childs v. Central R. Co. &c.*, 33 N. J. L. 323. See also *Smith v. Cleveland &c. R. Co.*, 170 Ind. 382, 81 N. E. 501; *Lilley v. Pittsburg &c. R. Co.*, 213 Pa. St. 247, 62 Atl. 852.

<sup>56</sup> *Brown v. Philadelphia &c. R. Co.*, 58 Md. 539; *Philadelphia &c. R. Co. v. Williams*, 54 Pa. St. 103. But such a condition may be so worded as to enable the landowner to take advantage of it. *Peavey v. Calais R. Co.*, 30 Maine 498; *Morris &c. R. Co. v. Central R. Co.*, 31 N. J. L. 205.

<sup>57</sup> Ante, §§ 1204, 1206, 1208.

<sup>58</sup> *Mason v. Lake Erie &c. R. Co.*, 9 Biss. (U. S.) 239; *Water Works Co. v. Burkhart*, 41 Ind. 364; *Logansport v. Shirk*, 88 Ind. 563; *Page v. O'Toole*, 144 Mass. 303, 10 N. E. 851; *Fairchild v. St. Paul*, 46 Minn. 540, 49 N. W. 325,

citing *Elliott Roads and Streets*, 172; *Currie v. New York Transit Co.*, 66 N. J. Eq. 313, 58 Atl. 308, 105 Am. St. 647; *Birdsall v. Cary*, 66 How. Prac. (N. Y.) 358; *Sweet v. Buffalo &c. R. Co.*, 79 N. Y. 293; *Malone v. Toledo*, 28 Ohio St. 643; *Halldeman v. Pennsylvania R. Co.*, 50 Pa. St. 425; *Hedger v. Aberdeen &c. R. Co.*, 26 S. Dak. 491, 128 N. W. 602; *Roanoke City v. Berkowitz*, 80 Va. 616. But see *Albany Street, Matter of*, 11 Wend. (N. Y.) 149, 25 Am. Dec. 618 and note; *New Orleans &c. Co. v. Gay*, 32 La. Ann. 471; *Henry v. Dubuque R. Co.*, 2 Iowa 288.

<sup>59</sup> *Union Pacific R. Co. v. Colorado Postal Tel. Cable Co.*, 30 Colo. 133, 69 Pac. 564; *Fitch v. New York &c. R. Co.*, 59 Conn. 414, 20 Atl. 345, 10 L. R. A. 188; *Henry v. Dubuque &c. R. Co.*, 2 Iowa 288; *Missouri &c. R. Co. v. Schmuck*, 69 Kans. 272, 76 Pac.

should be "seized and possessed of the land" taken,<sup>60</sup> it was held that an easement only was acquired by condemnation. So, where it was provided that the title to the land taken should vest in the company,<sup>61</sup> and it has even been held that an act providing that a fee-simple title to its right of way should vest in a railroad company conferred upon the company only a base of terminable fee, and that the land would revert if the company ceased to use it for railroad purposes.<sup>62</sup> The general railroad laws of the several states usually provide that the railroad company shall have "the right to acquire title" to necessary lands by certain proceedings for that purpose. Such a provision enables it to condemn merely an easement and not the fee.<sup>63</sup> But the ease-

836; *New Orleans R. Co. v. Gay*, 32 La. Ann. 471; *Postal Tel. & Co. v. Louisiana &c. R. Co.*, 49 La. Ann. 1270, 22 So. 219; *Clark v. Worcester*, 125 Mass. 226; *New Jersey &c. Co. v. Morris &c. Co.*, 44 N. J. Eq. 398, 15 Atl. 227, 1 L. R. A. 133 and note; *Pennsylvania R. Co. v. Breckenridge*, 60 N. J. L. 583, 38 Atl. 740; *New York &c. R. Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385; *Washington Cemetery Co. v. Prospect Park &c. R. Co.*, 68 N. Y. 591; *Corwin v. Cowan*, 12 Ohio St. 629; *McCombs v. Stewart*, 40 Ohio St. 647; *Oregon &c. R. Co. v. Oregon &c. Co.*, 10 Ore. 444; *Pittsburg &c. R. Co. v. Bruce*, 102 Pa. St. 23; *Lyon v. McDonald*, 78 Tex. 71, 14 S. W. 261, 9 L. R. A. 295 and note; *Jackson v. Rutland &c. R. Co.*, 25 Vt. 150, 60 Am. Dec. 246. See also *Cleveland &c. R. Co. v. Doan*, 47 Ind. App. 322, 94 N. E. 598; *Cleveland &c. R. Co. v. Smith*, 177 Ind. 524, 97 N. E. 164; *Louisiana Land Co. v. Blakewood*, 131 La. 539, 59 So. 984; *Louisiana &c. R. Co. v. Louisiana R. &c. Co.*, 121 La.

Ann. 587, 53 So. 872. But compare *New Orleans &c. R. Co. v. Gay*, 31 La. Ann. 430; *United States Pipe Line Co. v. Delaware &c. R. Co.*, 62 N. J. L. 254, 41 Atl. 749, 42 L. R. A. 572.

<sup>60</sup> *Quimby v. Vermont Central R. Co.*, 23 Vt. 387.

<sup>61</sup> *Dunham v. Williams*, 36 Barb. (N. Y.) 136. But see *Page v. O'Toole*, 144 Mass. 303, 10 N. E. 851; *Brooklyn Park Comrs. v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70 and note; *Barnett v. Johnson*, 15 N. J. Eq. 481.

<sup>62</sup> *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426. See *Gurney v. Minneapolis &c. Co.*, 63 Minn. 70, 65 N. W. 136; *Scott v. St. Paul &c. R. Co.*, 21 Minn. 232; *Mechanicsville &c. R. Co. v. Fitchburg R. Co.*, 103 Misc. 46, 170 N. Y. S. 476; *Leach v. Philadelphia &c. R. Co.*, 258 Pa. St. 518, 102 Atl. 174.

<sup>63</sup> *Quick v. Taylor*, 113 Ind. 540, 16 N. E. 588; *Chicago &c. R. Co. v. Huncheon*, 130 Ind. 529, 30 N. E. 636; *Kansas Central R. Co. v. Allen*, 22 Kans. 285, 31 Am. Rep. 190; *Washington Cemetery v. Prospect*

ment usually acquired is in its nature perpetual,<sup>64</sup> and differs very materially from an ordinary easement.<sup>65</sup> It has been held that where the state itself seizes land for a permanent public use it may more readily be presumed to have taken a fee, which may be transmitted by it to the corporation to which it grants the same.<sup>66</sup> A railroad can not condemn a less interest in land taken than that required and prescribed by the legislature. Thus, under a statute authorizing it to take land for a perpetual right of way it can not appropriate land for a temporary track, to be used while its main track is rebuilding,<sup>67</sup> or until the land-owners shall

Park &c. R. Co., 68 N. Y. 591. See also *East Tenn. &c. R. Co. v. Telford*, 89 Tenn. 293, 14 S. W. 776, 10 L. R. A. 855; *Pittsburg &c. R. Co. v. Bruce*, 102 Pa. St. 23; *Commissioners v. Mich. Cent. R. Co.*, 90 Mich. 385, 51 N. W. 447.

<sup>64</sup> *Chaplin v. Coms.*, 126 Ill. 264, 18 N. E. 765; *Henry v. Dubuque &c. R. Co.*, 2 Iowa 288; *Pilcher v. Atchison &c. R. Co.*, 38 Kans. 516, 16 Pac. 945, 5 Am. St. 770; *Beal v. New York &c. R. Co.*, 3 How. Prac. N. S. (N. Y.) 329; *Cummins v. Des Moines &c. R. Co.*, 63 Iowa 397, 19 N. W. 268. And is generally exclusive. *Fitch v. New York &c. R. Co.*, 59 Conn. 414, 20 Atl. 345, 10 L. R. A. 188; *New Mexico v. United States Trust Co.*, 172 U. S. 171, 19 Sup. Ct. 128, 43 L. ed. 407. See also *Philadelphia R. Co. v. Hummell*, 44 Pa. St. 375, 84 Am. Dec. 457. But compare *Louisville &c. R. Co. v. Western Un. Tel. Co.*, 249 Fed. 385.

<sup>65</sup> *Bemis v. Springfield*, 122 Mass. 110; *Pennsylvania &c. R. Co. v. Reading Paper Mills*, 149 Pa. St. 18, 20 Atl. 761; *New York &c. R. Co. v. Trimmer*, 53 N. J. L. 1, 20 Atl. 761. See also *Western Union Tel. Co. v. Pennsylvania R. Co.*,

195 U. S. 540, 25 Sup. Ct. 133, 141, 49 L. ed. 312; *Northern Pac. R. Co. v. North American Tel. Co.*, 230 Fed. 347; *Smith v. Hall*, 103 Iowa 95, 72 N. W. 427; *Currie v. Bangor &c. R. Co.*, 105 Maine 529, 75 Atl. 51; *Pittsburg &c. R. Co. v. Peet*, 152 Pa. St. 488, 25 Atl. 612, 19 L. R. A. 467; *Dilts v. Plumville R. Co.*, 222 Pa. St. 516, 71 Atl. 1072; *Philadelphia v. Ward*, 174 Pa. St. 45, 34 Atl. 458.

<sup>66</sup> *Water Works Co. v. Burkhard*, 41 Ind. 364; *Brookville &c. Co. v. Butler*, 91 Ind. 134, 46 Am. Rep. 580; *Dingley v. Boston*, 100 Mass. 544; *Coster v. New Jersey &c. Co.*, 23 N. J. L. 227; *Rexford v. Knight*, 11 N. Y. 308; *Malone v. Toledo*, 34 Ohio St. 541; *Haldeman v. Pennsylvania R. Co.*, 50 Pa. St. 425; *Wyoming &c. Co. v. Price*, 81 Pa. St. 156.

<sup>67</sup> *Currier v. Marietta &c. R. Co.*, 11 Ohio St. 228. In *Heyneman v. Blake*, 19 Cal. 579, it was held that authority to condemn private lands for use by a corporation includes the right to condemn any estate or interest therein for the same object. See also *Charleston &c. R. Co. v. Blake*, 12 Rich. (S. Car.) 634; *Sixth Ave. R. Co. v. Kerr*, 72

choose to mine the coal over which it runs.<sup>68</sup> But it need only take the surface of the land with sufficient underlying strata to support the road, and is not obliged to take the mines and minerals lying beneath the surface.<sup>69</sup> And it has been held in California and other states that the minerals can not ordinarily be taken, but are reserved to the land-owner.<sup>70</sup> But the underlying minerals may be and are usually if not always taken so far

N. Y. 330; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315, 11 Am. Dec. 484. Where it is not required by statute to take the maximum allowed, it may take a smaller interest, and provision is often made for limiting the interest or extent by the petition or instrument of appropriation.

<sup>68</sup> *De Camp v. Hibernia Underground R. Co.*, 47 N. J. L. 43; *Hibernia Underground R. Co. v. De Camp*, 47 N. J. L. 518, 54 Am. Rep. 197; *Hartford &c. R. Co.*, Matter of, 65 How. Prac. (N. Y.) 133; *Wheelock v. Young*, 4 Wend. (N. Y.) 647; *Pinchin v. London &c. R. Co.*, 24 L. J. N. S. 417.

<sup>69</sup> *Corporation of Huddersfield and Jacomb*, In re, L. R. 10 Ch. 92. See also *Robert v. Sadler*, 104 N. Y. 229, 58 Am. Rep. 498 and note; *Hartford &c. R. Co.*, Re, 65 How. Prac. (N. Y.) 133. An entry by eminent domain upon the surface is an entry upon subjacent strata, so far as they are necessary to support the surface for the purpose of the structure for which the land is taken. *Penn Gas Coal Co. v. Versailles Fuel Gas Co.*, 131 Pa. 522, 19 Atl. 933; *Evans v. Haefner*, 29 Mo. 141. See also *Platt v. Pennsylvania Co.*, 43 Ohio St. 228, 1 N. E. 420; *Alabama &c. R. Co. v. Gilbert*, 71 Ga. 591; *Hasson v.*

*Oil Creek &c. R. Co.*, 8 Phila. (Pa.) 556; *Lafferty v. Schuylkill &c. R. Co.*, 124 Pa. St. 297, 16 Atl. 869, 3 L. R. A. 124, 10 Am. St. 587; *East Tennessee &c. R. Co. v. Telford*, 89 Tenn. 293, 14 S. W. 776, 10 L. R. A. 855; *Olive v. Sabine &c. R. Co.*, 11 Tex. Civ. App. 208, 33 S. W. 139; *Hurd v. Rutland &c. R. Co.*, 25 Vt. 116; *Troy &c. R. Co. v. Potter*, 42 Vt. 265, 1 Am. Rep. 325; *St. Louis &c. R. Co. v. Clark*, 121 Mo. 169, 195, 25 S. W. 192, 906, 26 L. R. A. 751, as to how far the land-owner is precluded from using what is taken by the company. As to tide lands and right to take land under water, see *New York Cent. &c. R. Co.*, Matter of, 77 N. Y. 248; *State ex rel. v. King Co. Sup. Ct.*, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897 and note.

<sup>70</sup> *Southern Pac. R. Co. v. San Francisco Sav. Union*, 146 Cal. 290, 79 Pac. 961, 70 L. R. A. 221, 106 Am. St. 36, 41, and authorities there cited; notes in 85 Am. St. 295, 94 Am. St. 864. See generally as to right of landowner to mine under road without disturbing it and as to the relative rights and duties of landowner and company in such cases, *Eldorado &c. R. Co. v. Suies*, 228 Ill. 9, 81 N. E. 782; *Cleveland &c. R. Co. v. Simpson*, 182 Ind. 693, 104 N. E. 301, 108 N. E. 9;

as necessary to support the surface,<sup>71</sup> and, even where only an easement is taken, the company ordinarily acquires a right to take so much of the earth and materials within the right of way as may be reasonably necessary to remove in constructing and repairing its roadbed and to use it at other points on the road.<sup>72</sup> It has been held in Minnesota that the title, of whatsoever sort acquired, dates from the time the award is filed.<sup>73</sup>

§ 1223 (972a). **Reversion on abandonment.**—Where a railroad company acquires a mere easement in the land condemned its right to the property is dependent upon its use for public purposes, and it has been held that when this public use is abandoned or becomes impossible the right of the railroad company to hold the land ceases and the property reverts to the owner of the fee,<sup>74</sup> and is subject to an appropriation for other public uses.<sup>75</sup> To have this effect, however, there must ordinarily be not only an actual relinquishment of the property by the railroad

Kansas City R. Co. v. Allen, 22 Kans. 285, 31 Am. Rep. 190; notes in 8 L. R. A. (N. S.) 422, 45 L. R. A. (N. S.) 801, et seq.

<sup>71</sup> Dilts v. Plumville R. Co., 222 Pa. St. 516, 71 Atl. 1072.

<sup>72</sup> Cleveland &c. R. Co. v. Hadley, 179 Ind. 429, 442, 101 N. E. 473, 45 L. R. A. (N. S.) 796, and authorities there cited in opinion and note. There is some slight conflict among the cases upon the subject, but, as shown in the note above referred to, this is the prevailing and better rule. The company has no right, however, to remove such material merely for the purpose of selling it. Nashville &c. R. Co. v. Karlhaus, 150 Ala. 633, 43 So. 791; Hendrix v. Southern R. Co., 162 N. Car. 9, 77 S. E. 1001 (nor unnecessarily and merely for use elsewhere); Henderler v. Lehigh Valley R. Co., 209

Pa. St. 256, 58 Atl. 486, 103 Am. St. 1005 (same).

<sup>73</sup> State v. Chicago &c. R. Co., 85 Minn. 416, 89 N. W. 1. But see Dowie v. Chicago &c. R. Co., 214 Ill. 49, 73 N. E. 354, where it is held that the rights and interests of the parties date from the filing of the petition.

<sup>74</sup> Chicago &c. R. Co. v. Clapp, 201 Ill. 418, 66 N. E. 223; Miller v. Cincinnati &c. Elec. St. R. Co., 43 Ind. App. 540, 88 N. E. 102; Louisiana &c. R. Co. v. Louisiana R. &c. Co., 127 La. 587, 53 So. 872; Canton Co. v. Baltimore &c. R. Co., 99 Md. 202, 57 Atl. 637; Mechanicsville &c. R. Co. v. Fitchburg &c. R. Co., 103 Misc. 46, 170 N. Y. S. 476; Leach v. Philadelphia &c. R. Co., 258 Pa. St. 578, 102 Atl. 174.

<sup>75</sup> Crescent v. Pittsburg &c. R. Co., 210 Pa. 334, 59 Atl. 1103.

company, but also an intention to abandon it.<sup>76</sup> The law requires some decided act indicative of an intention to abandon and this intention must be determined from the circumstances of the case.<sup>77</sup> Thus it was held that an intention to abandon a right of way acquired by condemnation proceedings was not conclusively shown in the case of a railroad company financially embarrassed, by the mere fact, that it entered into an arrangement with another road by which it secured traffic facilities.<sup>78</sup> So in another case where a railroad company had regularly condemned land for a water station and caused it to be flooded with water for its use, it was held that a leasing of the reservoir to a fishing and boating club, reserving to the railroad company its actual possession for all the purposes for which the land was condemned with a right to cancel the lease at any time on thirty days' notice, did not show an abandonment of the land as a water station.<sup>79</sup> In Nebraska it is held that the failure of a railroad company for ten years to use property acquired in condemnation proceedings and afterwards conveyed to a railroad company by the owner does not show an abandonment of all title thereto and that even though an easement only was conveyed by the deed it could only be extinguished by adverse possession for the same length of time required to extinguish the title of an owner in fee.<sup>80</sup> On the question of intention to abandon, it has been held competent to show that the railroad was built merely for temporary purposes and this object had been fulfilled.<sup>81</sup>

**§ 1224 (973). Width taken for right of way.**—The legislature has authority to prescribe the width of the strip to be taken by a railroad for a right of way,<sup>82</sup> or it may confer a general power to take the necessary land for the purpose of the corporation.<sup>83</sup>

<sup>76</sup> *Chicago &c. R. Co. v. Clapp*, 201 Ill. 418, 66 N. E. 223.

<sup>77</sup> *Canton Co. v. Baltimore &c. R. Co.*, 99 Md. 202, 57 Atl. 637.

<sup>78</sup> *Canton Co. v. Baltimore &c. R. Co.*, 99 Md. 202, 57 Atl. 637.

<sup>79</sup> *Dillon v. Kansas City &c. R. Co.*, 67 Kans. 687, 74 Pac. 251.

<sup>80</sup> *Struve v. Republic Valley R.*

*Co.*, 2 Nebr. (Unoff.) 585, 89 N. W. 604.

<sup>81</sup> *Chicago &c. R. Co. v. Clapp*, 201 Ill. 418, 66 N. E. 223.

<sup>82</sup> See *Hingham &c. Tpk. Corp. v. Norfolk*, 6 Allen (Mass.) 353.

<sup>83</sup> Proceedings founded upon a petition by which the railroad company seeks to condemn a right of

The width of the strip which a railroad company is authorized to take for a right of way is usually fixed by statute, or by the charter,<sup>84</sup> and no land can be taken beyond the limits of that strip, except as specially authorized.<sup>85</sup> In many of the states additional land may be taken<sup>86</sup> when necessary for cuttings or embankments, depots and stations, or side tracks, or for procuring materials for use in the construction of the road. The enumerated reasons for which a railroad may be permitted to increase the width of its right of way are exclusive, and a railroad will not be permitted to increase the width of its roadway upon any other grounds.<sup>87</sup> Where the company seeks to take ground outside the limits of the right of way as defined by statute, the burden is upon it to establish the necessity of such taking.<sup>88</sup> It has also been held that even within the limits of the maximum width prescribed for its right of way, a railroad can take only such lands as are reasonably necessary and convenient for its use.<sup>89</sup> But courts do not ordinarily closely inquire into the question of necessity in such a case and where the width first taken is less than the width authorized by statute the power to take the full

way of greater width than the maximum width allowed by statute have been held void and set aside in toto. *State v. Hudson Terminal R. Co.*, 46 N. J. L. 289. See also *Barnes v. Chicago & C. R. Co.* (Tex.), 33 S. W. 601.

<sup>84</sup> See *Nashville & C. R. Co. v. Hammond*, 104 Ala. 191, 15 So. 935; *Lower v. Chicago & C. R. Co.*, 59 Iowa 563, 13 N. W. 718.

<sup>85</sup> *Kemper v. Cincinnati & C. R. Co.*, 11 Ohio 392; *Johnston v. Chicago & C. R. Co.*, 58 Iowa 537, 12 N. W. 576; *State v. Hudson & C. R. Co.*, 46 N. J. L. 289, 20 Am. & Eng. R. Cas. 294.

<sup>86</sup> See *Smith v. Cleveland & C. R. Co.*, 170 Ind. 382, 396, 81 N. E. 501 (citing text). But if the company abuses the discretion vested in it by statute, by taking addi-

tional land unnecessarily, equity may restrain it so as to keep it within the limits of its charter. *Atlantic & C. R. Co. v. Penny*, 119 Ga. 479, 46 S. E. 665.

<sup>87</sup> *Brown v. Rome & C. R. Co.*, 86 Ala. 206, 5 So. 195; *Johnston v. Chicago & C. R. Co.*, 58 Iowa 537, 12 N. W. 576.

<sup>88</sup> *Jefferson & C. R. Co. v. Hazeur*, 7 La. Ann. 182; *Wisconsin Central R. Co. v. Cornell University*, 52 Wis. 537, 8 N. W. 491. It is held in *Chicago & C. R. Co. v. Dunbar*, 100 Ill. 110, that the necessity need not be apparent before condemnation.

<sup>89</sup> *Tracy v. Elizabethtown & C. R. Co.*, 80 Ky. 259; *Chicago & C. R. Co. v. Dunbar*, 100 Ill. 110. But where it is necessary to take land upon which buildings are situated,



statutory width is not exhausted.<sup>90</sup> If it be shown that the railroad company has made arrangement with other companies to share with them the land sought to be condemned, this, it has been held, should be taken as an admission on its part that its necessities do not require all of the land.<sup>91</sup> But where a petition was filed for the condemnation of a strip of land twenty feet wider than the railroad company could lawfully condemn, unless for necessary cutting and filling, and no question as to its right to condemn was made in the court below, the necessity was held to have been conceded.<sup>92</sup> The company may condemn a strip of the full statutory width, although it already owns the adjoining land.<sup>93</sup> Where no width is specified, the charter will be construed to authorize the taking of so much land as is reasonably necessary for the purposes of the company,<sup>94</sup> including, in some jurisdictions at least, a reasonable amount of land for the an-

the buildings may be condemned with the ground and afterward removed and sold. *Forney v. Fremont &c. R. Co.*, 23 Nebr. 465, 36 N. W. 806; *Chicago &c. R. Co. v. Knuffke*, 36 Kans. 367, 13 Pac. 582.

<sup>90</sup> *Chicago &c. R. Co. v. Baugh*, 175 Ind. 419, 424, 94 N. E. 571, citing this section and *Chicago &c. R. Co. v. Chicago &c. R. Co.*, 211 Ill. 352, 360, 71 N. E. 1017, and other Indiana cases.

<sup>91</sup> *Swinney v. Fort Wayne &c. R. Co.*, 59 Ind. 205.

<sup>92</sup> *Booker v. Venice &c. R. Co.*, 101 Ill. 333.

<sup>93</sup> *Stark v. Sioux City &c. R. Co.*, 43 Iowa 501. See also *Eel River &c. R. Co. v. Field*, 67 Cal. 429, 7 Pac. 814; *Chicago &c. Electric Co. v. Chicago &c. R. Co.*, 211 Ill. 352, 71 N. E. 1017. In *New Central Coal Co. v. George's Creek Coal &c. Co.*, 37 Md. 537, it was held that a company could not take lands in invitum where it already owned lands equally useful for its

purpose. Where the railroad company has procured a strip of land for a right of way by voluntary grant it may condemn a sufficient amount of land to increase the right of way to the full statutory width. *Childs v. Central R. Co. &c.*, 33 N. J. L. 323.

<sup>94</sup> *Booker v. Venice &c. R. Co.*, 101 Ill. 333; *Lockie v. Mutual Union Tel. Co.*, 103 Ill. 401; *Sadd v. Maldon R. Co.*, 6 Exch. 143. A railroad company which purchased from another company a right of way twenty-five feet in width, on which a railroad track was constructed, was held to have the power to locate an additional track on land adjacent to the right of way, and it was held that it might for that purpose condemn an additional strip. *Chicago &c. R. Co. v. Chicago &c. R. Co.*, 211 Ill. 352, 71 N. E. 1017. A voluntary conveyance of a right of way of undefined width to a railroad whose charter did not specify the width

ticipated necessities of the company in the future.<sup>95</sup> Where a particular method is pointed out for determining how much land is necessary, as by resolution of the directors,<sup>96</sup> or by the report of the commissioners to assess damages,<sup>97</sup> that method must be followed, and the company can acquire no right to land by condemnation until the necessity for such acquisition has been duly ascertained and declared.<sup>98</sup> In general, however, the company is permitted a reasonable discretion in determining how much land is necessary<sup>99</sup> subject to the right of the court to set aside an inquisition for a clear abuse of this discretion.<sup>1</sup> If the company is given a general authority to take the necessary lands for a right of way, the width taken may vary in different localities according to the necessities of the company.<sup>2</sup> In a case where

of its right of way was held to include so much land as was reasonably necessary. *Day v. Railroad Co.*, 41 Ohio St. 392. A company has the same right to condemn land over which to swing a gate which it is compelled to maintain as it has to condemn land necessary for the construction of its track.

<sup>95</sup> *Staten Island R. T. Co., Matter of*, 103 N. Y. 251, 8 N. E. 548; *Lodge v. Philadelphia &c. R. Co.*, 8 Phila. (Pa.) 345; *Pennsylvania R. Co. v. National Docks &c. Co.*, 57 N. J. L. 86, 30 Atl. 183; *Kountze v. Propr's. Morris Aqueduct*, 58 N. J. L. 303, 33 Atl. 252; *St. Louis &c. R. Co. v. Foltz*, 52 Fed. 627, 633.

<sup>96</sup> *Stringham v. Oshkosh &c. R. Co.*, 33 Wis. 471.

<sup>97</sup> *Carolina &c. R. Co. v. Love*, 81 N. Car. 434.

<sup>98</sup> *Johnston v. Chicago &c. R. Co.*, 58 Iowa 537, 12 N. W. 576; *Carolina Central R. Co. v. Love*, 81 N. Car. 434; *Kemp v. South Eastern R. Co.*, L. R. 7 Ch. 364. But see *Chicago &c. R. Co. v.*

*Dunbar*, 100 Ill. 110; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *State v. Stewart*, 74 Wis. 620, 43 N. W. 947, 6 L. R. A. 394.

<sup>99</sup> *Smith v. Chicago &c. R. Co.*, 105 Ill. 511; *Zircle v. Southern R. Co.*, 102 Va. 17, 45 S. E. 802, 102 Am. St. 805 and note. As to the power of the railroad to judge of the necessity of taking land, see *New York Central &c. R. Co.*, *In re*, v. *Metropolitan &c. Co.*, 63 N. Y. 326; *Boston &c. R. Co.*, *In re*, v. *Kip*, 53 N. Y. 574; *New Orleans &c. R. Co. v. Gay*, 32 La. Ann. 471; ante, § 1195.

<sup>1</sup> *Chesapeake &c. Canal Co. v. Mason*, 4 Cranch (U. S. C. C.) 123; *Webb v. Manchester &c. R. Co.*, 4 M. & Cr. 116.

<sup>2</sup> *Chicago &c. R. Co. v. People*, 4 Bradw. (Ill.) 468. The company is not obliged to take the maximum width permitted by statute. *Jones v. Erie &c. R. Co.*, 169 Pa. St. 333, 32 Atl. 535, 47 Am. St. 916; *Indianapolis &c. R. Co. v. Rayl*, 69 Ind. 424. But it is held that if it takes

land was conveyed by a land-owner for full value to a railroad company for a right of way, the land-owner reserving a ferry landing and a private right of way, it was held that the company could, under a statute giving the railroad company power to enlarge and otherwise improve the whole or any portion of its road, condemn both the ferry landing and the reserved right of way.<sup>3</sup> It is not necessary that a railroad company could locate its tracks in the middle of its right of way, whether acquired by condemnation<sup>4</sup> or by purchase or voluntary grant.<sup>5</sup> Where the maximum width is prescribed, the presumption will be indulged that the full width allowed was taken unless the contrary affirmatively appears.<sup>6</sup>

**§ 1225 (974). Taking right of way of another road—When not allowed.**—Where the statute confers only a general authority to condemn property for railroad purposes land appropriated by a railroad company for public use can not afterwards be appropriated by another company for a similar use where the two can not coexist, except in case of a necessity so absolute that without such appropriation the grant to the latter company will be defeated, a necessity arising from the very nature of things, over which the company has no control, not one created by the company itself for the sake of convenience or economy.<sup>7</sup> As a

less it can not subsequently condemn more as against a rival company which has purchased the land in question. *Joplin &c. R. Co. v. Kansas City &c. R. Co.*, 135 Mo. 549, 37 S. W. 540.

<sup>3</sup> *Kenny v. Pittsburg &c. R. Co.*, 208 Pa. 30, 57 Atl. 74.

<sup>4</sup> *Stark v. Sioux City &c. R. Co.*, 43 Iowa 501; *Dougherty v. Wabash &c. R. Co.*, 19 Mo. App. 419.

<sup>5</sup> *Munkers v. Kansas City &c. R. Co.*, 60 Mo. 334.

<sup>6</sup> *Prather v. Western Union Tel. Co.*, 89 Ind. 501; *Jones v. Erie &c. R. Co.*, 144 Pa. St. 629, 23 Atl. 251; *Duck River Valley R. Co. v. Coch-*

*rane*, 3 Lea (Tenn.) 478; *Day v. Railroad Co.*, 41 Ohio St. 392. In an action for damages from fire set by the company's engines, the width of the right of way as held and claimed by the company, not exceeding the full statutory width may be shown by parol evidence. *Gram v. Northern Pac. R. Co.*, 1 N. Dak. 252, 45 Am. & Eng. R. Cas. 544.

<sup>7</sup> *South Dakota &c. R. Co. v. Chicago &c. R. Co.*, 141 Fed. 578; *Evergreen Cemetery Assn. v. New Haven*, 43 Conn. 234, 21 Am. Rep. 643; *Housatonic R. Co. v. Lee & Hudson River R. Co.*, 118 Mass.

general rule, under such authority, a corporation will not be permitted to condemn property already devoted to the public use for any purpose wholly inconsistent with such use. This rule seems particularly applicable where one company is seeking to condemn and take the right of way of another company longitudinally.<sup>8</sup> Thus, it has been held that one railroad company can not appropriate a portion of the right of way of another railroad company for the purpose of building a parallel road.<sup>9</sup> Nor will

391; *Boston &c. R. Co. v. Lowell &c. R. Co.*, 124 Mass. 368; *Boston & Albany R. Co.*, Matter of, 53 N. Y. 574; *Cincinnati &c. R. Co. v. Belle Centre*, 48 Ohio St. 273, 27 N. E. 464; *Pennsylvania R. Co.'s Appeal*, 93 Pa. St. 150; *Pittsburgh Junction Co.'s Appeal*, 122 Pa. St. 511, 6 Atl. 564, 9 Am. St. 128. Appeal of *Sharon R. Co.*, 122 Pa. St. 533, 17 Atl. 234, 9 Am. St. 133; *Mays v. Seaboard Air Line R. Co.*, 75 S. Car. 455, 56 S. E. 455; *Barre R. Co. v. Montpelier &c. R. Co.*, 61 Vt. 1, 17 Atl. 923, 4 L. R. A. 785, 15 Am. St. 886. See also *Sabine &c. R. Co. v. Gulf &c. R. Co.*, 92 Tex. 162, 46 S. W. 784. It is said, however, that "necessity" for the condemnation of the right of way of one railroad company for the use of another does not mean an absolute or indispensable necessity, but that which is reasonably requisite and proper for the accomplishment of the end in view under the particular circumstances. Such condemnation is necessary when, the public convenience being equally served, the financial benefits to the latter exceed the probable injuries to the former. *Mobile &c. R. Co. v. Alabama Midland R. Co.*, 87 Ala. 501, 6 So. 404, 39 Am. & Eng. R. Cas. 6. In the case first

cited it was held that the construction of a branch road which is but an incident to the main object of the railroad, which is already constructed, merely for the purpose of carrying its own freight to and from certain furnaces, instead of receiving it from and turning it over to another company, is not a matter of such necessity as will authorize a condemnation therefor of land already acquired for railroad purposes by another company. Appeal of *Sharon Railway*, 122 Pa. St. 533, 17 Atl. 234, 9 Am. St. 133 and note. See also *Evansville &c. Traction Co. v. Henderson Bridge*, 134 Fed. 973, 978 (citing text).

<sup>8</sup> Ante, § 1130, and authorities there cited; also *South Dakota Cent. R. Co. v. Chicago &c. R. Co.*, 141 Fed. 578, 584; *Chattanooga &c. Terminal R. Co. v. Felton*, 69 Fed. 273; *Indianapolis &c. R. Co. v. Indianapolis &c. Transit Co.*, 33 Ind. App. 337, 67 N. E. 1013.

<sup>9</sup> *Illinois Cent. R. Co. v. Chicago &c. R. Co.*, 122 Ill. 473, 13 N. E. 140. See *Lake Shore &c. R. Co. v. Cincinnati &c. R. Co.*, 116 Ind. 578, 19 N. E. 440. And see generally as to longitudinal or parallel lines, *Davis v. East Tenn. &c. R. Co.*, 87 Ga. 605, 13 S. E. 567; *Chi-*

one railroad company be permitted for any purpose to take such a part of the line of another road as to practically destroy such road.<sup>10</sup> And courts should give due consideration to the question of the future needs of a railroad in fulfilling its chartered purpose and performing its public duty as a common carrier before they undertake to deprive a railroad company of any part of its right of way at the instance of another corporation.<sup>11</sup> Where a petition by a railroad company for the appointment of commissioners to condemn the "located route" of an existing railroad shows that it seeks to condemn a part of the route generally, and not merely for the purpose of crossing, an order made thereon will be set aside.<sup>12</sup> And where a railroad corporation is seeking to condemn a longitudinal section of the right of way of

cago &c. Electric R. Co. v. Chicago &c. R. Co., 211 Ill. 352, 71 N. E. 1017; Indianapolis &c. R. Co. v. Indianapolis &c. Transit Co., 33 Ind. App. 337, 67 N. E. 1013; Northern Cent. R. Co. v. Baltimore, 46 Md. 425; Housatonic R. Co. v. Lee &c. R. Co., 118 Mass. 391; State v. Easton &c. R. Co., 36 N. J. L. 181; Oregon Cascade R. Co. v. Bailey, 3 Ore. 164; Alexandria &c. R. Co. v. Alexandria &c. R. Co., 75 Va. 780, 40 Am. Rep. 743.

<sup>10</sup> Central City Horse Ry. v. Fort Clark Horse Ry., 81 Ill. 523. The right to take longitudinally is strictly construed, and can only be justified by peculiar circumstances. Boston &c. R. Co. v. Lowell &c. R. Co., 124 Mass. 368; Housatonic R. Co. v. Lee &c. R. Co., 118 Mass. 391; Worcester &c. R. Co. v. Railroad Comrs., 118 Mass. 561; Attorney-General v. Morris &c. R. Co., 19 N. J. Eq. 386; Newark &c. R. Co. v. Newark, 23 N. J. Eq. 515; Greenwich Tp. v. Easton &c. R. Co., 24 N. J. Eq. 217; Easton

&c. R. Co. v. Inhabitants &c., 25 N. J. Eq. 565; State v. Hoboken, 35 N. J. L. 205; State v. Easton &c. R. Co., 36 N. J. L. 181; Buffalo, In re, 68 N. Y. 167; Commissioners v. Erie &c. R. Co., 27 Pa. St. 339, 67 Am. Dec. 471 and note; Cleveland &c. R. Co. v. Speer, 56 Pa. St. 325, 94 Am. Dec. 84; Cake v. Philadelphia &c. R. Co., 87 Pa. St. 307; Tennessee &c. R. Co. v. Adams, 3 Head (Tenn.) 596. Contra Costa R. Co. v. Moss, 23 Cal. 323; Attorney-General v. Ely &c. R. Co., L. R. 4 Ch. App. 194, L. R. 9 Eq. Cas. 106; Pugh v. Golden Valley R. Co., L. R. 12 Ch. Div. 274; Regina v. Wycombe R. R. L. R. 2 Q. B. 310.

<sup>11</sup> Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. 362, affirmed in 123 Fed. 33.

<sup>12</sup> United N. J. R. and Canal Co. v. National Docks &c. R. Co., 52 N. J. L. 90, 18 Atl. 574. See Johnson v. Freeport &c. R. Co., 116 Ill. 521, 6 N. E. 211; Brown v. Rome &c. R. Co., 86 Ala. 206, 5 So. 195.

another company for its exclusive use, it may be restrained by injunction unless express authority to make such condemnation has been conferred.<sup>13</sup> But in Alabama, the probate court, in a proper proceeding and upon proper notice, has jurisdiction to inquire of and condemn a part of a right of way, already acquired by one railroad corporation, for the use of another, if it can be done without destroying its usefulness as a franchise, or impairing the capacity of the easement so as to render it unsafe, but that court has no jurisdiction to condemn the road bed of one company for the use of another. To accomplish this, an express act of the legislature would be required.<sup>14</sup>

**§ 1226. Where such taking is allowed.**—It is said that if the proposed appropriation of the property of one railroad corporation by another would not destroy or greatly injure the franchise of such other company, or render it difficult to prosecute the object thereof, a general grant of authority is sufficient to justify the condemnation.<sup>15</sup> Thus it has been held that a small portion

<sup>13</sup> *Alexandria &c. R. Co. v. Alexandria &c. R. Co.*, 75 Va. 780, 40 Am. Rep. 743 and note. See also *Hoke v. Georgia &c. R. Co.*, 89 Ga. 215, 15 S. E. 124. But see *Mobile &c. R. Co. v. Alabama Midland R. Co.*, 87 Ala. 520, 6 So. 407. A company which is proceeding in good faith to acquire land and construct its road may enjoin another company from building a switch along and upon its proposed line upon land of which it has procured a lease maliciously and in bad faith and for the sole purpose of harassing and delaying the petition. *Rochester &c. R. Co. v. New York &c. R. Co.*, 44 Hun (N. Y.) 206; *Rochester &c. R. Co. v. Babcock*, 110 N. Y. 119, 17 N. E. 678.

<sup>14</sup> *Anniston &c. R. Co. v. Jacksonville &c. R. Co.*, 82 Ala. 297, 2

So. 710. If a second condemnation can be so carved out of a right of way previously granted to another railroad company as to leave the latter's tracks without such hindrance or obstruction as to render it unsafe, the court has jurisdiction to order the condemnation, and an injunction will not lie. *Mobile &c. R. Co. v. Alabama Midland R. Co.*, 87 Ala. 520, 6 So. 407, 39 Am. & Eng. R. Cas. 117.

<sup>15</sup> *Enfield Toll Bridge Co. v. Hartford &c. R. Co.*, 17 Conn. 40, 42 Am. Dec. 716 and note; *Atchison &c. R. Co. v. Kansas City &c. R. Co.*, 67 Kans. 569, 70 Pac. 939; *Little Miami R. Co. v. Dayton*, 23 Ohio St. 510; *Tuckahoe Canal Co. v. Tuckahoe R. Co.* 11 Leigh (Va.) 42, 36 Am. Dec. 374; *Seattle &c. R. Co. v. Billingham Bay &c. R. Co.*, 29 Wash. 491, 69 Pac. 1107; *State*

of the buttress of a bridge belonging to one railroad company and not necessary to the support of the bridge or the exercise of the company's franchises may be taken by another railroad company.<sup>16</sup> So where land owned by a railroad company was not used by it and by reason of its small area and shape it was

v. Superior Court of Clarke County, 45 Wash. 316, 88 Pac. 332; Baltimore &c. R. Co. v. Pittsburg &c. R. Co., 17 W. Va. 812.

<sup>16</sup> Baltimore &c. R. Co. v. Pittsburg &c. R. Co., 17 W. Va. 812. In this case, Johnson, J., speaking for the court said: "There is nothing so sacred in the title of a railroad company to property that it can not be taken under the exercise of the right of eminent domain. I understand the law to be that property belonging to a railroad company and not in actual use, necessary to the proper exercise of the franchise thereof, may be taken for the purposes of another railroad under the general railroad law of the state. An express legislative enactment is generally required in order to take such property in use by a railroad company, except where the proposed appropriation would not destroy or greatly injure the franchise of the company, or render it difficult to prosecute the object thereof. If such consequence would not follow, a general grant is sufficient. Enfield Toll Bridge Co. v. Hartford &c. R. Co., 17 Conn. 40, 42 Am. Dec. 716 and note; Little Miami R. Co. v. Dayton, 23 Ohio St. 510; Tuckahoe Canal Co. v. Tuckahoe R. Co., 11 Leigh (Va.) 42, 36 Am. Dec. 374. In Grand Rapids &c. R. Co. v. Grand Rapids &c. R. Co., 35 Mich. 265, 24 Am. Rep. 545 and note, it was held that

one railroad has no right to appropriate, without compensation, the franchise or property of another for the construction of its road. The fact that property has been taken for a particular public use does not make it public property for all purposes; and the property rights of a railroad company in its right of way are protected by the same restrictions against appropriation by any other railroad company for railroad purposes or other public use, as is afforded by the constitution and laws in the case of the private property of an individual. Baltimore & Havre de Grace Transportation Co. v. Union R. Co., 35 Md. 224, 6 Am. Rep. 397. It is insisted by counsel for plaintiff in error that where a corporation is authorized by its charter or a general law to take by condemnation the land required for its purposes, it can not, under such general authority, condemn property already appropriated to public use by another corporation; that to authorize it to do so, the power must be granted to it by express terms or by necessary implication. For this position they rely upon Boston & M. R. Co. v. Lowell & L. R. Co., 124 Mass. 368; Housatonic R. Co. v. Lee & Hudson River R. Co., 118 N. Y. 391; Evergreen Cemetery Assn. v. New Haven, 43 Conn. 234, 21 Am. Rep. 643; Boston &c. R. Co., Matter of,

wholly unsuitable for yard purposes, for which purposes the road claimed it to be valuable, it was held that another railroad was entitled to condemn a right of way across the land, where it did not appear that other and equally practicable rights were open to the condemning company.<sup>17</sup> The legislature may, in cases where it is deemed necessary, provide for the condemnation by one railroad corporation of the right to use a portion of the right of way of the railroad of another corporation in common with the owner thereof.<sup>18</sup> And when such provision is made, the right of railway companies to use the "right of way" of another company, includes the right to use the tracks, switches, turn-outs, turn-tables, and other terminal facilities constructed on the right of way.<sup>19</sup>

53 N. Y. 574; Buffalo, Matter of, 68 N. Y. 167. . . . It will be observed, that in these last cases the interference with the franchise was great, and much injury would have been sustained by the companies, if their property had been taken. But the taking of a portion of a buttress might inflict no injury at all upon the Baltimore and Ohio Railroad Co. The courts will take care to see that one railroad company is not materially injured for the benefit of another, and where no such material injury will result, the onward march of improvement demands that a great work of internal improvement shall not be impeded by imaginary injury to another corporation." The section of the Washington code authorizing the appropriation by a railroad of a longitudinal section of an existing right of way through canyons, passes and defiles, is held not to exclude the appropriations of an existing right of way in all other cases. It follows that one railroad may, when necessary, condemn a

right of way through the right of way of another railroad not in use for railroad purposes, and not necessary for the corporation franchise. *Seattle &c. R. Co. v. Billingham Bay &c. R. Co.*, 29 Wash. 491, 69 Pac. 1107.

<sup>17</sup> *Memphis &c. R. Co. v. Union R. Co.*, 116 Tenn. 500, 95 S. W. 1019.

<sup>18</sup> *Kinsman St. R. Co. v. Broadway &c. R. Co.*, 36 Ohio St. 239; *Cambridge R. Co. v. Charles River St. R. Co.*, 139 Mass. 454, 1 N. E. 925; *Metropolitan R. Co. v. Highland St. R. Co.*, 118 Mass. 290; *Providence &c. R. Co. v. Norwich &c. R. Co.*, 138 Mass. 277. See *Boston Water Power Co. v. Boston &c. R. Co.*, 23 Pick. (Mass.) 360; *Springfield v. Connecticut &c. R. Co.*, 4 Cush. (Mass.) 63; *Bridgeport v. New York &c. R. Co.*, 36 Conn. 255, 4 Am. Rep. 63; *Rutland Canadian R. Co. v. Central Vt. R. Co.*, 72 Vt. 128, 47 Atl. 399.

<sup>19</sup> *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. ed. 843, affirming 29 Fed. 546. Laying tracks



§ 1227 (975). **Crossing another road.**—Although, as elsewhere shown, the crossing by a street railway of the tracks of a commercial or steam railroad company at a street intersection is not a taking or an additional burden,<sup>20</sup> the rule is somewhat different where one commercial railroad crosses another.<sup>21</sup> But, as we have seen, the right of one railroad to cross the tracks of another may be implied from a general grant of authority to locate and build the road between two points.<sup>22</sup> And it has been held that a reasonable and a practicable crossing of one railroad track by another will be allowed, if it be in the interest of the public, though there is no statute specially allowing the con-

upon the location of a railroad, or using its rails for the running of trains, under authority of law has been held to be a taking within the meaning of the constitution for which compensation must be made. *Worcester &c. R. Co. v. Railroad Comrs.*, 118 Mass. 561; *Jersey City &c. R. Co. v. Jersey City Horse R. Co.*, 20 N. J. Eq. 61. See *Lexington &c. R. Co. v. Fitchburg R. Co.*, 14 Gray (Mass.) 266; *Sixth Avenue R. Co. v. Kerr*, 45 Barb. (N. Y.) 138. See also as to whether this is an additional burden for which the landowner is entitled to compensation, *Miller v. Green Bay &c. R. Co.*, 59 Minn. 169, 60 N. W. 1006, 11 Am. R. & Corp. Rep. 246 and note. A municipality which has permitted a railroad company to construct and maintain a railroad track, depots, and appurtenances, within the municipal district, and extended to it other privileges in consideration of an agreement on the part of the company that it should permit any other company whose road terminated within the municipality to use the track and appurtenances

and to enjoy the rights and privileges secured by the agreement, upon payment of a pro rata share of the cost of construction, may enforce the contract in such a manner as to give to the public the greatest convenience and enable it to reap the greatest results, and a company can not be excluded from participation in the use and enjoyment of the track on payment of its pro rata share of construction, where it appears its admission would not overburden the line, but it is in fact using it and paying tolls therefor. *Louisville &c. R. Co. v. Mississippi &c. R. Co.*, 92 Tenn. 681.

<sup>20</sup> Post, § 1234, note 87.

<sup>21</sup> Post, § 1606.

<sup>22</sup> Ante, § 1130. See also *Union Pac. R. Co. v. Burlington &c. R. Co.*, 1 McCr. (U. S.) 452; *East St. Louis Connecting R. Co. v. East St. Louis Union R. Co.*, 108 Ill. 265; *Minneapolis &c. R. Co. v. Chicago &c. R. Co.*, 116 Iowa 681, 88 N. W. 1082; *Lehigh Valley R. Co. v. Dover &c. R. Co.*, 43 N. J. L. 528; *Boston &c. R. Co.*, Matter of, 79 N. Y. 64; *Pennsylvania R. Co.'s*

demnation of one railroad by another.<sup>23</sup> The test in such cases is said to be necessity and the public interest.<sup>24</sup> Thus, where a proposed spur track was intended for the transfer of freight in carloads to and from manufacturing establishments in a town and its use was open to the public, it was held that the railroad company building the track had the right to condemn necessary crossings over spur tracks belonging to other companies.<sup>25</sup> This entire subject, however, including the question as to what property may be taken,<sup>26</sup> the location of the crossing,<sup>27</sup> the number of crossings that may be made,<sup>28</sup> the measure of damages,<sup>29</sup> and the right to cross at grade,<sup>30</sup> is fully treated elsewhere.<sup>31</sup> But to what is there said, we may add that it is within the police power of the state to abolish dangerous grade crossings, and it has been held that an act requiring the railroad company to bear the entire expense of the change does not amount to a taking of property without due process of law, where the mode provided for ascertaining the result is suitable to the nature of the case.<sup>32</sup>

Appeal, 93 Pa. St. 150; *Wellsburg &c. R. Co. v. Pan Handle Traction Co.*, 56 W. Va. 18, 48 S. E. 746. See as to when railroad which has located the best line between its terminals is entitled to restrain another road which with full knowledge, has threatened to occupy and recross the location of the former at many points, *Denver &c. R. Co. v. Arizona &c. R. Co.*, 233 U. S. 601, 34 Sup. Ct. 691, 58 L. ed. 1111.

<sup>23</sup> *Houston &c. R. Co. v. Kansas City &c. R. Co.*, 109 La. 581, 33 So. 609.

<sup>24</sup> *Houston &c. R. Co. v. Kansas City &c. R. Co.*, 109 La. 581, 33 So. 609.

<sup>25</sup> *Kansas City &c. R. Co. v. Louisiana Western R. Co.*, 116 La. 178, 40 So. 627, 5 L. R. A. (N. S.) 512. Other cases are to the same effect. *East St. Louis R. Co. v. East St. Louis &c. R. Co.*, 108 Ill.

265; *Toledo &c. R. Co. v. East Saginaw &c. R. Co.*, 72 Mich. 206, 40 N. W. 436.

<sup>26</sup> Post, § 1600.

<sup>27</sup> Post, § 1599.

<sup>28</sup> Post, § 1604.

<sup>29</sup> Post, § 1607.

<sup>30</sup> Post, §§ 1601, 1603.

<sup>31</sup> Post, Chapter XLVI.

<sup>32</sup> *New York &c. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. ed. 269, 9 Am. R. & Corp. Rep. 593; *New York &c. R. Co.'s Appeal*, 58 Conn. 532, 20 Atl. 17. See also *Otis Elevator Co. v. Chicago*, 263 Ill. 419, 105 N. E. 338, 52 L. R. A. (N. S.) 192, notes in 28 L. R. A. (N. S.) 298, L. R. A. 1915E, 757; *Minnesota ex rel. Clara City v. Great Northern R. Co.*, 130 Minn. 480, 153 N. W. 879, affirmed in *Great Northern R. Co. v. Minnesota*, 246 U. S. 434, 38 Sup. Ct. 346, 62 L. ed. 817 (state may

§ 1228 (975a). **Condemnation of right of way for other purposes—Highways.**—The authority of a municipality to extend a public street or highway across a railroad right of way, is implied in the general grant of power to lay out and establish streets and highways in cases where such action will not interfere with the proper operation of the railroad. If, however, the use of the railroad property for railway purposes will be essentially impaired or destroyed by the establishment of the highway, then express legislative authority to so extend the street is necessary.<sup>33</sup> And the case against this enforced appropriation would seem particularly strong where the railroad property is used for station grounds and yards.<sup>34</sup> It has been held that a city condemning a railroad right of way for the extension of a public street across it, acquires only a joint right with the railroad company for the use of the land condemned. Its interest is usually merely an easement, and it has been held that it can not deprive the company of the right to lay as many additional tracks on the right of way as the increase of business may require, provided it keeps that portion occupied by the street free and open

compel railroad to construct sidewalk over its crossing). It has also been held that an operating railroad by changing its grade or putting in double tracks does not thereby become the junior road in relation to another road, constructed after its own, whose tracks cross its right of way, so as to impose on the former the burden of paying the cost of a new crossing. *Chicago &c. R. Co. v. Old Colony Trust Co.*, 216 Fed. 577.

<sup>33</sup> *Minneapolis &c. R. Co. v. Hartland*, 85 Minn. 76, 88 N. W. 423. See also ante, § 1213, and numerous cases there cited. And see generally 1 *Elliott Roads & Streets* (3rd ed.), §§ 248, 249; *Louisville &c. R. Co. v. Louisville*, 131 Ky. 108, 114 S. W. 743, 24 L. R. A.

(N. S.) 1213 and note. Under a Massachusetts statute providing for the laying out of roads on petition of the county commissioners, a road can be laid out over land of the railroad company outside of the line of its road, and within a location acquired for railroad purposes under the statutes of that state. *Eldredge v. Norfolk Co.*, 185 Mass. 186, 70 N. E. 36.

<sup>34</sup> *Chicago &c. R. Co. v. Williams*, 148 Fed. 442; *Richmond &c. R. Co. v. Johnston*, 103 Va. 456, 49 S. E. 496; *Paterson &c. R. Co. v. Paterson*, 72 N. J. L. 112, 60 Atl. 47. Compare, however, *Southern Ry. Co. v. City of Rome*, 141 Ga. 143, 80 S. E. 557; *Pittsburgh &c. R. Co. v. Borough of Butler*, 242 Pa. St. 461, 89 Atl. 579.

to the use of the public as a street.<sup>35</sup> The decision of the city as to the necessity for the extension of the street will not be disturbed unless an extreme case of oppression or outrage is shown.<sup>36</sup> But the courts may intervene in a proper case.<sup>37</sup>

**§ 1229 (975b). Condemnation of right of way for other purposes—Reservoir sites—Drainage.**—Under the principle that property devoted to one public use can not be appropriated to another public use through condemnation proceedings where the later appropriation would materially impair or defeat the first use unless directly authorized by statute or justified by some superior public exigency, it has been held that the fact that a certain site over which a railroad company has a right of way is the only one at which a water company can construct a reservoir for the prosecution of its business—no public necessity for the reservoir being shown—does not authorize the condemnation of such right of way for the reservoir.<sup>38</sup> But the condemnation of a strip of railroad land for drainage has been upheld in Illinois.<sup>39</sup> And railroad companies have often been held bound at their own expense to construct bridges over public drainage ditches where such construction is necessitated by the widening or deepening of a natural water course, and, in some instances even where the ditch did not follow the lines of a natural water course.<sup>40</sup>

**§ 1230 (975c). Condemnation of right of way for other purposes—Telegraph and telephone lines.**—A duly incorporated<sup>41</sup>

<sup>35</sup> *Chicago &c. R. Co. v. Hogan*, 105 Ill. App. 136.

<sup>36</sup> *Chicago &c. R. Co. v. Morrison*, 195 Ill. 271, 63 N. E. 96; *Chicago &c. R. Co. v. Pontiac*, 169 Ill. 155, 48 N. E. 485; *Chicago &c. R. Co. v. Cicero*, 154 Ill. 656, 39 N. E. 574.

<sup>37</sup> *Chicago &c. R. Co. v. Williams*, 148 Fed. 442.

<sup>38</sup> *Denver Power &c. Co. v. Denver &c. R. Co.*, 30 Colo. 204, 69 Pac. 568.

<sup>39</sup> *Pittsburgh &c. Ry. Co. v. Sanitary Dist.*, 218 Ill. 286, 75 N. E. 892, 2 L. R. A. (N. S.) 226. Com-

pare *Lake Erie &c. R. Co. v. Hancock County*, 63 Ohio St. 23, 57 N. E. 1009.

<sup>40</sup> *Chicago &c. R. Co. v. Illinois*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. ed. 596 (but not the expense of removing the soil for the ditch); *Chicago &c. R. Co. v. Board*, 182 Fed. 291, 31 L. R. A. (N. S.) 1117 and note; *Chicago &c. R. Co. v. Luddington*, 175 Ind. 35, 91 N. E. 939, 93 N. E. 273; *Mason City etc., R. Co. v. Board of Supervisors*, 144 Iowa 10, 121 N. W. 39.

<sup>41</sup> *Ft. Worth &c. R. Co. v. Southwestern Tel. &c. Co.*, 96 Tex. 160,

telegraph<sup>42</sup> or telephone company<sup>43</sup> may acquire a right of way for its line over and along the right of way of a railroad company when such use will not materially interfere with the use for which the land was originally condemned by the railroad company. Condemnation for these purposes can not be defeated unless it is made to appear that the use of the land sought to be condemned is necessary to the operation of the railroad or of other lines of telegraph already erected thereon.<sup>44</sup> Nor is it a valid objection that the telegraph or telephone company can obtain a right of way over other adjacent or nearby property or in other ways.<sup>45</sup> It has been held that it is not essential for the telegraph company to affirmatively show in proceedings for condemnation either the necessity for the condemnation of the right of way or the particular portions intended for use.<sup>46</sup> Under these proceedings, however, it has been held the telegraph or telephone company acquires no more than an easement in the railroad right

71 S. W. 270, 60 L. R. A. 145; *Gulf &c. R. Co. v. Southwestern Tel. &c. Co.*, 25 Tex. Civ. App. 488, 61 S. W. 406. The right of a de facto telegraph company to exercise the power of eminent domain over a railroad right of way is not open to question by the railroad company on the ground that it is only a pretended, and not a real corporation. That question can only be raised by the state. *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 114 Fed. 787.

<sup>42</sup> *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 114 Fed. 787; *Western Atl. R. Co. v. Western Union Tel. Co.*, 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225; *Postal Tel. Cable Co. v. Chicago &c. R. Co.*, 30 Ind. App. 654, 66 N. E. 919; *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. 705. But see *Western Union*

*Tel. Co. v. Pennsylvania R. Co.*, 123 Fed. 33.

<sup>43</sup> *Southwestern Tel. Co. v. Kansas City &c. R. Co.*, 108 La. 892, 33 So. 910; *South Carolina &c. R. Co. v. American Tel. &c. Co.*, 65 S. Car. 459, 34 S. E. 970.

<sup>44</sup> *Union Pac. R. Co. v. Colorado Postal Cable Co.*, 30 Colo. 133, 69 Pac. 564. See also *Louisville &c. R. Co. v. Western Union Tel. Co.*, 249 Fed. 385.

<sup>45</sup> *Ft. Worth &c. R. Co. v. Savannah Tel. &c. R. Co.*, 96 Tex. 160, 71 S. W. 270, 60 L. R. A. 145; *Postal Tel. &c. Co. v. Oregon Short Line R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. 705; *Union Pac. R. Co. v. Colorado Postal Tel. Cable Co.*, 30 Colo. 133, 69 Pac. 564.

<sup>46</sup> *Savannah &c. R. Co. v. Postal Tel. Cable Co.*, 112 Ga. 941, 38 N. E. 353.

of way occupied by its poles with the right to enter thereon for the purpose of constructing and repairing its line.<sup>47</sup>

§ 1231 (976). **What constitutes a taking—Generally.**—As we have seen, the constitutions of the various states require that compensation must be made for all private property taken for public use under the power of eminent domain,<sup>48</sup> but there is great conflict in the authorities with regard to what constitutes a taking within the meaning of these constitutional provisions. Since property in land is not land itself, but the right to certain present or future privileges or advantages growing out of the land, so that a number of persons may have different estates in the same parcel of land, it would seem to follow, as a logical consequence that, as a general rule, whatever deprives a person of his rights in land and the use and enjoyment thereof constitutes a taking for which compensation should be made.<sup>49</sup> As was said by Chief Justice Shaw, of Massachusetts, in speaking of this subject: "The word 'property' in the tenth article of the bill of rights, which provides that 'whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensa-

<sup>47</sup> Atlantic Coast Line R. Co. v. Postal Cable Co., 120 Ga. 268, 48 S. E. 15. See generally as to railroad company's right to compensation and the measure thereof, notes in 26 L. R. A. (N. S.) 191, and in 29 L. R. A. (N. S.) 703.

<sup>48</sup> See ante, § 1187.

<sup>49</sup> Chicago &c. R. Co. v. Englewood Connecting R. Co., 115 Ill. 375, 385, 4 N. E. 246, 56 Am. Rep. 173; Denver v. Bayer, 7 Colo. 113, 2 Pac. 6; Pumpelly v. Green Bay &c. Co., 13 Wall. (U. S.) 166, 20 L. ed. 557; Caro v. Metropolitan El. R. Co., 46 N. Y. Super. Ct. 138; Baltimore Belt R. Co. v. Sattler, 100 Md. 306, 59 Atl. 654. See Elliott Roads and Streets (3rd ed.) §§ 202-204, cited in School Tp. of

Andrews v. Heiney, 178 Ind. 1, 8, 98 N. E. 628; Walker v. Old Colony &c. R. Co., 103 Mass. 10, 4 Am. Rep. 509; note to Vanderlip v. Grand Rapids, 73 Mich. 522, 41 N. W. 677, 16 Am. St. 597, 610; Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316, 329, 7 Atl. 432, 5 L. R. A. 247, and note; 56 Am. Rep. 1, and note; Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Abendroth v. Manhattan R. Co., 122 N. Y. 1, 25 N. E. 496, 11 L. R. A. 634 and note, 19 Am. St. 461; Rumsey v. New York &c. R. Co., 133 N. Y. 79, 30 N. E. 654, 15 L. R. A. 618, 28 Am. St. 600, 6 Am. R. & Corp. Rep. 67 and note; East Penna. Co. v. Schollenberger, 54 Pa. St. 144; Cumberland Tel. Co. v. United

tion therefor,' should have such liberal construction as to include every valuable interest which can be enjoyed as property and recognized as such."<sup>50</sup> Accordingly, it has been held that where a railroad, by cutting through a ridge near the plaintiff's farm, destroys the natural barrier by which in times of freshet, the waters of an adjacent river were prevented from overflowing the plaintiff's land, and such waters, flowing through the cut, flood the land, bringing down and lodging upon it quantities of earth and stones and rendering it unfit for cultivation, the railroad is liable in damages, although no part of the plaintiff's land was actually taken.<sup>51</sup> This is upon the principle that property is

Electric R. Co., 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236, 10 Am. R. & Corp. Rep. 549; *Great Northern R. Co. v. State*, 102 Wash. 348, 173 Pac. 40, L. R. A. 1918E, 987.

<sup>50</sup> *Old Colony &c. R. Co. v. Plymouth Co.*, 14 Gray (Mass.) 155, 161. See also *Sheldon v. Boston &c. R. Co.*, 172 Mass. 180, 51 N. E. 1078.

<sup>51</sup> *Eaton v. Boston &c. R. Co.* 51 N. H. 504, 12 Am. Rep. 147. In this, a leading case upon the subject, the court said: "The vital issue then is, whether the injuries complained of amount to a taking of the plaintiff's property, within the constitutional meaning of those terms. To constitute 'a taking of property' it seems to have sometimes been held necessary that there should be 'an exclusive appropriation,' 'a total assumption of possession,' 'a complete ouster,' an absolute or total conversion of the entire property, 'a taking the property altogether.' These views seem to us to be founded upon a misconception of the term 'property,' as used in the various state constitutions. In a strict legal sense,

land is not 'property,' but the subject of property. The term property, although in common parlance frequently applied to a tract of land or a chattel, in its legal signification, 'means only the right of the owner in relation to it.' 'It denotes a right over a determinate thing.' 'Property is the right of any person to possess, use, enjoy and dispose of a thing.' *Selden, J.*, in *Wynehamer v. People*, 13 N. Y. 378, p. 433. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes,' pro tanto, the owner's 'property.' The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'Use is the real side of property.' This right of user necessarily includes the right and power of excluding others from using the land. *Wells, J.*, in *Walker v. Old Colony &c. R. Co.*, 103 Mass. 10, p. 14, 4 Am. Rep. 509. 'From the very nature of these

taken when those proprietary rights are taken of which property

rights of user and of exclusion, it is evident that they can not be materially abridged without, ipso facto, taking the owner's property.' If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes 'property'—although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same property that he formerly had. Then, he had an unlimited right; now, he has only a limited right. His absolute ownership has been reduced to qualified ownership. Restricting A's unlimited right of using one hundred acres of land to a limited right of using the same land, may work a far greater injury to A than to take from him the title of fee-simple to one acre, leaving him the unrestricted right of using the remaining ninety-nine acres. Nobody doubts that the latter transaction would constitute a taking of 'property.' Why not the former? . . . A physical interference with the land, which substantially abridges this right, takes the owner's 'property' to just so great an extent as he is thereby deprived of his right. 'To deprive one of the use of his land is depriving him of his land,' for, as Lord Coke says: 'What is the land but the profits thereof?' Sutherland, J., in *People v. Kerr*, 37 Barb. (N. Y.) 357, 399. The private injury is thereby as completely effected as if the land itself

were 'physically taken away.' The principle must be the same, whether the owner is wholly deprived of the use of his land, or only partially deprived of it, although the amount or value of the property taken in the two instances may widely differ. If the railroad corporation take a strip four rods wide out of a farm to build their track upon, they can not escape paying for the strip by the plea that they have not taken the whole farm. So a partial, but substantial, restriction of the right of user may not annihilate all the owner's rights of property in the land, but it is none the less true that a part of his property is taken. . . . If the public can take part of a man's property without compensation, they can, by successive takings of the different parts, soon acquire the whole. Or, if it is held that the complete divestiture of the last scintilla of interest is a taking of the whole for which compensation must be made, it will be easy to leave the owner an interest in the land of infinitesimal value." See also *Brown v. Cayuga &c. R. Co.*, 12 N. Y. 486; *Robinson v. New York &c. R. Co.*, 27 Barb. (N. Y.) 512; *Gulf &c. R. Co. v. Jones*, 63 Tex. 524; *Attorney-General v. Tomline*, 12 L. R. Ch. Div. 214, affirmed 14 L. R. Ch. Div. 58. But compare *Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; *Meyer v. Richmond*, 172 U. S. 82, 19 Sup. Ct. 106, 111, 112; *Gordon v. Ellerville &c. R. Co.*, 195 N. Y. 137. 88 N. E. 14, 47 L. R. A. (N. S.) 462.



consists,<sup>52</sup> and that the plaintiff was damaged by the infringement of his right to the protection of the neighboring ridge of land, as clearly as he would have been had his right to occupy his farm been interfered with.<sup>53</sup> According to this rule, which we regard as the correct one, although some of the cases to which we have referred carry it very far in the application to particular facts, an actual physical seizure or manual possession of the land is not absolutely essential to constitute a taking for which compensation must be made.<sup>54</sup> On the other hand, however, it is held in many of the older authorities that to entitle the owner to protection under the clause of the constitution requiring compensation to be made for all property taken for public use, the property must be actually taken, in the physical sense of the word, and that the proprietor is not entitled to claim remuneration for indirect or consequential damages, no matter how serious or how clearly and unquestionably resulting from the exercise of the power of eminent domain.<sup>55</sup> Thus it was held that a land-owner,

<sup>52</sup> *Arimond v. Green Bay &c. Co.*, 31 Wis. 316, 335. See also note in 18 L. R. A. 166.

<sup>53</sup> *Thompson v. Androscoggin River Imp. Co.*, 54 N. H. 545.

<sup>54</sup> *Arnold v. Hudson River R. Co.*, 55 N. Y. 661; *Story v. New York El. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Rigney v. Chicago*, 102 Ill. 64; *Hooker v. New Haven &c. R. Co.*, 14 Conn. 146, 36 Am. Dec. 477; *Forster v. Scott*, 136 N. Y. 577, 32 N. E. 976, 977, 18 L. R. A. 543 and note; *King v. United States*, 59 Fed. 9. See also *Cincinnati &c. R. Co. v. Miller*, 36 Ind. App. 26, 72 N. E. 827, 73 N. E. 1001; *Baltimore Belt R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 654; *Dairy v. Iowa Cent. R. Co.*, 113 Iowa 716, 84 N. W. 688; *Vanderburg v. Minneapolis*, 98 Minn. 329, 108 N. W. 480, 6 L. R. A. (N. S.) 741; *Matthias v. Minneapolis &c.*

*R. Co.*, 125 Minn. 224, 146 N. W. 353.

<sup>55</sup> *Northern Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; *Selden v. Jacksonville*, 28 Fla. 558, 10 So. 457, 14 L. R. A. 370 and note, 29 Am. St. 278; *Hotsman v. Covington &c. R. Co.*, 18 B. Mon. (Ky.) 218; *Cushman v. Smith*, 34 Maine 247; *Boothby v. Androscoggin &c. R. Co.*, 51 Maine 318; *Baltimore &c. R. Co. v. Magruder*, 34 Md. 79, 6 Am. Rep. 310; *Garrett v. Lake Roland &c. R. Co.*, 79 Md. 277, 29 Atl. 830, 24 L. R. A. 396, 10 Am. R. & Corp. Rep. 39; *Curtis v. Eastern R. Co.*, 14 Allen (Mass.) 55, 98 Mass. 428; *Estabrooks v. Peterborough &c. R. Co.*, 12 Cush. (Mass.) 224; *Boston &c. R. Co. v. Old Colony R. Co.*, 12 Cush. (Mass.) 605; *Commissioners &c. v. Withers*, 29 Miss. 21, 64 Am. Dec. 126; *Clark v. Hannibal &c. R.*

along the border of whose land a railway is built by which he is compelled to maintain the entire line of a fence of which he formerly maintained but half is not entitled to compensation, since no part of his land had been taken.<sup>56</sup> Also that a railroad company whose charter only required it to make compensation for lands which were taken for the corporate purposes, was not liable in damages to the owner of a house in front of which it had raised a high embankment, so that the owner could not pass and repass to and from the same, it being shown that the company had built its road in a prudent and reasonable manner. The court held that simply affecting land injuriously in the construction of a public work was not a taking of it for public use within the meaning of the constitution.<sup>57</sup>

§ 1232. **No taking where no property right.**—There is another class of cases in which compensation has been sought for the taking or destruction of that which the plaintiff never owned, or in which he had merely the same right possessed by the public in general. In such cases the right of recovery is uniformly denied.<sup>58</sup> Thus where the plaintiff watered his cattle on the

Co., 36 Mo. 202; Kennett's Petition, 24 N. H. 139; Arnold v. Hudson River R. Co., 49 Barb. (N. Y.) 108; Gould v. Hudson River R. Co., 6 N. Y. 522; Bellinger v. New York Cent. R. Co., 23 N. Y. 42; O'Connor v. Pittsburgh, 18 Pa. St. 187; Clarke v. Birmingham &c. Bridge Co., 41 Pa. St. 147; West Branch &c. Canal Co. v. Mulliner, 68 Pa. St. 357; Norris v. Vermont Cent. R. Co., 28 Vt. 99; Hatch v. Vermont Cent. R. Co., 28 Vt. 142. See also Hurt v. Atlanta, 100 Ga. 274, 28 S. E. 65, and compare Roman Catholic &c. v. Penna. R. Co., 207 Fed. 897; Fink v. Cleveland &c. R. Co., 181 Ind. 539, 105 N. E. 116.

<sup>56</sup> Kennett's Petition, 24 N. H. 139. In the case of Eaton v. Boston &c. R. Co., 51 N. H. 504, 12

Am. Rep. 147, Smith, J., points out the fact that all that was really decided in this case was that the statute under which the petition was prosecuted made no provision for the payment of such damages. "The construction and not the constitutionality is the point for decision."

<sup>57</sup> Richardson v. Vermont Cent. R. Co., 25 Vt. 465, 60 Am. Dec. 283; Hatch v. Vermont Cent. R. Co., 25 Vt. 49, 28 Vt. 142.

<sup>58</sup> Lee v. Pembroke Iron Co., 57 Maine 481; Davidson v. Boston &c. R. Co., 3 Cush. (Mass.) 91, 106; Gould v. Hudson River &c. R. Co., 6 N. Y. 522, 12 Barb. 616; Shrunk v. Pres. &c. Schuylkill Nav. Co., 14 Serg. & R. (Pa.) 71; Canal Appraisers &c. v. People, 17

farm of another, across the highway from his own farm, but had, however, no right to the water, or of access thereto, that was not common to the public, it was held that, in estimating the damage arising from the taking of a strip of plaintiff's land for the construction of a railroad, interference with the plaintiff's access to the watering place was not an element of damages.<sup>59</sup> So, where the state authorized a railroad company to build a bridge across a navigable river belonging to the state, thereby obstructing navigation and rendering less valuable the lands of a riparian proprietor, no part of whose land, however, was taken or flooded, it was held that such proprietor could not maintain an action for damages. Since he held no title to the right of navigating the river, other than the right common to all the public, he was only "deprived of use of what was never his own."<sup>60</sup> Under this class of cases may be included those in which the act complained of constituted a public nuisance, the plaintiff's damage differing in degree only, not in kind, from that sustained by the rest of the community. In such cases it is held that the proper remedy is a public prosecution and not a private action for damages.<sup>61</sup>

Wend. (N. Y.) 571; *New York &c. R. Co. v. Young*, 33 Pa. St. 175; *Clarke v. Birmingham &c. Bridge Co.*, 41 Pa. St. 147; *Monongahela Bridge Co. v. Kirk*, 46 Pa. St. 112, 84 Am. Dec. 527.

<sup>59</sup> *Gorgas v. Philadelphia &c. R. Co.*, 144 Pa. St. 1, 22 Atl. 715. See also *Illinois Cent. R. Co. v. Stewart*, 265 Ill. 35, 106 N. E. 512; *Chesapeake &c. R. Co. v. Blankenship*, 158 Ky. 270, 164 S. W. 943. In both of these cases the use was merely permissive and the party claiming his property was taken had no real property right.

<sup>60</sup> *Gould v. Hudson River R. Co.*, 6 N. Y. 522, 12 Barb. 616. In *Canal Appraisers &c. v. People*, 17 Wend. (N. Y.) 571, the majority disallowed the relator's claim to compensation for the destruction of the waterfall in the Mohawk river,

upon the ground that the bed of that river belonged to the state, and an adjoining owner acquired no rights therein. See also *Scranton v. Wheeler*, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. ed. 126, 21 Am. St. 48; *Gibson v. United States*, 166 U. S. 269, 17 Sup. Ct. 578, 41 L. ed. 996. But compare *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. ed. 463. And see *Richards v. New York &c. R. Co.*, 77 Conn. 501, 60 Atl. 295, 69 L. R. A. 929.

<sup>61</sup> *Blood v. Nashua &c. R. Co.*, 2 Gray (Mass.) 137, 61 Am. Dec. 444; *Boston &c. R. Co. v. Old Colony R. Co.*, 12 Cush. (Mass.) 605; *Hatch v. Vermont Central &c. R. Co.*, 28 Vt. 142; *Illinois Cent. R. Co. v. Trustees*, 212 Ill. 406, 72 N. E. 39; *Gulf &c. R. Co. v. Fuller*, 63 Tex. 467.

§ 1233 (977). **What constitutes a taking—Illustrative cases.**—A mere preliminary survey, when properly conducted, does not amount to a taking.<sup>62</sup> But where a railroad company diverted a stream into a new channel for a short distance, and the stream escaped from the new channel by percolation the company was held liable;<sup>63</sup> so, also, where the company took from a stream for the use of its locomotives, so much water as to perceptibly reduce the volume of water therein.<sup>64</sup> Permitting the waste water from a tank to run upon private property, where it caused damage by freezing and otherwise, has been held such an infringement of the property-owner's rights on the part of a railroad company as to render it liable in damages.<sup>65</sup> Where the construction of a bridge and the accompanying embankments by a railroad com-

<sup>62</sup> Ante, § 1134. Nor does the commencement of proceedings to condemn. *Duluth &c. R. Co. v. Northern Pac. R. Co.*, 51 Minn. 218, 53 N. W. 366; *Morris v. Wisconsin &c. R. Co.*, 82 Wis. 541, 52 N. W. 758. But the act of location has been held to be also an act of appropriation. *Hagner v. Pennsylvania &c. R. Co.*, 154 Pa. St. 475, 25 Atl. 1082. But see *United States v. Oregon R. &c. Co.*, 16 Fed. 524. A temporary unintentional trespass is held not to constitute a taking in *Morris v. Wisconsin Midland R. Co.*, 82 Wis. 541, 52 N. W. 758.

<sup>63</sup> *Cott v. Lewiston R. Co.*, 36 N. Y. 214. See also note in 38 L. R. A. (N. S.) 1040.

<sup>64</sup> *Garwood v. New York &c. R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452; *Sandwich v. Great Northern R. Co.*, L. R. 10 Ch. Div. 707; *Lord v. Meadville &c. Co.*, 135 Pa. St. 122.

19 Atl. 1007, 8 L. R. A. 202, 20 Am. St. 864, 2 Am. R. & Corp. Rep. 744 and note; *Pennsylvania R. Co. v. Miller*, 112 Pa. St. 34, 3 Atl. 780. But it has been held that a railroad company, being a riparian proprietor, may take a reasonable amount of water for the purpose of supplying its locomotives or the like. *Elliott v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191, 57 Am. Dec. 85; *Pennsylvania R. Co. v. Miller*, 112 Pa. St. 34, 3 Atl. 780; *Sandwich v. Great Northern R. Co.*, L. R. 10 Ch. Div. 707. See also *Fay v. Salem &c. Co.*, 111 Mass. 27. And see generally as to riparian proprietors, notes in 7 L. R. A. (N. S.) 344, and 38 L. R. A. (N. S.) 1040; also *Thiesen v. Gulf &c. Ry. Co.*, 75 Fla. 28, 78 So. 491.

<sup>65</sup> *Chicago &c. R. Co. v. Hoag*, 90 Ill. 339. See also *Schaake v. Kansas City &c. Ry. Co.*, 102 Kans. 470, 170 Pac. 804.

pany changes the course,<sup>66</sup> or increases the current<sup>67</sup> of the stream crossed to the damage of private property, it has been held that compensation must be made.<sup>68</sup> And the fact that no part of the plaintiff's land was taken in the construction of the railroad does not affect his right to recover damages for an interference with the stream whereby rights are injuriously affected.<sup>69</sup> Where a railroad is built along the shore of public navigable waters, so as to shut off the riparian proprietor from access thereto, he is generally held entitled to compensation for the injury to his riparian rights, although no part of his land is taken,<sup>70</sup> and even though that part of his land adjoining high water mark has already been

<sup>66</sup> *Union Pac. R. Co. v. Dyche*, 31 Kans. 120, 1 Pac. 243; *Robinson v. New York &c. R. Co.*, 27 Barb. (N. Y.) 512; *Estabrooks v. Petersborough &c. R. Co.*, 12 Cush. (Mass.) 224; *Dickson v. Chicago &c. R. Co.*, 71 Mo. 575; *Chicago &c. R. Co. v. Moffitt*, 75 Ill. 524. See also *Jacksonville v. Lambert*, 62 Ill. 519; *White v. Penna. R. Co.*, 229 Pa. St. 480, 78 Atl. 1035, 38 L. R. A. (N. S.) 1040 and other cases there cited in note.

<sup>67</sup> *Evansville &c. R. Co. v. Dick*, 9 Ind. 433. But it has been held that the construction of a wall or an embankment along one side of a stream will not render the corporation liable for damage caused by forcing the water in times of flood to flow against and over property on the other side of the stream. *Moyer v. New York Central &c. R. Co.*, 88 N. Y. 351; *Lawrence v. Great Northern R. Co.*, 16 Q. B. 643. See also *Salliotte v. King Bridge Co.*, 122 Fed. 378, 65 L. R. A. 620, and note. But see *Cairo &c. R. Co. v. Brevoort*, 62 Fed. 129, 25 L. R. A. 527 and note and authorities there cited.

<sup>68</sup> *Robinson v. New York &c. R. Co.*, 27 Barb. (N. Y.) 512. See also *Toledo &c. R. Co. v. Morrison*, 71 Ill. 616; *Leard v. Penna. R. Co.*, 229 Pa. St. 475, 78 Atl. 1034; *Barron v. Memphis*, 113 Tenn. 89, 80 S. W. 832, 106 Am. St. 810. But see *Henry v. Vermont Cent. R. Co.*, 30 Vt. 638, 73 Am. Dec. 329; *Norris v. Vermont Cent. R. Co.*, 28 Vt. 99.

<sup>69</sup> *Estabrooks v. Petersborough &c. R. Co.*, 12 Cush. (Mass.) 224; *Evansville &c. R. Co. v. Dick*, 9 Ind. 433; *Delaware &c. Canal Co. v. Lee*, 22 N. J. L. 243.

<sup>70</sup> *Yates v. Milwaukee*, 10 Wall. (U. S.) 497, 19 L. ed. 984; *Renwick v. Dubuque &c. R. Co.*, 49 Iowa 664; *Dubuque &c. R. Co. v. Renwick*, 102 U. S. 180, 26 L. ed. 51; *State v. Illinois Cent. R. Co.*, 33 Fed. 730; *Farist Steel Co. v. Bridgeport*, 60 Conn. 278, 22 Atl. 544, 13 L. R. A. 590; *Baltimore &c. R. Co. v. Chase*, 43 Md. 23; *Brisbane v. St. Paul &c. R. Co.*, 23 Minn. 114; *Carli v. Stillwater St. R. &c. Co.*, 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290; *Union Depot &c. Co. v. Brunswick*, 31 Minn.

appropriated as a public highway.<sup>71</sup> Where a company builds tide water mills and other works below high water mark under an authority from the legislature, it has been held that they constitute property which can not be taken or damaged by a railroad company without compensation.<sup>72</sup> It has been held that where the right to erect a bridge has been purchased or condemned, no further damage can be recovered for injuries resulting from constructing the bridge in a reasonable and proper manner with a view both to the safety of passengers and the protection of the property holder.<sup>73</sup> But damages may be recovered for injuries resulting from negligent or improper construction, whether there has been an assessment of damages or not.<sup>74</sup>

297, 17 N. W. 626, 47 Am. Rep. 789; Myers v. St. Louis, 82 Mo. 367; Langdon v. New York, 93 N. Y. 129; Rumsey v. New York & C. R. Co., 133 N. Y. 79, 30 N. E. 654, 15 L. R. A. 618, 28 Am. St. 600, 6 Am. R. & Corp. Rep. 67 and note, where the cases on both sides of the question are reviewed; Wilson v. Welch, 12 Ore. 353, 7 Pac. 341; Delaplaine v. Chicago & C. R. Co., 42 Wis. 214, 24 Am. Rep. 386; Diedrich v. Northwestern & C. R. Co., 42 Wis. 248, 24 Am. Rep. 399; Lyon v. Fishmonger's Co., L. R. 1 App. Cas. 662. See also Drury v. Midland R. Co., 127 Mass. 571. Contra Stevens v. Paterson & C. R. Co., 34 N. J. L. 532, 3 Am. Rep. 269; Tomlin v. Dubuque & C. R. Co., 32 Iowa 106, 7 Am. Rep. 176 and note; Thayer v. New Bedford & C. R. Co., 125 Mass. 253; Henry v. Newburyport, 149 Mass. 582, 22 N. E. 75, 5 L. R. A. 179 and note; Gould v. Hudson River R. Co., 6 N. Y. 522; Bowlby v. Shively, 22 Ore. 410, 30 Pac. 154; McKeen v. Delaware Canal Co., 49 Pa. St. 424; State ex rel. Columbia & C. R. Co. v. Prosser, 4 Wash. 816, 30 Pac.

734. But see Scranton v. Wheeler, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. ed. 126; Gibbon v. United States, 166 U. S. 269, 17 Sup. Ct. 578, 41 L. ed. 996.

<sup>71</sup> *Brisbine v. St. Paul & C. R. Co.*, 23 Minn. 114; *Chesapeake & Canal Co. v. Union Bank*, 5 Cranch C. C. (U. S.) 509.

<sup>72</sup> *Boston Water Power Co. v. Boston & C. R. Co.*, 16 Pick. (Mass.) 512; *Lee v. Pembroke Iron Co.*, 57 Maine 481, 2 Am. Rep. 59. But where the riparian proprietor had built his lot out into the lake past high water mark, it was held that he could not recover for the land taken by a railroad which located its line across the made land, though he might for an injury to his riparian rights. *Diedrich v. Northwestern U. Ry. Co.*, 42 Wis. 248, 24 Am. Rep. 399.

<sup>73</sup> *Evansville & C. R. Co. v. Dick*, 9 Ind. 433; *Norris v. Vermont Cent. R. Co.*, 28 Vt. 99; *Terre Haute & C. R. Co. v. McKinley*, 33 Ind. 274.

<sup>74</sup> *Terre Haute & C. R. Co. v. McKinley*, 33 Ind. 274; *Miller v. Keokuk & C. R. Co.*, 63 Iowa 680, 16 N.

**§ 1234 (977a). What constitutes a taking—Other illustrative cases.**—The construction of works in a stream by which the waters are set back and made to overflow the lands of a proprietor above, constitutes a taking for which he must be compensated,<sup>75</sup> as does also, in many jurisdictions, the construction of an embankment or other obstruction by which surface water is prevented from flowing over the railroad company's right of way, and is made to accumulate upon private property,<sup>76</sup> or is

W. 567; *Fowle v. New Hampshire &c. R. Co.*, 112 Mass. 334, 17 Am. Rep. 106; *Brink v. Kansas City &c. R. Co.*, 17 Mo. App. 177; *Spencer v. Hartford &c. R. Co.*, 10 R. I. 14; *International &c. R. Co. v. Klaus*, 64 Tex. 293.

<sup>75</sup> *Toledo &c. R. Co. v. Morrison*, 71 Ill. 616; *Wabash &c. Canal v. Spears*, 16 Ind. 441, 79 Am. Dec. 444; *Estabrooks v. Petersborough &c. R. Co.*, 12 Cush. (Mass.) 224; *Grand Rapids &c. Co. v. Jarvis*, 30 Mich. 308; *Minnetonka Lake Imp. Co.*, In re, 56 Minn. 513, 45 Am. St. 494; *Mississippi Cent. R. Co. v. Mason*, 51 Miss. 234; *Sheehy v. Kansas City &c. R. Co.*, 94 Mo. 574, 7 S. W. 579, 4 Am. St. 396 and note; *Omaha &c. R. Co. v. Standen*, 22 Nebr. 343, 35 N. W. 183; *Delaware &c. Canal Co. v. Lee*, 22 N. J. L. 243; *Tinsman v. Belvidere Del. R. Co.*, 26 N. J. L. 148; *Barclay R. &c. Co. v. Ingham*, 36 Pa. St. 194; *Gulf &c. R. Co. v. Donahoo*, 59 Tex. 128; *Arimond v. Green Bay &c. Canal Co.*, 31 Wis. 316. See also *Broadway Mfg. Co. v. Leavenworth &c. R. Co.*, 81 Kans. 616, 106 Pac. 1034, 28 L. R. A. (N. S.) 157 and note (right to damages where this is caused by negligent construction). An occasional flooding is sufficient to give

the right to compensation. *Weaver v. Mississippi &c. Boom Co.*, 28 Minn. 534, 11 N. W. 114. There is ordinarily no liability for flooding caused by ice gorges forming at a bridge. *Gulf &c. R. Co. v. Pomeroy*, 67 Tex. 498, 3 S. W. 722; *Bellinger v. New York Cent. R. Co.*, 23 N. Y. 42; *Omaha &c. R. Co. v. Brown*, 14 Nebr. 170, 15 N. W. 321. Unless the damage was caused by negligent and improper construction of the bridge. *Abbott v. Kansas City &c. R. Co.*, 83 Mo. 271, 53 Am. Rep. 581.

<sup>76</sup> *Bentonville R. Co. v. Baker*, 45 Ark. 252; *Gillham v. Madison Co. R. Co.*, 49 Ill. 484, 95 Am. Dec. 627; *Illinois &c. R. Co. v. Fehring*, 82 Ill. 129; *Chicago &c. R. Co. v. Carey*, 90 Ill. 514; *Drake v. Chicago &c. R. Co.*, 63 Iowa 302, 19 N. W. 215, 50 Am. Rep. 746; *Payne v. Morgan's La. &c. R. Co.*, 38 La. Ann. 164, 58 Am. Rep. 174; *Raleigh &c. R. Co. v. Wicker*, 74 N. Car. 220; *Gulf &c. R. Co. v. Hellsley*, 62 Tex. 593; *Sabine &c. R. Co. v. Johnson*, 65 Tex. 389; *Gulf &c. R. Co. v. Holliday*, 65 Tex. 512; *Owens v. Missouri Pac. R. Co.*, 67 Tex. 679, 4 S. W. 593. The opposite doctrine is held in many of the states. *Adams v. Walker*, 34 Conn. 466, 91 Am. Dec.

collected into a channel and discharged upon land where it is not accustomed to flow.<sup>77</sup> The question of the right of the owner of

742; *Cairo &c. R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139 and note; *Shelbyville &c. Tpk. Co. v. Green*, 99 Ind. 205; *Jean v. Pennsylvania Co.*, 9 Ind. App. 56, 36 N. E. 159; *Kansas City &c. R. Co. v. Riley*, 33 Kans. 374, 6 Pac. 581; *Greeley v. Maine Cent. R. Co.*, 53 Maine 200; *Morrison v. Bucksport &c. R. Co.*, 67 Maine 353; *Luther v. Winnisimmet Co.*, 9 Cush. (Mass.) 171; *Abbott v. Kansas City &c. R. Co.*, 83 Mo. 271, 53 Am. Rep. 581; *Sweet v. Clutts*, 50 N. H. 439, 9 Am. Rep. 276 and note; *Bowlsby v. Speer*, 31 N. J. L. 351, 86 Am. Dec. 216; *Bellinger v. New York Cent. R. Co.*, 23 N. Y. 42; *Limerick & C. Tpk. Co.'s Appeal*, 80 Pa. St. 425; *Wakefield v. Newell*, 12 R. I. 75, 34 Am. Rep. 598; *Chatfield v. Wilson*, 28 Vt. 49; *Waters v. Bay View*, 61 Wis. 642, 21 N. W. 811. Even in the states holding this latter doctrine, it is conceded that if the construction of a railroad lessens the value of adjoining property by reason of the detention, diversion, or accumulation of surface water, compensation for such injury may be included in the assessment of damages. *Walker v. Old Colony &c. R. Co.*, 103 Mass. 10, 4 Am. Rep. 509; *Eaton v. Boston &c. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147; *Morrison v. Bucksport R. Co.*, 67 Maine 353; *Pflegar v. Hastings &c. R. Co.*, 28 Minn. 510, 11 N. W. 72. In *Cairo &c. R. Co. v. Brevoort*, 62 Fed. 129, 25 L. R. A. 527 and note, the conflicting authorities as to what constitutes

surface water are carefully reviewed and it is held that the waters of a river which, at times of ordinary flood, spread beyond its banks, but form one body of water flowing within its accustomed boundaries during such floods, are not surface waters within the rule announced in some jurisdictions, that they may be turned upon the land of others by one seeking to keep them off his own land.

<sup>77</sup> *Jacksonville R. Co. v. Cox*, 91 Ill. 500; *Cairo &c. R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139 and note; *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Crawfordsville v. Bond*, 96 Ind. 236; *Cubit v. O'Dett*, 51 Mich. 347, 16 N. W. 679; *Pye v. Mankato*, 36 Minn. 373, 31 N. W. 863, 1 Am. St. 671; *McCormick v. Kansas City &c. R. Co.*, 70 Mo. 359, 35 Am. Rep. 431 and note; *Chase v. New York Central R. Co.*, 24 Barb. (N. Y.) 273; *Huddleston v. West Bellvue*, 111 Pa. St. 110, 2 Atl. 200; *Galveston &c. R. Co. v. Tait*, 63 Tex. 223; *Fort Worth &c. R. Co. v. Scott*, 2 Tex. Civ. App. 137; *Whalley v. Lancashire &c. R. Co.*, L. R. 13 Q. B. Div. 131, affirmed 16 Q. B. Div. 227. See *Walker v. Old Colony &c. R. Co.*, 103 Mass. 10, 4 Am. Rep. 509; *Ogburn v. Connor*, 46 Cal. 346, 13 Am. Rep. 213; *Minor v. Wright*, 16 La. Ann. 151; *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732. "The reasoning which leads to the rule forbidding the owner of a field to overflow an



land on one side of a navigable river, which forms the boundary between two states, to construct a levee and turn the waters upon land on the opposite side of the river is not a local question, but depends upon general principles of law, and the decisions of a state court in conflict with those principles are not binding upon the federal courts.<sup>78</sup> It is a vexed question as to whether any interference by a railroad company with the right of an adjoining land-owner to lateral support constitutes a taking.<sup>79</sup> The weight of authority, however, in accordance with what seems to us the better reason, is to the effect that the destruction of such lateral support by excavating on the company's own land so near that of the adjoining owner as to cause his land to slide into the excavation is a taking for which he is entitled to compensation regardless of any question of negligence on the part of the railroad company.<sup>80</sup> A railroad company is not liable in damages, as a

adjoining field by obstructing a natural water course fed by remote springs applies with equal force to the destruction of a natural channel through which the surface waters derived from the rains or snow falling on such fields are wont to flow. What difference does it make in principle whether the water comes directly upon the field from the clouds above or has fallen upon remote hills and comes thence in a running stream upon the surface, or rises in a spring in the upper fields and flows upon the lowers." *Lawrence v. J.*, in *Gormley v. Sandford*, 52 Ill. 158. *Contra Morrison v. Bucksport &c. R. Co.*, 67 Maine 353; *Atchison &c. R. Co. v. Hammer*, 22 Kans. 763, 31 Am. Rep. 216; *Abbott v. Kansas City &c. R. Co.*, 83 Mo. 271, 53 Am. Rep. 581. And see *Raleigh &c. R. Co. v. Wicker*, 74 N. Car. 220.

<sup>78</sup> *Cairo &c. R. Co. v. Brevoort*, 62 Fed. 129, 25 L. R. A. 527 and note.

<sup>79</sup> Most of the authorities pro and con are cited in the principal and dissenting opinion in *Parke v. Seattle*, 5 Wash. 1, 20 L. R. A. 68, 34 Am. St. 839.

<sup>80</sup> Note to *Kansas City &c. R. Co. v. Schwake*, 70 Kans. 141, 68 L. R. A. 673n, 701, 78 Pac. 431; *O'Brien v. St. Paul*, 25 Minn. 331, 33 Am. Rep. 470; *Dyer v. St. Paul*, 27 Minn. 457, 8 N. W. 272; *Nichols v. Duluth*, 40 Minn. 389, 42 N. W. 84, 12 Am. St. 743; *McCullough v. St. Paul &c. R. Co.*, 52 Minn. 12, 53 N. W. 802; *Williams v. Natural Bridge &c. Co.*, 21 Mo. 580; note to *Larson v. Metropolitan St. R. Co.*, 110 Mo. 234, 19 S. W. 416, 16 L. R. A. 330, 33 Am. St. 439, 446, 467; *Eaton v. Boston &c. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147; *Ryckman v. Gillis*, 6 Lans. (N. Y.) 79; *Ludlow v. Hudson River R. Co.*, 6 Lans. (N. Y.) 128; *Keating v. Cincinnati*, 38 Ohio St. 141, 43 Am. Rep. 421; *Mosier v. Oregon Nav. Co.*, 39 Ore. 256, 64 Pac. 453,

rule at least, for remote and indirect consequences of lawful acts done on its own land. Thus, where a railroad, by making excavations on its own land drained a spring on adjoining land, it was held not liable for the resulting damages.<sup>81</sup> But it has been held that such an injury to springs or wells on a tract of land would be a proper subject for consideration in assessing damages for the condemnation of a right of way across it.<sup>82</sup> The construction of a railroad upon land in which an easement for a turn-pike,<sup>83</sup> or a canal<sup>84</sup> has been granted, entitles the owner of the fee to damages for the additional servitude.<sup>85</sup> This branch of our

87 Am. St. 652, 653 (citing text); *Richardson v. Vermont &c. R. Co.*, 25 Vt. 465, 60 Am. Dec. 283; *Stearns v. Richmond*, 88 Va. 992, 14 S. E. 847, 29 Am. St. 758 (damages, also, allowed for building, the weight of which did not contribute to the subsidence of the land); *Elliott Roads and Streets* (3rd ed.), § 229. *Contra Boothby v. Androscoggin &c. R. Co.*, 51 Maine 318; *Hortsman v. Covington &c. R. Co.*, 18 B. Mon. (Ky.) 218. See also *Northern Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; *Radcliff v. Mayor &c.*, 4 N. Y. 195, 53 Am. Dec. 357. It would clearly seem to be at least within a constitutional provision requiring compensation where property is taken or "damaged." *Farnandis v. Great Northern R. Co.*, 41 Wash. 486, 84 Pac. 18, 5 L. R. A. (N. S.) 1086.

<sup>81</sup> *Hougan v. Milwaukee &c. R. Co.*, 35 Iowa 558, 14 Am. Rep. 502; *Aldrich v. Cheshire R. Co.*, 21 N. H. 359, 53 Am. Dec. 212; *Waffle v. New York Cent. R. Co.*, 58 Barb. (N. Y.) 413; *Regina v. Metropolitan Board*, 3 B. & S. 710. But see *Lord v. Meadville &c. Co.*, 135 Pa.

St. 122, 19 Atl. 1007, 8 L. R. A. 202, 20 Am. St. 864, 2 Am. R. & Corp. Rep. 744; *Sheldon v. Boston &c. R. Co.*, 172 Mass. 180, 51 N. E. 1078.

<sup>82</sup> See *Trowbridge v. Brookline*, 144 Mass. 139, 10 N. E. 796; *Parker v. Railroad Co.*, 3 Cush. (Mass.) 107, 50 Am. Dec. 709 and note. In *Cleveland &c. R. Co. v. Hadley*, 179 Ind. 429, 101 N. E. 473, 45 L. R. A. (N. S.) 790, it is said that damages awarded for condemnation of a right of way for railway purposes will be presumed to include compensation for injury to springs and wells.

<sup>83</sup> *Ellicottville &c. Plank R. Co. v. Buffalo &c. R. Co.*, 20 Barb. (N. Y.) 644; *Mifflin v. Railroad Co.*, 16 Pa. St. 182; *Mahon v. New York Cent. R. Co.*, 24 N. Y. 658; *Brainard v. Missisquoi R. Co.*, 48 Vt. 107.

<sup>84</sup> *LaFayette &c. R. Co. v. Murdock*, 68 Ind. 137; *Hatch v. Cincinnati &c. R. Co.*, 18 Ohio St. 92.

<sup>85</sup> If the railroad is not empowered to condemn the canal lands, a transfer by the canal company of its canal bed to a railroad corporation for railroad purposes

subject, however, will be fully treated when we come to consider railroads in highways.<sup>86</sup> Where, as in most jurisdictions, the use of a street by a street railway is regarded as a legitimate use thereof, and not an additional burden, the construction of such a railway across the tracks of a commercial railroad where they intersect a street by a company which is authorized by the municipality to do so is not such a taking of the property of the railroad company as to entitle it to compensation.<sup>87</sup> So, it has been held that an electric railway may be operated in a street without compensation to a telegraph or telephone company which has a prior grant to use the street.<sup>88</sup> The construction of a telegraph line upon a railroad company's right of way is, however, a taking of its property for which it is entitled to compensation.<sup>89</sup> But it has been held that the railroad company may erect such a line on its right of way for its own use without

amounts to such an abandonment that the land reverts to the owner of the fee, and the railroad company must pay him the full value of the land. *Pittsburgh & C. R. Co. v. Bruce*, 102 Pa. St. 23.

<sup>86</sup> Post, Chapter XLIV.

<sup>87</sup> *Chicago & C. R. Co. v. Whiting & C. St. Ry. Co.*, 139 Ind. 297, 38 N. E. 604, 47 Am. St. 264, 26 L. R. A. 337, 11 Lewis' Am. R. & Corp. Rep. 507; *South East Ry. Co. v. Evansville Ry. Co.*, 169 Ind. 339, 82 N. E. 765, 13 L. R. A. (N. S.) 916; *Pittsburgh Ry. Co. v. Muncie Trac. Co.*, 174 Ind. 167, 91 N. E. 600 (interurban railway at crossing in city); *New York & C. R. Co. v. Bridgeport Traction Co.*, 65 Conn. 410, 32 Atl. 953, 29 L. R. A. 367 (electric railway); *Chicago & C. R. Co. v. West Chicago & C. Co.*, 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485. See also *Southern Ry. Co. v. Atlanta Ry. Co.*, 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125; *Galveston Ry. Co. v. Houston Elec. Co.*,

57 Tex. Civ. App. 170, 122 S. W. 287.

<sup>88</sup> *Cincinnati & C. R. Co. v. City & C. R. Co.*, 48 Ohio St. 390, 27 N. E. 890, 12 L. R. A. 534, 29 Am. St. 559, 4 Am. R. & Corp. Rep. 533; *Cumberland Tel. & C. Co. v. United Electric R. Co.*, 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236, 10 Am. R. & Corp. Rep. 549 and note. See also *Cumberland Tel. & C. Co. v. United Electric R. Co.*, 42 Fed. 273, 12 L. R. A. 544; *Consolidated Tract. Co. v. South Orange & C. Co.*, 56 N. J. Eq. 569, 40 Atl. 15; *National Tel. Co. v. Baker*, 62 L. J. Ch. 699. But it is held by Pickler, J., in the second case above cited injury to the telephone plant by conduction amounts to a taking.

<sup>89</sup> *Southwestern R. Co. v. Southern & C. Tel. Co.*, 46 Ga. 43, 12 Am. Rep. 585; *Western Union Tel. Co. v. Rich*, 19 Kans. 517, 27 Am. Rep. 159; *Atlantic & C. Tel. Co. v. Chicago & C. R. Co.*, 6 Biss. (U. S. C.

additional compensation to the land-owner,<sup>90</sup> although the telegraph company can not do so.<sup>91</sup> The use of a public toll bridge by an electric railway, on payment of adequate toll, has been held in a recent case not to be a taking of property under the eminent domain,<sup>92</sup> and it has also been held in another recent case that a bridge company which had long permitted its bridge to be used by railroads and induced large expenditures of money by street railways, had dedicated its bridge as a highway for use by street railways as well as other travel, and that a street railway company had a right to use it upon paying a fair rate of toll.<sup>93</sup> A railroad company acquires its right of way for railroad purposes, in the manner and to the extent that rights of way are ordinarily used by railroad companies as the public interest may require. So, as it is customary for railroad companies to permit other companies to use its tracks in common with itself, especially in cities, for terminal purposes, and as the public interest requires that they should do so, the abutting land-owner is not entitled to additional compensation for such use as for the imposition of an additional burden.<sup>94</sup> But one company can not thus authorize a

C.) 158, 1 Am. Elec. Cas. 111. See generally as to condemnation by telegraph company in such cases, *Union Pac. R. Co. v. Colorado &c. R. Co.*, 30 Colo. 133, 69 Pac. 564 and note, 97 Am. St. 106; *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. 705; *Fort Worth &c. Ry. Co. v. Southwestern Tel. Co.*, 96 Tex. 160, 71 S. W. 270, 60 L. R. A. 145. See as to appropriation of railroad property for other purposes, *Denver Power &c. Co. v. Colorado &c. R. Co.*, 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383; *Pittsburgh &c. R. Co. v. Sanitary Dist.*, 218 Ill. 286, 75 N. E. 892.

<sup>90</sup> *Western Union Tel. Co. v. Rich*, 19 Kans. 517, 27 Am. Rep. 159; *Prather v. Western Union Tel. Co.*, 89 Ind. 501.

<sup>91</sup> *American Tel. Co. v. Pearce*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200 and note.

<sup>92</sup> *Pittsburgh &c. R. Co. v. Point Bridge Co.*, 165 Pa. St. 37, 30 Atl. 511, 26 L. R. A. 323. See also *Berks Co. v. Reading City Pass. R. Co.*, 167 Pa. St. 102, 31 Atl. 474, 663.

<sup>93</sup> *Covington &c. Bridge Co. v. South Covington &c. St. R. Co.*, 93 Ky. 136, 19 S. W. 407, 15 L. R. A. 828. Compare however *Floyd Co. v. Rome St. R. Co.*, 77 Ga. 614, 3 S. E. 3; *United States v. Parkersburg &c. R. Co.*, 134 Fed. 969.

<sup>94</sup> *Miller v. Green Bay &c. R. Co.*, 59 Minn. 169, 60 N. W. 1006, 26 L. R. A. 443, 11 Am. R. & Corp. Rep. 246.

second company to construct and use additional tracks upon the right of way of the former company without additional compensation to the land-owner.<sup>95</sup>

§ 1235 (978). **Property damaged or injured—Constitutional and statutory provisions.**—Because of the instances in which the infliction of injuries upon private property was held not to be a taking, all of those states which have adopted new constitutions within the past twenty-five years have added a provision that property shall not be damaged by the construction of public works without compensation. Similar provisions have been made by statute in several of the states<sup>96</sup> and in England.<sup>97</sup> In several cases, it is said in general terms that such a provision includes all damage arising from the exercise of the right of eminent domain which causes a diminution in the value of private property.<sup>98</sup> This statement, however, seems a little too broad.

<sup>95</sup> *Blakely v. Chicago &c. R. Co.*, 34 Nebr. 284, 51 N. W. 767, 6 Am. R. & Corp. Rep. 262; *Fort Worth &c. R. Co. v. Jennings*, 76 Tex. 373, 13 S. W. 270, 2 Am. R. & Corp. Rep. 121; *Platt v. Pennsylvania Co.*, 43 Ohio St. 228, 1 N. E. 420. This is a different thing from laying additional tracks by a company upon its right of way for its own use, which may be done without additional compensation. *East Tennessee &c. R. Co. v. Telford*, 89 Tenn. 293, 10 L. R. A. 855, Am. R. & Corp. Rep. 364; *White v. Chicago &c. R. Co.*, 122 Ind. 317, 23 N. E. 782, 2 Am. R. & Corp. Rep. 138, 23 N. E. 782, 7 L. R. A. 257.

<sup>96</sup> *Bradley v. New York &c. R. Co.*, 21 Conn. 294; *Nicholson v. New York &c. R. Co.*, 22 Conn. 74, 56 Am. Dec. 390; *St. Louis &c. R. Co. v. Capps*, 67 Ill. 607, 72 Ill. 188; *Drady v. D. M. &c. R. Co.*, 57 Iowa 393, 10 N. W. 754; *Parker v. Bos-*

*ton &c. R. Co.*, 3 Cush. (Mass.) 107, 50 Am. Dec. 709 and note; *Gardner v. Boston &c. R. Co.*, 9 Cush. (Mass.) 1. See also *Whitney v. Commonwealth*, 190 Mass. 531, 77 N. E. 516, 517; *Hyde v. Fall River*, 189 Mass. 439, 75 N. E. 953. But compare *McSweeney v. Commonwealth*, 185 Mass. 371, 70 N. E. 429.

<sup>97</sup> *Knock v. Metropolitan R. Co.*, L. R. 4 C. P. 131. It is held under the English statute that no compensation can be claimed for any personal inconvenience or injury not connected with real property. *Rickets v. Metropolitan R. Co.*, 34 L. J. Q. B. 257; *Beckett v. Midland R. Co.*, L. R. 3 C. P. 82, 37 L. J. C. P. 11; *Bird v. Great Eastern R. Co.*, 34 L. J. C. P. 366.

<sup>98</sup> *Chicago &c. R. Co. v. Hazels*, 26 Nebr. 364; *City of Omaha v. Kramer*, 25 Nebr. 489, 13 Am. St. 504; *Stehr v. Mason City &c. R.*

There must be an interference with some right, either appurtenant to the property or which can be made use of in connection with it, as well as depreciation in value.<sup>90</sup> In England, where the statute requires compensation for property "injuriously affected," the following rule of construction has been adopted: "When by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if by reason of such interference, the property, as a property is lessened in value."<sup>1</sup> So, in a case which is now regarded as one of the leading cases upon the subject in this country, it is said that "it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally."<sup>2</sup>

Co., 77 Nebr. 641, 110 N. W. 702, 703. Compare *Gottschalk v. Chicago &c. R. Co.*, 14 Nebr. 550, 560.

<sup>90</sup> See *Hot Springs R. Co. v. Williams*, 45 Ark. 429; *Austin v. Augusta Terminal Ry. Co.*, 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755 and authorities cited in following notes. And it is generally held that there must be something more than mere "consequential" damage as that term is ordinarily used in law. *Gordon v. Ellenville &c. R. Co.*, 195 N. Y. 137, 88 N. E. 14, 47 L. R. A. (N. S.) 462 and note; also note in 36 L. R. A. (N. S.) 741. In *City of St. Louis v. St. Louis &c. Ry. Co.*, 272 Mo. 80, 197 S. W. 107, it is said that, so far as concerns consequential damages to remainder of tract from the actual

taking of part the addition of the words "or damaged" did not change the law.

<sup>1</sup> Metropolitan Board of Works v. McCarthy, L. R. 7 E. & I. App. 243, 253. Approved and followed in *Gainesville &c. R. Co. v. Hall*, 78 Tex. 169, 14 S. W. 259, 9 L. R. A. 298 and note, 22 Am. St. 42, 46.

<sup>2</sup> *Rigney v. Chicago*, 102 Ill. 64. The rule is stated in similar language in *Peel v. Atlanta*, 85 Ga. 138, 11 S. E. 582, 8 L. R. A. 787, 2 Am. R. & Corp. Rep. 413, and in *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. ed. 638, and these cases are approved in *Stehr v. Mason City &c. R. Co.*, 77 Nebr. 641, 110 N. W. 702, 703, in which it is held that "where an ordinance is passed granting the use of pub-

As said by still another court, the object of the constitutional and statutory provisions to which we have referred "was to grant relief in cases where there was no direct injury to the real estate itself, but some physical disturbance of a right which the owner possesses in connection with his estate, by reason of which he sustains a special injury to such property in excess of that sustained by the public at large."<sup>3</sup>

**§ 1236. Property damaged—Illustrative cases.**—Where part of a tract is taken compensation should be made for damages to the entire tract, and where two lots were occupied by the buildings of a brewery, it was held that they constituted a single tract, although they were separated by an alley, under which connection was made between the several parts of the brewery establishment.<sup>4</sup> But the general rule is that where only part of a tract of land is taken, the remainder is not damaged, within the meaning of the law, unless its value is thereby diminished.<sup>5</sup> It is not

lic streets to a railroad company for the construction and operation of its road, an abutting property owner can not be prevented from recovering from the railroad company damages to his property caused by the construction of the railroad in and across the streets by inserting in such ordinance a provision vacating the portions of the streets to be so used by the railroad company." But compare *Scrutchfield v. Choctaw &c. R. Co.*, 18 Okla. 308, 88 Pac. 1048.

<sup>3</sup> *Gottschalk v. Chicago &c. R. Co.*, 14 Nebr. 550, 16 N. W. 475, 17 N. W. 120.

<sup>4</sup> *Hannibal Bridge Co. v. Schaubacher*, 57 Mo. 582. See also *Sharp v. United States*, 191 U. S. 341, 24 Sup. Ct. 114, 48 L. ed. 211. Where village lots were merely held for sale, the fact that they were separated by a street was held conclu-

sive of the fact that they were separate tracts. *Pittsburgh &c. R. Co. v. Reich*, 101 Ill. 157. See also *Wellington v. Boston &c. R. Co.*, 164 Mass. 380, 41 N. E. 652; *Gorgas v. Philadelphia &c. R. Co.*, 215 Pa. St. 501, 64 Atl. 680, 114 Am. St. 974.

<sup>5</sup> *Metropolitan &c. R. Co. v. Stickney*, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773, 10 Am. R. & Corp. Rep. 1. See also *Somers v. Metropolitan &c. R. Co.*, 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344. And in general the damages are confined to the particular tract or parcel and do not include separate and independent tracts. 1 Elliott Roads & Sts. (3rd ed.), §§ 288, 289, and cases cited. See also *Illinois Cent. R. Co. v. Roskemmer*, 264 Ill. 103, 105 N. E. 695.

necessary, however, that any part of the land should be actually taken to bring the case within the meaning of provisions to which we have referred. Thus, depreciation in the value of property caused by noise, vibration, smoke and cinders from passing trains has been held in many jurisdictions to be a damage or injury to the owner's property for which he is entitled to compensation under such provisions, although none of his land is taken in the construction of the road.<sup>6</sup> But it is held otherwise in a few

<sup>6</sup> *Idaho &c. R. Co. v. Nagle*, 184 Fed. 598; *Stone v. Fairbury &c. R. Co.*, 68 Ill. 394, 18 Am. R. 556; *Lake Erie &c. R. Co. v. Scott*, 132 Ill. 429, 24 N. E. 78, 8 L. R. A. 330; *Omaha &c. R. Co. v. Janeczek*, 30 Nebr. 276, 46 N. W. 478, 27 Am. St. 399, 3 Am. R. & Corp. Rep. 268 and note; *Railway Co. v. Gardner*, 45 Ohio St. 309, 13 N. E. 69; *Gainesville &c. R. Co. v. Hall*, 78 Tex. 169, 11 S. W. 582, 9 L. R. A. 298, 22 Am. St. 42; *Missouri &c. R. Co. v. Calkins* (Tex. Civ. App.), 79 S. W. 852; *St. Louis &c. R. Co. v. Shaw* (Tex. Civ. App.), 88 S. W. 817; *Tidewater R. Co. v. Shartzler*, 107 Va. 562, 59 S. E. 407, 17 L. R. A. (N. S.) 1053 and note; *Turner v. Sheffield &c. R. Co.*, 10 Mees. & W. 425; *East &c. R. Co. v. Gattke*, 20 L. J. Ch. (N. S.) 217. See also *Chicago &c. R. Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341 and note; *Muhlker v. New York &c. R. Co.*, 197 U. S. 544, 25 Sup. Ct. 522, 49 L. ed. 872; *Mason City &c. Ry. Co. v. Wolf*, 148 Fed. 961; *Chicago &c. R. Co. v. Darke*, 148 Ill. 226, 35 N. E. 750; *Jeffersonville &c. R. Co. v. Esterle*, 13 Bush (Ky.) 667; *Illinois Cent. R. Co. v. Elliott*, 129 Ky. 121, 110 S. W. 817; *Mathias v. Minneapolis &c. Ry. Co.*, 125 Minn. 224, 146 N.

W. 353 (switchyard); *Stehr v. Mason City &c. Ry. Co.*, 77 Nebr. 641, 110 N. W. 701; *Lahr v. Metropolitan Elevated R. Co.*, 104 N. Y. 268, 10 N. E. 528; *Story v. New York &c. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Smith v. St. Paul &c. R. Co.*, 39 Wash. 355, 81 Pac. 840, 70 L. R. A. 1018. Many cases in New York growing out of the construction and operation of elevated railroads are substantially to the same effect even in the absence of such a provision. *Contra Pennsylvania R. Co. v. Lippincott*, 116 Pa. St. 472, 9 Atl. 871, 2 Am. St. 618; *Pennsylvania R. Co. v. Marchant*, 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. 659, affirmed in *Marchant v. Pennsylvania R. Co.*, 153 U. S. 380, 14 Sup. Ct. 894, 38 L. ed. 751; *Jones v. Erie &c. R. Co.*, 151 Pa. St. 30, 25 Atl. 134, 17 L. R. A. 758, 31 Am. St. 722. But compare *Pennsylvania &c. R. Co. v. Walsh*, 124 Pa. St. 544, 17 Atl. 186, 10 Am. St. 611. See generally *Austin v. Augusta Terminal R. Co.*, 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755; *Aldrich v. Metropolitan &c. Co.*, 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237; *Dimmick v. Council Bluffs &c. R. Co.*, 62 Iowa 409, 17 N. W. 395; *Presbrey v. Old Colony &c. R. Co.*, 103 Mass. 6; *Bennett v. Long Island*



jurisdictions.<sup>7</sup> Additional illustrations will be given when we come to consider the subject of railroads in streets, and it is sufficient at this place to refer to other authorities supporting and showing the application of the general rule without reviewing them at length.<sup>8</sup>

R. Co., 181 N. Y. 431, 74 N. E. 418; Smith v. St. Paul &c. R. Co., 39 Wash. 355, 81 Pac. 840.

<sup>7</sup> Pennsylvania R. Co. v. Lippincott, 116 Pa. St. 472, 9 Atl. 871, 2 Am. St. 618; Willock v. Beaver Val. R. Co., 222 Pa. St. 590, 72 Atl. 237; Wunderlich v. Penna. R. Co., 223 Pa. St. 114, 72 Atl. 247; Hyde v. Minnesota &c. R. Co., 29 S. Dak. 220, 136 N. W. 92, 40 L. R. A. (N. S.) 48. See also Fink v. Cleveland &c. R. Co., 181 Ind. 539, 105 N. E. 116; Twenty-second Corp. v. Oregon &c. Ry. Co., 36 Utah 238, 103 Pac. 243, 23 L. R. A. (N. S.) 860, 140 Am. St. 819.

<sup>8</sup> Chicago v. Taylor, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. ed. 638; Richards v. Washington Terminal Co., 233 U. S. 546, 34 Sup. Ct. 654, 58 L. ed. 1088; Omaha &c. R. Co. v. Cable &c. Co., 32 Fed. 727; Montgomery v. Townsend, 80 Ala. 489, 492, 2 So. 155, 60 Am. Rep. 112; Hot Springs R. Co. v. Williamson, 45 Ark. 429; Eachus v. Los Angeles &c. R. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. 149; Denver v. Bayer, 7 Colo. 113, 2 Pac. 6; Albany v. Sikes, 94 Ga. 30, 20 S. E. 257, 26 L. R. A. 653, 47

Am. St. 132; Chicago &c. R. Co. v. Ayres, 106 Ill. 511; East St. Louis &c. R. Co. v. Eisentraut, 134 Ill. 96, 24 N. E. 760; Sheehy v. Kansas City &c. R. Co., 94 Mo. 574, 7 S. W. 579, 4 Am. St. 396 and note; Gulf &c. R. Co. v. Eddins, 60 Tex. 656; Hatch v. Tacoma &c. R. Co., 6 Wash. 1, 32 Pac. 1063; Johnson v. Parkersburg, 16 W. Va. 402, 37 Am. Rep. 779; Caledonian R. Co. v. Waker, L. R. 7 App. Cas. 259. In Kansas City &c. R. Co. v. St. Joseph &c. R. Co., 97 Mo. 457, 10 S. W. 826, 3 L. R. A. 240, it was held that a railroad company was not entitled to damages under such a provision for delay and inconvenience caused by another company crossing its tracks in a public street. And so it is held that danger to persons crossing or from fire is not a proper element to be considered as damages. Illinois &c. R. Co. v. Freeman, 210 Ill. 270, 71 N. E. 444. See generally upon the subject treated in this section, notes in 1 L. R. A. (N. S.) 49, 17 L. R. A. (N. S.) 1053, 36 L. R. A. (N. S.) 741, 38 L. R. A. (N. S.) 497.

## CHAPTER XXXIX.

### COMPENSATION AND DAMAGES

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| Sec.   | Sec.   |
| 1240. Compensation — Constitutional right.   | 1256. Remote and speculative damages—Possibility of negligence in construction or operation of road.                           |
| 1241. Provisions of the federal constitution—Federal powers.                                   | 1257. Damages confined to particular tract.  |
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| 1243. Constitutional right to compensation does not extend to general damages.                 | 1259. Elements of value.   |
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| 1247. Time at which compensation is computed.  | 1263. Measure of damages for property of railroad company taken for other public use — Railroad and street railroad crossings. |
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| <p>Sec.<br/>1269. Improvements made by company under unauthorized entry—Views of the authors.</p> <p>1270. Improvements made by company under unauthorized entry—Illustrative cases.</p> <p>1271. Deviation from proposed line—Change of route.</p> <p>1272. Owner, at time possession is taken is entitled to damages—Vendor and vendee.</p> <p>1273. Who is owner.</p> <p>1274. Who is entitled to the compensation where the land is conveyed after appropriation proceedings are commenced — Vendor and vendee.</p> | <p>Sec.<br/>1275. Temporary use of premises.</p> <p>1276. Notice to purchaser by existence of railroad.</p> <p>1277. To whom compensation should be paid.</p> <p>1278. Measure of damages to lessee.</p> <p>1279. Apportionment of compensation.</p> <p>1280. Occupying claimants on public lands.</p> <p>1281. Effect of assessment of damages.</p> <p>1282. Award of compensation does not cover negligent acts.</p> <p>1283. Interest—Allowance of.</p> <p>1284. Presumption of payment of compensation — Statute of limitations.</p> <p>1285. Waiver—Estoppel.</p> |
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§ 1240 (979). **Compensation — Constitutional right.** — The right of a citizen whose property is taken for a public use to compensation is, as we believe, fundamental. In our judgment there is a right to compensation in all cases where private property is seized under the power of eminent domain. We believe that the right exists even where there is no express constitutional provision forbidding the taking of private property without paying or tendering compensation. The right to compensation is part of the right of every freeman to hold, own and enjoy property, and he can only be deprived of his property even for a public use by due process of law and upon the payment of just compensation for whatever property may be taken from him.<sup>1</sup>

<sup>1</sup> In *Sinnickson v. Johnson*, 17 N. J. L. 129, 145, 34 Am. Dec. 184, it was said, of the right of eminent domain that: "This power to take private property reaches back of all constitutional provisions, and it seems to be considered a settled principle of universal law that the

right to compensation is an incident to the exercise of that power, that the one is so inseparably connected with the other that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle." This statement of the law

**§ 1241 (980). Provisions of the federal constitution—Federal powers.**—Prior to the adoption of the fourteenth amendment it was held that the provisions of the federal constitution apply

was approved in *Pumpelly v. Green Bay Co.*, 13 Wall. (U. S.) 166, 178, 20 L. ed. 557, and in *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. ed. 463, and in *Chicago &c. R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 585, 41 L. ed. 979. The general doctrine is asserted in *Chattanooga &c. R. Co. v. Felton*, 69 Fed. 273, 278. See also *Gardner v. Newburg*, 2 Johns. Ch. (N. Y.) 162; *Bonaparte v. Camden &c. R. Co.*, Bald. (U. S. C. C.) 205; *Martin, ex parte*, 13 Ark. 198, 58 Am. Dec. 321; *Harness v. Chesapeake &c.*, 1 Md. Ch. 248; *Bristol v. New Chester*, 3 N. H. 524; *Garvey v. Long Island R. Co.*, 159 N. Y. 323, 54 N. E. 57, 70 Am. St. 550 and note; *Johnston v. Rankin*, 70 N. Car. 550; *Staton v. Norfolk R. Co.*, 111 N. Car. 278, 17 L. R. A. 838 and note; *Southern Kansas R. Co. v. Oklahoma City*, 12 Okla. 82, 69 Pac. 1050; *Watson v. Fairmount &c. R. Co.*, 49 W. Va. 528, 39 S. E. 193; *Elliott Roads and Streets* (3rd ed.), § 261, et. seq. But see *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *United States v. Jones*, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. ed. 1015; *Lindsay v. Commonwealth*, 2 Bay (S. Car.), 38; *State v. Dawson*, 3 Hill (S. Car.), 100; *United States v. Rauers*, 70 Fed. 748. A Maine statute relating to the location of street railroads in the streets and ways of cities and towns, and of the approval thereof by municipal

officers, and appeals from the action of such officers is held not unconstitutional as permitting the property of the towns to be taken for street railroad purposes without compensation, as the public act through the legislature, which may regulate and control, extend or diminish the public uses as it sees fit. *Appeal of Milbridge & C. Electric R. Co.*, 96 Maine 110, 51 Atl. 818. A land-owner is entitled to compensation for injuries to his premises caused by the erection of a dam on adjoining premises by a railroad company though it has a lawful right to erect the structure. *Illinois Central R. Co. v. Lockard*, 112 Ill. App. 423. See also *Southern Tract. Co. v. Fears* (Tex. Civ. App.), 199 S. W. 856. The provision of the constitution of Texas that no person's property shall be taken for public use without adequate compensation, unless by the consent of the owner is held to apply only to the property of others than the state. Over the state lands there is no such restriction. *Texas Central R. Co. v. Bowman*, 97 Tex. 417, 79 S. W. 295. Just compensation means the full equivalent of the property taken or the actual loss to the owner by reason of the taking of his property, *Kanakanni v. United States*, 244 Fed. 923; *Erie County v. Fridenberg*, 221 N. Y. 389, 117 N. E. 611.

only to acts of the general government.<sup>2</sup> And it has been so held since the adoption of the fourteenth amendment.<sup>3</sup> It seems to us that there is reason for concluding that under that amendment there is not due process of law when property is taken without compensation where the constitution of the state requires that compensation shall be paid or tendered.<sup>4</sup> We suppose that if a state statute should assume to permit some corporations to take without compensation and require others, under like circumstances, to pay or tender compensation, the statute would be void under the fourteenth amendment, for the reason that it denied the equal protection of the laws. The supreme court of the United States, in a comparatively recent case, carefully considered the question of the power of the general government in the exercise of the right of eminent domain, and laid down the general rules which govern the exercise of the right.<sup>5</sup> Congress

<sup>2</sup> *Barron v. Baltimore*, 7 Pet. (U. S.) 243, 8 L. ed. 672.

<sup>3</sup> *Smith v. Bivens*, 56 Fed. 352. See also *Winous Point Shooting Club v. Caspersen*, 193 U. S. 189, 24 Sup. Ct. 431, 48 L. ed. 675; *Bemis v. Guirl Drainage Co.*, 182 Ind. 36, 105 N. E. 496 (Fifth Amendment).

<sup>4</sup> *Scott v. Toledo*, 36 Fed. 385, 1 L. R. A. 688. See *Murdock v. Cincinnati*, 44 Fed. 726, 729. We are inclined to believe that on principle it must be held that in all cases where there is no provision for compensation there is not due process of law. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, opinion of Bradley, J. See also *Chicago &c. R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. ed. 979; *Missouri Pac. R. Co. v. Nebraska*, 164 U. S. 403, 17 Sup. Ct. 130, 135, 41 L. ed. 489; *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 25 Sup. Ct.

251, 256, 49 L. ed. 462. These decisions seem to settle the question in accordance with the doctrine of the text.

<sup>5</sup> *Shoemaker v. United States*, 147 U. S. 282, 13 Sup. Ct. 361, 37 L. ed. 170. See *Canal Co. v. Key*, 3 Cranch (C. C.) 599; *Chesapeake &c. Co. v. Union Bank*, 4 Cranch (C. C.) 75; *Luxton v. North River Bridge Co.*, 147 U. S. 337, 13 Sup. Ct. 356, 37 L. ed. 194. As to the measure of damages, see *Kerr v. South Park Commissioners*, 117 U. S. 379, 29 L. ed. 924; *Shoemaker v. United States*, supra. See generally *Rugheimer*, In re, 36 Fed. 369; *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 5 Sup. Ct. 306, 28 L. ed. 846; *United States v. Gettysburg Elec. R. Co.*, 160 U. S. 668, 16 Sup. Ct. 427, 40 L. ed. 576; *Chappell v. United States*, 160 U. S. 499, 16 Sup. Ct. 397, 40 L. ed. 510.

may grant authority to a railroad company to condemn lands through one of the territories.<sup>6</sup> It is held that an act which provides that a property owner may apply to the court of claims for indemnity affords a remedy to him for the recovery of damages, but the court declined to pass upon the constitutionality of the act.<sup>7</sup> The provision of the federal constitution that private property shall not be taken "for public use without just compensation," does not require that compensation shall be actually paid in advance of the occupancy of the land to be taken, but the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed.<sup>8</sup> It was also held in the case referred to that an offer to pay was not sufficient, but the money must be actually paid into court. It has been held that an act of Congress, which provides that no compensation shall be paid for property seized, will not authorize the seizure of private property for a public use.<sup>9</sup> Congress may provide what proceedings shall be taken in case of condemnation

<sup>6</sup> *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. ed. 295. See also as to right of United States to condemn property already devoted to a public use. *United States v. Boston Elev. R. Co.*, 176 Fed. 963.

<sup>7</sup> *Great Falls Mfg. Co. v. Attorney-General Garland*, 124 U. S. 581, 8 Sup. Ct. 631, 31 L. ed. 527; *Great Falls Manufacturing Co. v. Garland*, 25 Fed. 521. In the opinion in the first case cited it was said of the act of the party in submitting his claim to the court of claims that: "The plaintiff, by adopting that mode, has assented to the taking of his property by the government for public use, and has agreed to submit the determination of the question of compensation to the tribunal named by congress."

<sup>8</sup> *Cherokee Nation v. Southern*

*Kansas R. Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. ed. 295. In the case cited the court quoted from the case of *Kennedy v. Indianapolis*, 103 U. S. 599, 604, 26 L. ed. 550, the following: "On principle and authority, the rule is, under such a constitution as that of Indiana, that the right to enter and use the property is complete as soon as the property is actually appropriated under the authority of the law for a public use, but that the title does not pass from the owner without his consent, until just compensation has been made to him," and held that the rule applied to the provisions of the federal constitution. See *Chattanooga & C. R. Co. v. Felton*, 69 Fed. 273; *Payne v. Kansas City & C. R. Co.*, 46 Fed. 546.

<sup>9</sup> *Manderson, In re*, 51 Fed. 501; *Montgomery, In re*, 48 Fed. 896.

by the United States, or, it may provide that the proceedings shall be such as the state statute prescribes.<sup>10</sup> Where there is no statute prescribing the rule for measuring the compensation to be awarded, it must be determined upon the principle of the common law, and consequential damages can not be awarded.<sup>11</sup> It is held that private and not public property, is protected by the provisions of the federal constitution,<sup>12</sup> but we suppose that the term "public property," as used in this connection, must be held to mean such as belongs to the state or nation, and not property of a public nature, that is, property public in the sense that it is "affected with a public interest." It is doubtful whether the doctrine of the case referred to can be regarded as going to the extent of denying that such a provision as that contained in the national constitution protects property held by a state or one of its municipalities for a use in its nature private, as, for instance, for a school house, a hospital for the insane or the like.<sup>13</sup>

<sup>10</sup> *High Bridge &c. Co. v. United States*, 69 Fed. 320; *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449; *United States v. Jones*, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. ed. 1015. See also *Kanakanni v. United States*, 244 Fed. 923.

<sup>11</sup> *High Bridge &c. Co. v. United States*, 69 Fed. 320, citing, as to the common law rule, *Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336 (wherein *Pumpelly v. Green Bay Co.*, 13 Wall. (U. S.) 166, 20 L. ed. 557, is criticised), and *Railroad Co. v. Bingham*, 87 Tenn. 522, 11 S. W. 705, 4 L. R. A. 622 and note; *Smith v. Washington*, 20 How. (U. S.) 135, 15 L. ed. 858. It was also said that the decisions in *Van Schoick v. Delaware &c. Canal Co.*, 20 N. J. L. 249, and *Asher v. Louisville &c. R. Co.*, 87 Ky. 391, 8 S. W. 854, were based upon statutes. See also *New York &c. R. Co. v. Blacker*, 178 Mass.

386, 59 N. E. 1020. As to the effect of an award where consequential damages are provided for by statute, the court cited, *Ohio &c. R. Co. v. Thillman*, 143 Ill. 127, 32 N. E. 529, 36 Am. St. 359. See also upon question of adopting state statutes, *United States v. Engelman*, 46 Fed. 898.

<sup>12</sup> *Stockton v. Baltimore &c. R. Co.*, 32 Fed. 9; *Frost v. Washington Co. R. Co.*, 96 Maine 76, 51 Atl. 806, 59 L. R. A. 68 and note.

<sup>13</sup> In the case under immediate mention, *Stockton v. Baltimore &c. R. Co.*, 32 Fed. 9, the court, after showing that the lands which were the subject of controversy, were "publici juris, that is, were held for the people at large," said: "Such being the character of the state's ownership of the land under water—an ownership held, not for the purpose of emolument, but for public use, especially the pub-

If it does we should be inclined to doubt its soundness. The tendency of the courts is to give the word "property," as used in the constitution in this connection, a liberal construction and the word is generally held to cover every valuable interest which can be enjoyed as property and recognized as such.<sup>14</sup> Thus construed it includes not only real estate held in fee, but also an easement, personal property and the like, and where it is proposed to appropriate any property of this character, the owner is entitled to just compensation.<sup>15</sup>

lic use of navigation and commerce—the question arises whether it is a kind of property susceptible of pecuniary compensation, within the meaning of the constitution. The fifth amendment provides only that private property shall not be taken without compensation, making no reference to public property. But, if the phrase may have an application broad enough to include all property and ownership, the question would still arise whether the appropriation of a few square feet of the river bottom to the foundation of a bridge, which is to be used for the transportation of an extensive commerce in aid and relief of that afforded by the water way, is at all a diversion of the property from its original public use. It is not so considered when sea-walls, piers, wing-dams and other structures are erected for the purpose of aiding commerce by improving and preserving the navigation. Why should it be deemed such when (without injury to the navigation) erections are made for the purpose of aiding and enlarging commerce beyond the capacity of the navigable stream itself, and of all the navigable waters of the country? It

is commerce, and not navigation, which is the great object of constitutional care." See *St. Louis &c. R. Co. v. Blind Inst.*, 43 Ill. 303; *Atlanta v. Central R. Co.*, 53 Ga. 120; *Burbank v. Fay*, 65 N. Y. 57; *Clinton v. Cedar Rapids &c. R. Co.*, 24 Iowa 455; *Mount Hope Cemetery v. Boston*, 158 Mass. 509, 33 N. E. 695, 35 Am. St. 515; *State v. District Court*, 77 Minn. 248, 79 N. W. 971; *Pennsylvania R. Co. v. New York &c. R. Co.*, 23 N. J. Eq. 157; *People v. Kerr*, 27 N. Y. 188; *Portland &c. R. Co. v. Portland*, 14 Ore. 188, 12 Pac. 265, 58 Am. Rep. 299.

<sup>14</sup> *Old Colony R. Co. v. Plymouth Co.*, 14 Gray (Mass.) 161.

<sup>15</sup> *Southern Kansas R. Co. v. Oklahoma City*, 12 Okla. 82, 69 Pac. 1050. See also *Lake Auburn Crystal Ice Co. v. Lewiston*, 109 Maine 489, 84 Atl. 1004. But see *St. Louis &c. R. Co. v. Knapp &c. Co.*, 160 Mo. 396, 61 S. W. 300, where it is held that the words "other property," in Rev. St. Mo. § 2734, providing that in case lands or "other property" is sought to be appropriated by any railroad corporation for public use, and the owners and such corporation can not agree as to compensation, the



§ 1242 (980a). **Federal power—Abridgment of right of navigation.**—The right of navigation in navigable waters is not an individual property right protected from abridgment or abolition by the constitutional provision against the taking of private property without just compensation. It is a public and not a private right, and hence the obstruction of such navigation by the government does not give the users of the water the right to demand compensation.<sup>16</sup> Thus it has been held that the fact that the building and maintenance of a trestle and the consequent closing of a tidal channel, by a railroad company under the authority of the legislature and of congress, has seriously damaged the business of the plaintiff and the selling value of his property adjoining the channel, does not entitle him to compensation from the railroad company, none of his property having been entered upon or used by the company. It is the common case of *damnum absque injuria*. The company has not wronged the plaintiff.<sup>17</sup> But where the United States erected dams in a

corporation may apply to the circuit court, etc., have no reference to the words "or damaged," in Const. Mo. art. 2 § 21, declaring that private property shall not be taken "or damaged" for public use without just compensation. The latter expression refers to real estate damaged by appropriation or the manipulation of property appropriated; and damages to personal property or business interests need not be compensated for in condemnation proceedings.

<sup>16</sup> *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713, 18 L. ed. 96; *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525; *Escanaba &c. Transp. Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. ed. 442; *Miller v. New York*, 109 U. S. 385, 3 Sup. Ct. 228, 27 L. ed. 971; *Cardwell v. Bridge Co.*, 113 U. S. 205, 5 Sup. Ct. 423, 28 L. ed. 959; *Hamilton v. Railroad*

*Co.*, 119 U. S. 280, 7 Sup. Ct. 206, 30 L. ed. 393; *Scranton v. Wheeler*, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. ed. 126; *Rogers v. Kennebec &c. R. Co.*, 35 Maine 319; *Gowen v. Penobscot R. Co.*, 44 Maine 140; *Brooks v. Improvement Co.*, 82 Maine 17, 19 Atl. 87, 7 L. R. A. 460, 17 Am. St. 459; *Frost v. Washington County R. Co.*, 96 Maine 76, 51 Atl. 806, 59 L. R. A. 68 and note, citing *Spring v. Russell*, 7 Maine 273.

<sup>17</sup> *Frost v. Washington Co. R. Co.*, 96 Maine 76, 51 Atl. 806, 59 L. R. A. 68 and note. See also as to wharfage and accretions in the case of navigable waters. *Hedges v. West Shore R. Co.*, 150 N. Y. 150, 44 N. E. 691, 55 Am. St. 660; *Chicago &c. R. Co. v. Porter*, 72 Iowa 426, 34 N. W. 286; *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. ed. 331; *Western Pac.*

river for the improvement of navigation, and in so doing turned a valuable rice plantation into an irreclaimable and valueless bog, it was held that it was a taking of property for which compensation must be made.<sup>18</sup>

**§ 1243 (981). Constitutional right to compensation does not extend to general damages.**—Where a property owner sustains no special injury but does sustain an injury in common with the public he can not, it is held, successfully invoke the protection of the constitutional provision giving compensation for private property taken for a public use. Injuries common in the community which result from the construction of a railroad, the construction of which is authorized by law, are general injuries and not special to the property owner, and the rule is that for such general injuries compensation can not be recovered in the absence of a statute authorizing their recovery.<sup>19</sup> There is difficulty in giving practical application to the rule, and it seems to us that some of the cases carry it entirely too far. The general rule unquestionably is that there is a right in a street, distinct from that

Ry. Co. v. Southern Pac. Co., 151 Fed. 376. And see as to removal or alteration of bridges over navigable streams, *United States v. Union Bridge Co.*, 143 Fed. 377; *United States v. Parkersburg Branch R. Co.*, 143 Fed. 224.

<sup>18</sup> *United States v. Lynah*, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. ed. 539. But compare cases cited in last preceding note, and also *Gibson v. United States*, 166 U. S. 269, 17 Sup. Ct. 578, 41 L. ed. 996.

<sup>19</sup> *Metropolitan West Side El. R. Co. v. Goll*, 100 Ill. App. 323; *Rigney v. Chicago*, 102 Ill. 64; *Chicago v. Union &c. Association*, 102 Ill. 379, 40 Am. Rep. 598; *Illinois Cent. R. Co. v. Trustees*, 212 Ill. 406, 72 N. E. 39; *Dantzer v. Indianapolis Union R. Co.*, 141 Ind. 604, 39 N. E. 223, 34 L. R. A. 769, 50 Am. St. 343;

*Grand Rapids &c. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306; *Buhl v. Fort St. &c. Depot Co.*, 98 Mich. 596, 608, 57 N. W. 829, 23 L. R. A. 392; *Ruckert v. Grand Ave. R. Co.*, 163 Mo. 260, 63 S. W. 814; *Nagel v. Lindell Ry. Co.*, 167 Mo. 89, 66 S. W. 1090; *Stockdale v. Rio Grande Western Ry. Co.*, 28 Utah 201, 77 Pac. 849; *Oregon Short Line R. Co. v. Fox*, 28 Utah 311, 78 Pac. 800; *Smith v. St. Paul &c. R. Co.*, 39 Wash. 355, 81 Pac. 840. See also *Coatsworth v. Lehigh Valley R. Co.*, 100 N. Y. S. 504; *De Lucca v. North Little Rock*, 142 Fed. 597; *Crofford v. Atlanta &c. R. Co.*, 158 Ala. 288, 48 So. 366; *Sioux City Seed Co. v. Detroit &c. R. Co.*, 184 Mich. 181, 150 N. W. 841; *Murphy v. Chicago &c. Ry. Co.*, 66 Wash. 663, 120 Pac. 525.

of the general public, which can not be taken from the abutting owner without compensation.<sup>20</sup> It is difficult to lay down general rules upon this subject for much depends upon the situation of the particular property and surrounding circumstances, but it will not do to broadly hold that there is no case where the vacation or closing of a street may not be such an injury as to entitle an adjoining owner to compensation. One court addressing itself on this subject has said: "The right of recovery exists where, for the benefit of the public, private property has been specially, even though lawfully damaged—that is, in a way not common to the public, and hence in excess of the damage sustained by the public generally; and such damage must be occasioned by a direct physical disturbance of a property right, of a character for which redress could have been had at the common law, if such disturbance had not been authorized by statutory enactment. It is not enough that the damage exceeds merely in amount that sustained by the public generally. It must be greater in kind—that is, greater by reason of its peculiar nature; for if only greater in degree no recovery can be had."<sup>21</sup>

<sup>20</sup> *Morgan v. Railroad Co.*, 96 U. S. 716, 24 L. ed. 743; *Imlay v. Union Branch &c. R. Co.*, 26 Conn. 249, 68 Am. Dec. 392; *Macon v. Franklin*, 12 Ga. 239; *Peoria v. Johnston*, 56 Ill. 45; *Haynes v. Thomas*, 7 Ind. 38; *Ross v. Thompson*, 78 Ind. 90; *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749; *Fossison v. Landry*, 123 Ind. 136, 24 N. E. 96; *Central Branch &c. R. Co. v. Andrews*, 41 Kans. 370, 21 Pac. 276; *Grand Rapids &c. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306, opinion by Cooley, J.; *Port Huron &c. R. Co. v. Voorhies*, 50 Mich. 506, 15 N. W. 882; *Chicago &c. R. Co. v. Hazels*, 26 Nebr. 364, 42 N. W. 93; *Johnston v. Old Colony R. Co.*, 18 R. I. 642, 29 Atl. 594, 49 Am. St. 800. See also *Powell v. Houston &c.*

*R. Co.*, 104 Tex. 219, 135 S. W. 1153, 46 L. R. A. (N. S.) 615; notes in 2 L. R. A. (N. S.) 269, 18 L. R. A. (N. S.) 268, and 30 L. R. A. (N. S.) 637. Injury caused to a country place by the fact that the railroad runs between it and a city is general and not special. *Little Rock &c. R. Co. v. Newman*, 73 Ark. 1, 83 S. W. 653.

<sup>21</sup> *Metropolitan West Side El. R. Co. v. Goll*, 100 Ill. App. 323; citing *East St. Louis v. O'Flynn*, 119 Ill. 200, 10 N. E. 395, 59 Am. Rep. 795; *Gilbert v. Greeley &c. R. Co.*, 13 Colo. 501, 22 Pac. 814; *Parker v. Catholic Bishop of Chicago*, 146 Ill. 158, 34 N. E. 473; *Chicago v. Burcky*, 158 Ill. 103, 42 N. E. 178, 29 L. R. A. 568, 49 Am. St. 142. See generally *Powell v. Houston &c. R. Co.*, 104 Tex. 219, 135 S. W.

§ 1244 (982). **Compensation must be made in money—Principle not violated by deducting special benefits.**—The inflexible rule is that compensation for property seized by virtue of the power of eminent domain must be made in money.<sup>22</sup> The rule that benefits may be deducted from the damages has been said to violate the principle that compensation must be made in money, but this, we venture to say, is a mistake. The legislature, it is true, has no power to prescribe that compensation shall be made in anything else than money,<sup>23</sup> but, if a land-owner suffers no loss he can not be said to be deprived of property, and if he receives benefits equal to the value of the land taken he suffers no loss. If the construction of a railroad enhances the value of lands not taken, then to the extent that such value is enhanced is the loss of the owner reduced. In allowing benefits to be considered the court simply ascertains the extent of the loss actually sustained by the land-owner and does not pay him compensation in benefits. It is obvious that on principle it is only special benefits that can be deducted since it is only such benefits that the land-owner secures as an individual, for a general benefit does not move to him in his character of an individual property owner.

1153, 46 L. R. A. (N. S.) 615, where many other cases are cited to the effect that there may be a right to damages even where the street is closed or obstructed although is not in front of the land-owner's premises, when the injury, is special.

<sup>22</sup> Fletcher v. Peck, 6 Cranch (U. S.) 87, 145, 3 L. ed. 162; Sanborn v. Belden, 51 Cal. 266; Burlington &c. R. Co. v. Schweikart, 10 Colo. 178, 14 Pac. 329; St. Louis &c. R. Co. v. Teters, 68 Ill. 144; State v. Beackmo, 8 Blkf. (Ind.) 246; Henry v. Dubuque &c. R., 2 Iowa 288; Commonwealth v. Peters, 2 Mass. 125; Toledo &c. R. Co. v. Munson, 57 Mich. 42, 23 N. W. 455, 20 Am.

& Eng. R. Cas. 410; Winona &c. R. Co. v. Waldron, 11 Minn. 515, 539, 88 Am. Dec. 100 and note; Brown v. Beatty, 34 Miss. 227, 241, 69 Am. Dec. 389; Brown v. Chicago &c. R. Co., 66 Nebr. 106, 92 N. W. 128; Butler v. Sewer Commissioners, 39 N. J. L. 665; Hill v. Mohawk &c. R. Co., 7 N. Y. 152; Central Ohio R. Co. v. Holler, 7 Ohio St. 220; Memphis v. Bolton, 9 Heisk. (Tenn.) 508; Chesapeake &c. R. Co. v. Patton, 6 W. Va. 147.

<sup>23</sup> Isom v. Mississippi &c. R. Co., 36 Miss. 300; Commonwealth v. Pittsburg &c. R. Co., 58 Pa. St. 26; Pennsylvania R. Co. v. Baltimore &c. R. Co., 60 Md. 263; Woodfolk v. Nashville &c. R. Co., 2 Swan.

§ 1245 (983). The measure of compensation is a judicial question.—The legislative department of government has no power to determine what shall be the measure of compensation. The legislature possesses no judicial power and hence can not decide what compensation shall be paid a property owner whose property has been seized under the right of eminent domain. "The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial."<sup>24</sup> What the legislature can not do directly it can not do by indirection; thus, it can not effectively declare that in assessing compensation certain elements which give value to the property seized shall be excluded from consideration.<sup>25</sup> While it is not competent for the legisla-

(Tenn.) 421; Elliott's Roads and Streets (3rd ed.) § 273. It is not within the power of a court to substitute the performance of some act as, for instance, the opening of a new highway, the grant of special privileges or the like for money. *Chicago &c. R. v. McGrew*, 104 Mo. 282, 15 S. W. 931; *Burlington &c. R. Co. v. Schweikart*, 10 Colo. 178, 14 Pac. 329. See *Thompson v. Grand Gulf &c. R. Co.*, 4 Miss. 240, 34 Am. Dec. 81; *Chicago &c. R. Co. v. Springfield &c. R. Co.*, 67 Ill. 142; *New Orleans &c. R. Co. v. Murrell*, 34 La. Ann. 536; *Hewett v. Commissioners*, 85 Maine 308, 27 Atl. 179; *Pennsylvania R. Co. v. Reichert*, 58 Md. 261; *Drury v. Midland R. Co.*, 127 Mass. 571; *Toledo &c. R. Co. v. Munson*, 57 Mich. 42, 23 N. W. 455; *Bloodgood v. Mohawk &c. R. Co.*, 18 Wend. (N. Y.) 9, 31 Am. Dec. 313 and note; *McArthur v. Kelly*, 5 Ohio 139; *Chesapeake &c. R. Co. v. Halstead*, 7 W. Va. 301.

<sup>24</sup> *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420,

571, 9 L. ed. 773; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. ed. 463; *Tripp v. Overocker*, 7 Colo. 72, 1 Pac. 695; *Rich v. Chicago*, 59 Ill. 286; *Pennsylvania R. Co. v. Baltimore &c. R. Co.*, 60 Md. 263; *Paul v. Detroit*, 32 Mich. 108; *Isom v. Mississippi &c. R. Co.*, 36 Miss. 300; *Vanhorne Lessee v. Dorrance*, 2 Dall. (Penn.) 304; *Lebanon School Dist. v. Lebanon &c. Seminary (Pa.)*, 12 Atl. 857; *Commonwealth v. Pittsburg &c. R. Co.*, 58 Pa. St. 26, 50. See generally *Hughes v. Todd*, 2 Duv. (Ky.) 188; *Cunningham v. Campbell*, 33 Ga. 625; *County Court v. Griswold*, 58 Mo. 175; *City of Kansas v. Baird*, 98 Mo. 215, 11 S. W. 243, 562; *People v. McDonald*, 69 N. Y. 362; *Kiser v. Board*, 85 Ohio St. 129, 97 N. E. 52, 39 L. R. A. (N. S.) 1029.

<sup>25</sup> *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. ed. 463. But see *Cambridge v. County Commissioners*, 117 Mass. 79.

ture to determine the measure of compensation, it is, nevertheless, competent for it to limit the aggregate amount that shall be expended.<sup>26</sup>

**§ 1246 (984). Right to compensation not lost by conditional grant.**—There can, of course, be no doubt that where there is an unconditional grant of a right of way the owner can not afterwards successfully prosecute proceedings to recover compensation or maintain an action for damages, but a different rule applies where there is a conditional grant and the conditions of the grant are not performed. Thus, where the grant is upon the express condition that the road shall be constructed within a designated time, and the condition is not performed and the road is built after the expiration of the time limited in the grant, the owner is entitled to compensation.<sup>27</sup> It was also held in the

<sup>26</sup> *Shoemaker v. United States*, 147 U. S. 282, 13 Sup. Ct. 361, 37 L. ed. 170.

<sup>27</sup> *Bredin v. Pittsburg &c. R. Co.*, 165 Pa. St. 262, 31 Atl. 39. A conveyance of part of a lot for railway purposes does not operate to release the railway company from damages for injury to another lot caused by the construction of an embankment. *Atchison &c. R. Co. v. Pratt*, 53 Ill. App. 263. See also *Baltimore &c. R. Co. v. Bouvier* 70 N. J. Eq. 158, 62 Atl. 868. In this case the court held that where a railroad company had entered on land under a right of way deed, in which it covenanted among other things to erect a passenger station and double-track its road for a certain distance, which conditions it failed to fulfill, the improvements made by such company on the land were not to be considered in determining, in condemnation proceedings thereafter instituted, the damages suffered by the vendor;

that in fixing the price of land conveyed to the railroad for right of way the benefit resulting to the landowner from improvements to be made by the railroad in the way of a passenger station and double tracks having been taken into consideration in fixing the compensation under the deed, the comparative value of the land with and without the advantages of such improvements was determinative of the abatement or allowance to the railroad company in fixing the price for the land conveyed; and that as it did not appear that any benefit would result to the vendor from such improvements, the road being distinctly one for the carriage of freight, a breach of such covenants by the railroad company did not debar it of equitable relief, in condemnation proceedings instituted by it after declaration of a forfeiture for the breach, with respect to the allowance to the vendor of compensation for improve-

case cited in the note that a recital of payment of damages did not take away the grantor's right to compensation for taking the land after the time limited for the construction of the road had expired. And it has been held that the purchase by railroad of an additional right of way for double tracking did not settle future damages for increased drainage onto land, made necessary by change of grade, where at the time of the transaction the land-owner did not know and could not reasonably have anticipated that such a change was contemplated.<sup>28</sup>

**§ 1247 (985). Time at which compensation is computed.—**

The general rule is that the land-owner is entitled to compensation for the value of his land at the date of the taking, and the fact that he has made improvements with the knowledge of the fact that it is proposed to build a railroad does not preclude him from claiming pay for such improvements,<sup>29</sup> at least where they

ments already made by such company on the land. But see *Leeds v. Camden &c. R. Co.*, 53 N. J. L. 229, 23 Atl. 168; *Trimmer v. Penn. &c. R. Co.*, 55 N. J. L. 46, 25 Atl. 932; *Briggs v. Railroad Co.*, 56 Kans. 526, 43 Pac. 1131.

<sup>28</sup> *Chicago &c. R. Co. v. Hoffman* (Ind. App.), 119 N. E. 169.

<sup>29</sup> *Sherwood v. St. Paul &c. R. Co.*, 21 Minn. 122; *State v. Carra-gan*, 36 N. J. L. 52; *Wall Street, In re*, 17 Barb. (N. Y.) 617; *Driver v. Western Union R. Co.*, 32 Wis. 569, 14 Am. Rep. 726; *Krier v. Milwaukee Northern R. Co.*, 139 Wis. 207, 120 N. W. 847. See also *Chicago &c. R. Co. v. Mogridge*, 116 Tenn. 445, 92 S. W. 1114; *McElroy v. Kansas City &c. R. Co.*, 172 Mo. 546, 72 S. W. 913; *Portland v. Lee Sam*, 7 Ore. 397; *Van Husen v. Omaha Bridge &c. R. Co.*, 118 Iowa 366, 92 N. W. 47. In *Driver v. Western Union R. Co.*, *supra*, it appeared that "plaintiff was noti-

fied by defendants that part of certain lands bought by him to erect buildings on would be taken by defendants for their railroad, and proceedings were commenced therefor, plaintiff, notwithstanding, erected his buildings, and defendants afterward took the land." The court said: "Upon the commissioners making and filing their report, and payment or legal tender of the appraisal to the owner, or upon the payment of the amount to the clerk of the court to which the appeal has been taken, title vests in the company. Now, the 7th of May (after the buildings were erected) was the time the commissioners made and filed their award, and when the company, by depositing the amount thereof with the clerk, acquired, under the charter, the right to lot seven, this, then, was the actual taking of the property for the use of the road, and the time to fix its value, not only

were made before the proceedings were commenced.<sup>30</sup> But he certainly can not make such improvements after the taking and obtain compensation therefor, and some courts hold that he can not do so where he makes them in bad faith after the commencement of the proceedings.<sup>31</sup> The authorities differ as to when the taking is complete, the question depending in a great measure upon the peculiarities of different state laws authorizing the condemnation of property for railroad purposes. In states where the payment of compensation is required to precede the taking, the date of the award of appraisers by which is determined the value to be paid before entry,<sup>32</sup> or the date of

within the intent of the charter, but upon general principles applicable to these cases." The first four or five other cases cited in this note also allow compensation even though the improvements were made after condemnation proceedings were begun. But in *Shick v. Pennsylvania R. Co.*, 1 Pears. (Pa.) 264, 1 Legal Gazette 61, it was held that an improvement, erected by the owner, on the property, in order to prevent its being taken for public use was not a proper subject for compensation where the company began proceedings, filed a bond and obtained an appraisal in good faith, and afterwards all the proceedings were set aside by the court, except the bond. See to the same effect *Cobb v. Boston*, 109 Mass. 438. And compare also *Re New York*, 196 N. Y. 255, 89 N. E. 814, 36 L. R. A. (N. S.) 273.

<sup>30</sup> *Jones v. New Orleans &c. R. Co.*, 70 Ala. 227; *Chicago &c. R. Co. v. Catholic Bishop*, 119 Ill. 525, 10 N. E. 372; *In re Forbes St.*, 70 Pa. St. 125; *In re South Twelfth St.*, 217 Pa. 362, 66 Atl. 568; *Morris v. Colman County* (Tex. Civ. App.),

28 S. W. 380. In most of these cases it was held that compensation could not be recovered because the improvements were made too late. See also *Cobb v. Boston*, 109 Mass. 438; *Foster v. Scott*, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A. (N. S.) 543 and note.

<sup>31</sup> *Re Hawkstone St.*, 137 App. Div. 630, 122 N. Y. S. 316, *affd.* in 199 N. Y. 567, 93 N. E. 377; *Lloyd v. Fair Haven*, 67 Vt. 167, 31 Atl. 164. See also *Re New York*, 196 N. Y. 255, 89 N. E. 814, 36 L. R. A. (N. S.) 273, and cases cited in last preceding note. If after the assessment there is a change in plan resulting in further injury to the property a right of action is held to exist for the additional injury caused by the alteration. *Otis Elevator Co. v. Chicago*, 263 Ill. 419, 105 N. E. 338, 52 L. R. A. (N. S.) 192.

<sup>32</sup> *Jones v. New Orleans &c. R. Co.*, 70 Ala. 227; *Logansport &c. R. Co. v. Buchanan*, 52 Ind. 163; *Lafayette &c. R. Co. v. Murdock*, 68 Ind. 137; *Hampden &c. Co. v. Springfield &c. R. Co.*, 124 Mass. 118; *Blue Earth v. St. Paul &c. R. Co.*, 28 Minn. 503, 11 N. W. 73; *Morin*



approval of this award by the court, where such approval is necessary to its validity,<sup>33</sup> is generally held to be the time to which the assessment of damages must relate. Since there can be no constitutional taking of property until after an assessment of damages to be paid or tendered, this holding seems correct upon principle,<sup>34</sup> though there are cases in apparent conflict with it.<sup>35</sup> But in states where the compensation does not necessarily precede the taking, it has been variously held that the time of

v. St. Paul &c. R. Co., 30 Minn. 100, 14 N. W. 460; Pennsylvania R. Co. v. First German Lutheran Congregation, 53 Pa. St. 445; Stafford v. Providence, 10 R. I. 567, 14 Am. Rep. 710; Driver v. Western Union R. Co., 32 Wis. 569, 14 Am. Rep. 726; Lyon v. Green Bay &c. R. Co., 42 Wis. 538; West v. Milwaukee &c. R. Co., 56 Wis. 318, 14 N. W. 292. See also Georgia Southern R. Co. v. Small, 87 Ga. 355, 13 S. E. 515; and see and compare Ft. Wayne &c. Tract. Co. v. Ft. Wayne &c. R. Co. (Ind.), 80 N. E. 837; Kansas City So. Ry. Co. v. Second St. Imp. Co., 256 Mo. 386, 166 S. W. 296; Buckhannon &c. R. Co. v. Great Scott Coal &c. Co., 75 W. Va. 433, 83 S. E. 1031. And the fact that the case is retried de novo on appeal does not extend the time, but damages, must, in such a case, be assessed as of the date of the original award. Lafayette &c. R. Co. v. Murdock, 68 Ind. 137; Logansport &c. R. Co. v. Buchanan, 52 Ind. 163. In Arnold v. Covington &c. Bridge Co., 1 Duv. (Ky.) 372, the court held that the assessment should be as of the date of the trial on appeal, but where, as is usually the case, the railroad company is entitled to take the land upon payment or tender of the ori-

ginal award, the date when it was made would clearly be the date of the taking.

<sup>33</sup> Hudson River R. Co. v. Outwater, 3 Sand. (N. Y.) 689; Beale v. Pennsylvania R. Co., 86 Pa. St. 509; Neal v. Pittsburg &c. R. Co., 31 Pa. St. 19; St. Joseph &c. R. Co. v. Orr, 8 Kans. 419.

<sup>34</sup> The value, according to the constitutional requirement, must be ascertained at the time of making the assessment, for, up to the moment of making the assessment the land, or its equivalent value, belongs to the owner, and it is not subject to be taken for public use until the compensation has been first made; the owner is, therefore, entitled to receive its market value at the time. California S. R. Co. v. Colton &c. Co. (Cal.), 2 Pac. 38, 14 Am. & Eng. R. Cas. 194, affirmed on authority of California S. R. Co. v. Kimball, 61 Cal. 90. See 65 Cal. xix; Bensley v. Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575.

<sup>35</sup> Oregon &c. R. Co. v. Barlow, 3 Ore. 311. See Logansport &c. R. Co. v. Buchanan, 52 Ind. 163; Lafayette &c. R. Co. v. Murdock, 68 Ind. 137; Ft. Wayne &c. Tract. Co. v. Ft. Wayne &c. R. Co., 170 Ind. 49, 83 N. E. 665, 16 L. R. A. (N.

filing the location and map of the proposed route,<sup>36</sup> or the time of filing the bond to pay the damages,<sup>37</sup> or the time of bringing the action for condemnation by filing a petition for the assessment of damages,<sup>38</sup> is the time when the property is taken. In cases where the road has been constructed under a parol agreement with the owner, or under proceedings instituted in good faith, but afterwards held invalid, the time of the actual entry

S.) 537. In the case first cited the court held that the time of beginning proceedings to condemn was the time for which the assessment of damages should be made.

<sup>36</sup> *Whitman v. Boston &c. R. Co.*, 7 Allen (Mass.) 313; *Hazen v. Boston &c. R. Co.*, 2 Gray (Mass.) 574; *Charleston Branch R. Co. v. County Commissioners*, 7 Metc. (Mass.) 78; *Hampden &c. Co. v. Springfield &c. R. Co.*, 124 Mass. 118; *Old Colony R. Co. v. Miller*, 125 Mass. 1, 28 Am. Rep. 194; *Morris &c. R. Co. v. Blair*, 9 N. J. Eq. 635.

<sup>37</sup> *Schonhardt v. Pennsylvania R. Co.*, 216 Pa. 224, 65 Atl. 543.

<sup>38</sup> *South Park Comrs. v. Dunlevy*, 91 Ill. 49; *Dupuis v. Chicago &c. R. Co.*, 115 Ill. 97, 3 N. E. 720; *Chicago &c. R. Co. v. Mines*, 221 Ill. 448, 77 N. E. 898; *Missouri Pac. R. Co. v. Hays*, 15 Nebr. 224, 18 N. W. 51; *Northeastern &c. R. Co. v. Frazier*, 25 Nebr. 53, 40 N. W. 609; *Newport News &c. Electric Co. v. Lake*, 105 Va. 311, 54 S. E. 328. In *Missouri Pac. R. Co. v. Hays*, *supra*, the court says: "On the part of the plaintiff it was contended on the trial, and is here, that the assessment should be made as of the time when the proceedings to condemn the property are instituted; in other words, when

the petition for the appointment of commissioners to assess the damages is filed with the county judge. The court below, however, held that the jury should make the assessment as of the date of the filing of the commissioners' report, which was something over two months later. There was evidence tending to show that during this time the market value of the land had materially advanced in consequence of the location of the road. The authorities seem to agree pretty generally that the damages in such cases must be assessed as of the time of taking; also that the increased value given to the property by the location of the road should be excluded in making the estimate. The point of chief difficulty, however, seems to be found in determining as to just what constitutes a 'taking' within the meaning of the law." After reviewing the cases of *Charlestown Branch R. Co. v. County Commissioners*, 7 Metc. (Mass.) 78; *Logansport &c. R. Co. v. Buchanan*, 52 Ind. 163; *Lafayette &c. R. Co. v. Murdock*, 68 Ind. 137, and *South Park Commissioners v. Dunlevy*, 91 Ill. 49, the opinion continues: "The principle of these decisions, which requires compensation for property taken for public use to be esti-

upon the land for the purpose of building the road has been held to be the time to which an assessment of the land-owner's damages must relate.<sup>39</sup>

§ 1248 (986). **Time of payment of compensation.**—Where the question is not controlled by statute the rule seems to be that the payment of compensation must precede the actual occupancy of the land.<sup>40</sup> It is well settled that a preliminary survey may be made before payment of compensation, and, indeed, without com-

mated with special reference to its value at the time of the appropriation or taking, is manifestly just to all concerned. By no other rule, in cases of condemnations for uses of great public interest and local benefit, could the valuation of property in the assessment of damages be so successfully guarded against the influence of enhanced values resulting specially from the enterprise." *Scranton v. Wheeler*, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. ed. 126.

<sup>39</sup> *New York &c. R. Co. v. Stanley*, 35 N. J. Eq. 283; *Indiana Central R. Co. v. Hunter*, 8 Ind. 74; *Logansport &c. R. Co. v. Buchanan*, 52 Ind. 163. But compare *Cridder v. Pittsburgh &c. Ry. Co.*, 54 Pa. Super. Ct. 587. See post, § 1269. See also *McElroy v. Kansas City &c. Line*, 172 Mo. 546, 72 S. W. 913.

<sup>40</sup> *Cherokee Nation v. Southern Kansas &c. R. Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. ed. 295; *Schreiber v. Chicago &c. R. Co.*, 115 Ill. 340, 3 N. E. 427; *Chicago &c. R. Co. v. Gates*, 120 Ill. 86, 11 N. E. 527; *Covington &c. R. Co. v. Piel*, 87 Ky. 267, 8 S. W. 449; *Redman v. Philadelphia &c. R. Co.*, 33 N. J. Eq. 165. See *Memphis*

*&c. R. Co. v. Payne*, 37 Miss. 700; *Henry v. Dubuque &c. R. Co.*, 10 Iowa 540; *Walther v. Warner*, 25 Mo. 277; *Presbyterian Society v. Auburn &c. R. Co.*, 3 Hill (N. Y.) 567; *Williams v. New York &c. R. Co.*, 16 N. Y. 97, 69 Am. Dec. 651 and note; *Oregonian R. Co. v. Hill*, 9 Ore. 377. See generally *Martin v. Tyler*, 4 N. Dak. 278, 60 N. W. 392, 25 L. R. A. 838; *Atlanta &c. R. Co. v. Southern R. Co.*, 131 Fed. 657; *Jones v. New Orleans &c. R. Co.*, 70 Ala. 227; *Southern R. Co. v. Birmingham &c. R. Co.*, 130 Ala. 660, 31 So. 509; *Steele v. Tanana Mines R. Co.*, 2 Alaska 451; *Little Rock &c. R. Co. v. Greer*, 77 Ark. 387, 96 S. W. 129; *San Francisco &c. R. Co. v. Mahoney*, 29 Cal. 112; *St. Louis &c. R. Co. v. Clark*, 119 Mo. 357, 24 S. W. 157; *Sweeney v. Montana Central R. Co.*, 25 Mont. 543, 65 Pac. 912; *Brown v. Chicago &c. R. Co.*, 64 Nebr. 62, 89 N. W. 405; *Chicago &c. R. Co. v. Douglass Co. (Nebr.)*, 95 N. W. 339; *Orr v. Quimby*, 54 N. H. 590; *Johnson v. Baltimore &c. R. Co.*, 45 N. J. Eq. 454, 17 Atl. 574, 39 Am. & Eng. R. Cas. 101; *State v. Wells (N. Car.)*, 55 S. E. 210; *Postal Tel. Co. v. Oregon Short Line R. Co.*, 23 Utah 474, 65 Pac. 735; *Southern R.*

pensation, for a preliminary survey is not regarded as a taking,<sup>41</sup> but if jury is wrongfully inflicted in making such survey an action will lie. Possession may be taken, in some instances, before compensation is actually paid, as for instance, where money is paid into court in appropriation proceedings under a statute authorizing such a procedure, but while possession may be taken the title does not pass in most jurisdictions until payment of the compensation awarded by the court.<sup>42</sup> Thus, it is held in Nebraska that the deposit money with the county judge pending condemnation proceedings does not, unless withdrawn by the property owner, discharge the obligation of the railroad company to make compensation for the property taken. And in the case cited the court said: "It is not competent for either the legislature or the courts to appoint some person without his consent, and to say that payment or deposit with such appointee shall be

Co. v. Gregg, 101 Va. 308, 43 S. E. 570; *Sherman v. Milwaukee &c. R. Co.*, 40 Wis. 645; *Stolz v. Milwaukee &c. R. Co.*, 113 Wis. 44, 88 N. W. 919, 90 Am. St. 833. Where payment is made into court the company is generally entitled to possession. *State v. McHatton*, 15 Mont. 159, 38 Pac. 711. But see *Pennsylvania R. Co. v. National &c. Co.*, 53 N. J. Eq. 178, 32 Atl. 220.

<sup>41</sup> *California &c. R. Co. v. Central &c. R. Co.*, 47 Cal. 528; *Chambers v. Cincinnati &c. R. Co.*, 69 Ga. 320, 10 Am. & Eng. R. Cas. 376; *Burrow v. Terre Haute &c. R. Co.*, 107 Ind. 432, 8 N. E. 167; *Chicago &c. R. Co. v. Watkins*, 43 Kans. 50, 22 Pac. 985; *Nichols v. Somerset &c. R. Co.*, 43 Maine 356; *Republican &c. R. Co. v. Fink*, 18 Nebr. 82, 24 N. W. 439; *Ask v. Cummings*, 50 N. H. 591; *Orr v. Quimby*, 54 N. H. 590; *Lyon v. Green Bay &c. Co.*, 42 Wis. 538; ante, §§ 1134, 1233. See also At-

lanta &c. R. Co. v. Southern R. Co., 131 Fed. 657.

<sup>42</sup> *Lake Erie &c. R. Co. v. Kinsey*, 8 Ind. 514, 14 Am. & Eng. R. Cas. 309; *Blackshire v. Atchison &c. R. Co.*, 13 Kans. 514; *Harness v. Chesapeake &c. R. Co.*, 1 Md. Ch. 248; *Evans v. Missouri &c. R. Co.*, 64 Mo. 453; *Green v. Missouri Pac. R. Co.*, 82 Mo. 653; *Manchester &c. R. Co. v. Keene*, 62 N. H. 81, *State v. Wells*, 142 N. Car. 590, 55 S. E. 210; *Davidson v. Texas &c. R. Co.*, 29 Tex. Civ. App. 54, 67 S. W. 1093; *Southern R. Co. v. Gregg*, 101 Va. 308, 43 S. E. 570. See also note to *Ft. Wayne &c. Trac. Co. v. Ft. Wayne &c. R. Co.*, 170 Ind. 49, 83 N. E. 665, 16 L. R. A. (N. S.) 537, citing additional authorities and reviewing many cases. But see *Old Colony R. Co. v. Miller*, 125 Mass. 1, 28 Am. Rep. 194; *Davis v. Russell*, 47 Maine 443; *Wallace v. New Castle &c. R. Co.*, 138 Pa. St. 168, 22 Atl. 95; *Paducah &c. R. Co. v. Miller*, 12

equivalent to payment to him. If the statute expressly so provided or was susceptible of that construction, it would be unconstitutional and void."<sup>43</sup>

§ 1249 (987). **Benefits—General survey of the subject.**—It is obvious that there must be a difference in respect to benefits in cases where land is taken for streets or highways, and cases where land is taken for a railroad, since the owner of the fee of land taken for a street or highway retains a beneficial interest in the use and enjoyment of the public way,<sup>44</sup> whereas, in the case of the appropriation of land for railroad purposes, the right to the use and possession of the land acquired by the railroad company is generally exclusive.<sup>45</sup> The exclusive right acquired by a railroad company to the land appropriated excludes the use of it by the owner for the purposes of traveling thereon, whereas an urban street or rural highway affords facilities for travel. But while there is a difference in the nature of the easement acquired, the authorities lay down much the same general rules in regard to the consideration of benefits for both classes of cases. Where there is no statute to the contrary the doctrine supported by the weight of authority is that special benefits resulting from the construction and operation of the railroad

Heisk. (Tenn.) 1. So, it is held in some jurisdictions where there is no constitutional provision to the contrary and adequate provision is made by statute it may authorize an entry before payment. *Carolina Cent. R. Co. v. McCaskill*, 94 N. Car. 746; *Northern Pac. R. Co. v. Burlington & C. R. Co.*, 4 Fed. 298; *Cairo & C. R. Co. v. Turner*, 31 Ark. 494, 25 Am. Rep. 564; *State v. Jacksonville & C. R. Co.*, 20 Fla. 616, and other cases cited in 10 Am. & Eng. Ency. of Law (2d ed.), 1139, 1140. But see *Steinhart v. Superior Court*, 137 Cal. 575, 70 Pac. 629, 59 L. R. A. 404, 92 Am. St. 183. So, a tender may be sufficient.

<sup>43</sup> *Brown v. Chicago & C. R. Co.*, 64 Nebr. 62, 89 N. W. 405.

<sup>44</sup> *Elliott Roads and Streets* (3rd ed.), §§ 876, 891.

<sup>45</sup> *Atlantic & C. Co. v. Chicago & C. R. Co.*, 6 Biss. (U. S.) 158, Fed. Cas. No. 632; *Cairo & C. R. Co. v. Brevoort*, 62 Fed. 129, 136, 25 L. R. A. 527 and note; *Hayden v. Skillings*, 78 Maine 413, 6 Atl. 830; *Brinard v. Clapp*, 10 Cush. (Mass.) 6, 57 Am. Dec. 74; *Hazen v. Boston & C. R. Co.*, 2 Gray (Mass.) 574; *Proprietors & C. v. Nashua & C. R. Co.*, 104 Mass. 1, 6 Am. Rep. 181; *Jackson v. Rutland & C. R. Co.*, 25 Vt. 150, 60 Am. Dec. 246; *Connecticut & C. R. Co. v. Holton*, 32 Vt. 43.

may be taken into consideration in estimating compensation,<sup>46</sup> but there is conflict of authority on this point.<sup>47</sup> In many of the states the constitution or the statute excludes benefits from consideration, and, of course, in those states benefits can not be considered, although they may be special and substantial.<sup>48</sup> Some of the state constitutions use the term "just compensation," and

<sup>46</sup> *San Francisco &c. Co. v. Caldwell*, 31 Cal. 367; *Moran v. Ross*, 79 Cal. 549, 21 Pac. 958; *Whiteman v. Wilmington &c. R. Co.*, 2 Harr. (Del.) 514, 33 Am. Dec. 411; *Atlanta v. Central &c. R. Co.*, 53 Ga. 120; *Alton &c. R. Co. v. Carpenter*, 14 Ill. 190; *Todd v. Kankakee &c. R. Co.*, 78 Ill. 530; *Indiana Central R. Co. v. Hunter*, 8 Ind. 74; *New Orleans &c. R. Co. v. Lagarde*, 10 La. Ann. 150; *Vicksburg &c. R. Co. v. Calderwood*, 15 La. Ann. 481; *Meacham v. Fitchburg &c. R. Co.*, 4 Cush. (Mass.) 291; *Winona &c. R. Co. v. Waldron*, 11 Minn. 515, 88 Am. Dec. 100 and note; *Wyandotte &c. Co. v. Waldo*, 70 Mo. 629; *Ragan v. Kansas City &c. R. Co.*, 111 Mo. 456, 20 S. W. 234; *Fremont &c. R. Co. v. Whalen*, 11 Nebr. 585, 10 N. W. 491; *Kings Co. R. Co.*, In re, 58 Hun 608, 12 N. Y. S. 198; *Haislip v. Wilmington &c. R. Co.*, 102 N. Car. 376, 8 S. E. 926; *Kramer v. Cleveland &c. R. Co.*, 5 Ohio St. 140; *Columbus &c. R. Co. v. Simpson*, 5 Ohio St. 251; *Symonds v. Cincinnati &c. R. Co.*, 14 Ohio 147, 45 Am. Dec. 529 and note; *Pennsylvania R. Co. v. Heister*, 8 Pa. St. 445; *Delaware &c. Co. v. Burson*, 61 Pa. St. 369; *Long v. Harrisburgh &c. Co.*, 126 Pa. St. 143, 19 Atl. 39; *Holton v. Milwaukee &c. R. Co.*, 31 Wis. 27; *Neilson v. Chicago &c. R. Co.*, 58 Wis. 516,

17 N. W. 310. See also *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. ed. 270; *Pittsburg &c. R. Co. v. Wolcott*, 162 Ind. 399, 69 N. E. 451; *Terre Haute &c. R. Co. v. Flora*, 29 Ind. App. 442, 64 N. E. 648, 650; *Abney v. Texarkana &c. R. Co.*, 105 La. 446, 29 So. 890; *Cox v. Philadelphia &c. R. Co.*, 215 Pa. 506, 64 Atl. 729; *Bramlet v. Greenville*, 88 S. Car. 110, 70 S. E. 450. The various distinctions made and the different lines of cases are considered in the next section.

<sup>47</sup> *Alabama &c. R. Co. v. Burkett*, 42 Ala. 83; *St. Louis &c. R. Co. v. Anderson*, 39 Ark. 167, 17 Am. & Eng. R. Cas. 97; *Koestebader v. Peirce*, 41 Iowa 204; *Asher v. Louisville &c. R. Co.*, 87 Ky. 391, 8 S. W. 854; *Brown v. Beatty*, 34 Miss. 227, 60 Am. Dec. 389; *New Orleans &c. R. Co. v. Moye*, 39 Miss. 374; *Virginia &c. R. Co. v. Lovejoy*, 8 Nev. 100; *Packard v. Bergen &c. R. Co.*, 54 N. J. L. 229, 23 Atl. 722. See also *Murphy &c. R. Co.*, 66 Wash. 663, 120 Pac. 525.

<sup>48</sup> *Britton v. Des Moines &c. R. Co.*, 59 Iowa 540, 13 N. W. 710; *Ham v. Wisconsin &c. R. Co.*, 61 Iowa 716, 17 N. W. 157; *St. Joseph &c. R. Co. v. Orr*, 8 Kans. 419; *Atchison &c. R. Co. v. Blackshire*, 10 Kans. 477; *Reisner v. Atchison &c. R. Co.*, 27 Kans. 382; *Giesy v. Cincinnati &c. R. Co.*, 4 Ohio St.

there is great diversity of opinion as to the meaning and effect to be assigned to the term. Some of the cases affirm that it excludes benefits from consideration, others assert a contrary doctrine, and still others that it excludes the consideration of benefits as a deduction from the value of the land actually appropriated, but not as to damages for land injured but not actually taken.<sup>49</sup> We can see no sufficient reason for holding that the term "just" adds such force as to exclude the consideration of special or peculiar benefits, for if the land-owner's property is enhanced in value to that extent there is just compensation. It seems to us that all that is required under any law, except one directly excluding a consideration of benefits, is that the land-owner shall receive fair and reasonable compensation for the injury he sustains, and that in ascertaining the extent of his injury, special but not general benefits should be taken into consideration.<sup>50</sup> The matter of benefits, however, may be made the

308; Little Miami &c. R. Co. v. Collett, 6 Ohio St. 182; Cincinnati &c. R. Co. v. Longworth, 30 Ohio St. 108; Bowen v. Atlantic &c. R. Co., 17 S. Car. 574. See Grand Rapids &c. R. Co. v. Horn, 41 Ind. 479; McMahon v. Cincinnati &c. R. Co., 5 Ind. 413; White Water Valley R. Co. v. McClure, 29 Ind. 536; Brown v. Beatty, 34 Miss. 227, 241, 69 Am. Dec. 389; Isom v. Mississippi &c. R. Co., 36 Miss. 300; New Orleans &c. R. Co. v. Moye, 39 Miss. 374; Board of Levee Commissioners v. Harkleroads, 62 Miss. 807; Swayze v. New Jersey Midland R. Co., 36 N. J. L. 295; Crater v. Fritts, 44 N. J. L. 374; Bevier v. Dillingham, 18 Wis. 529. But see Balfour v. Louisville &c. R. Co., 62 Miss. 508. See Beveridge v. Lewis, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 59 L. R. A. 581.

<sup>49</sup> Laffin v. Chicago &c. R. Co., 33 Fed. 415; Dolores &c. Co. v. Hartman, 17 Colo. 138, 29 Pac. 378;

Savannah v. Hartridge, 37 Ga. 113; Elizabethtown &c. R. v. Helm, 8 Bush. (Ky.) 681; Louisville &c. R. Co. v. Thompson, 18 B. Mon. (Ky.) 735; Bangor &c. R. Co. v. McComb, 60 Maine 290; Shipley v. Baltimore &c. R. Co., 34 Md. 336; Brown v. Beatty, 34 Miss. 227, 69 Am. Dec. 389; Isom v. Mississippi &c. R. Co., 36 Miss. 300; Newman v. Metropolitan &c. R. Co., 118 N. Y. 618, 23 N. E. 901, 7 L. R. A. 289 and note; Oregon &c. R. Co. v. Wait, 3 Ore. 91; Paducah &c. R. Co. v. Stovall, 12 Heisk. (Tenn.) 1; Paris v. Mason, 37 Tex. 447; Milwaukee &c. R. Co. v. Eble, 4 Chand. (Wis.) 72; Munkwitz v. Chicago &c. R. Co., 64 Wis. 403, 25 N. W. 438, 22 Am. & Eng. R. Cas. 151; Washburn v. Milwaukee &c. R. Co., 59 Wis. 364, 18 N. W. 328. See also Oil Belt R. Co. v. Lewis, 259 Ill. 108, 102 N. E. 228.

<sup>50</sup> Monongahela Nav. Co. v. United States, 148 U. S. 312, 13

subject of a contract between the parties. In one case where a railroad company contracted with the property owner that on payment of a bonus it should have license to construct its railroad in advance of condemnation proceedings and that on these proceedings the property owner was to be paid the value of the property taken, the contract was construed to exclude consideration of special benefits and the land-owner was entitled to the entire value of his land without diminution.<sup>51</sup>

§ 1250 (988). **Benefits—Different lines of decision.**—It will be found upon a study of the authorities that where the subject is not controlled by peculiar constitutional or statutory provisions there are or have been four general lines of cases.<sup>52</sup> (1) Those holding that benefits can not in any case be set off against the damages.<sup>53</sup> (2) Those holding that special benefits may not

Sup. Ct. 622, 37 L. ed. 463; Pittsburgh &c. R. Co. v. Rose, 74 Pa. St. 362. See also Brand v. Union Elevated R. Co., 258 Ill. 133, 101 N. E. 247, Ann. Cas. 1914B, and note. And as to Kansas constitution applying to right of way but not to condemnation for depots or the like when no part of the right of way, see Smith v. Missouri Pac. R. Co., 90 Kans. 757, 136 Pac. 253. As to what is not a special benefit, see Illinois &c. R. Co. v. Borms, 219 Ill. 179, 76 N. E. 149.

<sup>51</sup> McElroy v. Kansas City &c. R. Co., 172 Mo. 546, 72 S. W. 913.

<sup>52</sup> Elliott Roads and Streets (3rd ed.), § 276. We use the term incidental injuries in this immediate connection as meaning injuries to the property not actually taken. Mr. Lewis in his work on Eminent Domain divides them into five classes, mentioning the states in each class, as shown in a recent New York decision, but as the court shows the classification is

not entirely correct although it is approximately so. In re Water Front, 190 N. Y. 350, 83 N. E. 299, 301, 16 L. R. A. (N. S.) 335. The cases are also classified and reviewed in notes in 8 L. R. A. (N. S.) 794 and L. R. A. 1918A, 884, et seq.

<sup>53</sup> Brown v. Beatty, 34 Miss. 227, 69 Am. Dec. 389; Isom v. Mississippi R. Co., 36 Miss. 300; New Orleans &c. R. Co. v. Moye, 39 Miss. 374. See also Texas &c. R. Co. v. Matthews, 60 Tex. 215; Jones v. Wills Valley R. Co., 30 Ga. 43; Selma &c. R. Co. v. Keith, 53 Ga. 178; Sutton's Heirs v. Louisville, 5 Dana (Ky.) 28; Elizabethtown &c. R. Co. v. Helm's Heirs, 8 Bush. (Ky.) 681; Louisville &c. R. Co. v. Thompson, 18 B. Mon. (Ky.) 735; New Orleans Pac. R. Co. v. Murrell, 36 La. Ann. 344; Vicksburgh &c. R. Co. v. Dillard, 35 La. Ann. 1045; Buffalo Bayou &c. R. Co. v. Ferris, 26 Tex. 586. But this rule does not now



be set off against the value of the land actually seized, but may be set off against incidental injuries sustained by the landowner.<sup>54</sup> (3) Those holding that special benefits may be set off against the value of the land taken as well as against incidental injuries.<sup>55</sup> (4) Those holding that all benefits both general and special may be set off against the damages. Our opinion is that special, but not general benefits may be deducted from the dam-

obtain in all these jurisdictions at least as to all classes of corporations, and is the result, mainly, of constitutional or statutory provision. See even in Mississippi, where the rule seems to have been most pronounced, *Meridian v. Higgins*, 81 Miss. 376, 33 So. 1.

<sup>54</sup> *Alabama &c. Co. v. Burket*, 42 Ala. 83; *Savannah v. Hartridge*, 37 Ga. 113; *Israel v. Jewett*, 29 Iowa 475; *Memphis v. Bolton*, 9 Heisk. (Tenn.) 508; *Woodfolk v. Nashville &c. R. Co.*, 2 Swan (Tenn.) 422; *Elliott Roads and Streets* (3rd ed.), § 276. See also *Chicago &c. R. Co. v. Rottgering*, 26 Ky. L. 1167, 83 S. W. 584; *Peoria &c. Trac. Co. v. Vance*, 225 Ill. 270, 80 N. E. 134, 9 L. R. A. (N. S.) 781; *East Side Levee &c. Dist. v. Alton &c. R. Co.*, 281 Ill. 372, 118 N. E. 26; *In re Water Front*, 190 N. Y. 350, 83 N. E. 299, 16 L. R. A. (N. S.) 335 (apparently adopting this rule and holding that in any event an award can not be made for less than the value of the property actually taken); *Guthrie &c. R. Co. v. Faulkner*, 12 Okla. 532, 73 Pac. 290; *Taber v. New York &c. R. Co.*, 28 R. I. 269, 67 Atl. 9; *Wray v. Knoxville &c. R. Co.*, 113 Tenn. 544, 82 S. W. 471; *Morrison v. Fairmount &c. Traction Co.*, 60 W. Va. 441, 55 S. E. 669.

<sup>55</sup> *San Francisco &c. R. Co. v. Caldwell*, 31 Cal. 367; *Pueblo &c. R. Co. v. Rudd*, 5 Colo. 270; *McIntire v. State*, 5 Blackf. (Ind.) 384; *Heath v. Sheetz*, 164 Ind. 665, 74 N. E. 505; *Pittsburgh &c. R. Co. v. Wolcott*, 162 Ind. 399, 69 N. E. 451; *Wyandotte &c. R. Co. v. Waldo*, 70 Mo. 629; *Adden v. White Mt. R. Co.*, 55 N. H. 413, 20 Am. Rep. 220; *Swayze v. New Jersey &c. R. Co.*, 36 N. J. L. 299; *Symonds v. Cincinnati*, 14 Ohio 147, 45 Am. Dec. 529; *Putnam v. Douglass Co.*, 6 Ore. 328, 25 Am. Rep. 527; *Hornstein v. Atlantic &c. R. Co.*, 51 Pa. St. 87; *Roots' Case*, 77 Pa. St. 276; *Greenville &c. R. Co. v. Partlow*, 5 Rich. (S. Car.) 428; *Adams v. St. Johnsbury &c. R. Co.*, 57 Vt. 240. See also *Mississippi &c. R. Co. v. McDonald*, 12 Heisk. (Tenn.) 54; *Keithsburg &c. R. Co. v. Henry*, 79 Ill. 290; *St. Louis &c. R. Co. v. Kirby*, 104 Ill. 345; *Tide Water Canal Co. v. Archer*, 9 Gill & J. (Md.) 479; *Shipley v. Baltimore &c. R. Co.*, 34 Md. 336; *Fremont &c. R. Co. v. Whalen*, 11 Nebr. 585, 10 N. W. 491; *Allaire v. Woonsocket*, 25 R. I. 414, 56 Atl. 262, 263 (citing *Elliott Roads and Sts.*, § 275); *East Tennessee &c. R. Co. v. Love*, 3 Head (Tenn.) 63; *James River &c. Co. v. Turner*, 9 Leigh (Va.) 313; *Railroad Com-*

ages.<sup>56</sup> There are now few if any jurisdictions in which it is held that in no case can any benefits be set off or considered.

§ 1251 (989). **Benefits—General and special.**—As indicated in the preceding section there is much conflict of opinion upon the subject of allowing a deduction of benefits, and there are cases which deny that there is a distinction between general and special benefits. We think there is a clear distinction between the two kinds of benefits and that the distinction rests upon an essential difference in the two classes of cases. Where the construction of a railroad adds increased value to the land of an individual different in its nature from the benefit to the general community he receives a special benefit which lessens his injury or loss, so that he really sustains no injury or loss except that which is above and beyond the amount of the peculiar benefit which the construction of the railroad confers upon him by enhancing the value of that part of his land which is not appropriated. But where the land-owner reaps no advantage peculiar to himself but only such as is shared by the community at large,

pany v. Tyree, 7 W. Va. 693; Railroad Co. v. Foreman, 24 W. Va. 662; Robbins v. Milwaukee &c. R. Co., 6 Wis. 636; Driver v. Western Union R. Co., 32 Wis. 569, 14 Am. Rep. 726; Washburn v. Milwaukee &c. R. Co., 59 Wis. 364, 18 N. W. 328.

<sup>56</sup> Laffin v. Chicago &c. R. Co., 33 Fed. 415; Pueblo &c. R. Co. v. Rudd, 5 Colo. 270, 10 Am. & Eng. R. Cas. 404; Chicago &c. R. Co. v. Blake, 116 Ill. 163, 4 N. E. 488, 23 Am. & Eng. Cas. 97; West Side El. R. Co. v. Stickney, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773; Burk v. Simonson, 104 Ind. 173, 3 N. E. 826, 54 Am. Rep. 304; Lipes v. Hand, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160; Forsyth v. Wilcox, 143 Ind. 144, 41 N. E. 371; Donovan v. Springfield, 125 Mass. 371;

Minnesota &c. R. Co. v. Doran, 17 Minn. 188; Arbrush v. Oakdale, 28 Minn. 61, 9 N. W. 30; Morin v. St. Paul &c. R. Co., 30 Minn. 100, 14 N. W. 460; Pacific &c. R. Co. v. Chrystal, 25 Mo. 544; St. Louis &c. Co. v. Richardson, 45 Mo. 466; Missouri &c. R. Co. v. Hays, 15 Nebr. 224, 18 N. W. 51; Sullivan v. North Hudson Co. R. Co., 51 N. J. L. 518, 18 Atl. 689; Little Miami &c. R. Co. v. Collett, 6 Ohio St. 182; Pittsburgh &c. R. Co. v. McCloskey, 110 Pa. St. 436, 1 Atl. 555, 23 Am. & Eng. R. Cas. 86; Grafton &c. R. Co. v. Foreman, 24 W. Va. 662, 20 Am. & Eng. R. Cas. 215; Elliott Roads and Streets (3rd ed.), § 315; (quoted in Masters v. Portland, 24 Ore. 161, 33 Pac. 540, and cited in Allaire v. Woonsocket, 25 R. I. 414, 56 Atl. 262, 263).

there is reason for excluding the benefits from consideration. Special benefits may be said to be such as are direct and peculiar to the land. General benefits such as are bestowed upon other lands of similar character and situation in the same vicinity.<sup>57</sup>

**§ 1252 (990). Benefits confined to parcel or tract actually taken.**—As we have elsewhere shown damages are confined to the parcel or tract of which part is taken,<sup>58</sup> and upon the same principle benefits must be confined to the tract or parcel of which

<sup>57</sup> Page v. Chicago &c. R. Co., 70 Ill. 324; Lipes v. Hand, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160; Potawatonic Co. v. O'Sullivan, 17 Kans. 58; Roberts v. Commissioners, 21 Kans. 247; Whiteman v. Boston &c. R. Co., 3 Allen (Mass.) 133; Stattuck v. Stoneham &c. R. Co., 6 Allen (Mass.) 115; Childs v. New Haven &c. R. Co., 133 Mass. 253; Minnesota &c. R. Co. v. McNamara, 13 Minn. 508; Wyandotte &c. R. Co. v. Waldo, 70 Mo. 629; Pittsburgh &c. Co. v. Robinson, 95 Pa. St. 426; Washburn v. Milwaukee &c. R. Co., 59 Wis. 364, 18 N. W. 328; Elliott Roads and Streets (3d ed.), § 277. See generally Donovan v. Springfield, 125 Mass. 371; Hayes v. Ottawa &c. R. Co., 54 Ill. 373; Carrell v. Muncie &c. R. Co., 38 Ind. App. 700, 78 N. E. 254; Brown v. Providence &c. R. Co., 5 Gray (Mass.) 35; Farrar v. Midland Electric R. Co., 101 Mo. App. 140, 74 S. W. 500; St. Louis &c. R. Co. v. Continental Brick Co., 198 Mo. 698, 96 S. W. 1011; Southport &c. R. Co. v. Owners of Platt Land, 133 N. Car. 266, 45 S. E. 589; Guthrie &c. R. Co. v. Faulkner, 12 Okla. 532, 73 Pac. 290; Shimer v. Eastern &c. R. Co., 205 Pa. St. 648, 55 Atl. 769; Eastern Texas

R. Co. v. Eddings, 30 Tex. Civ. App. 170, 70 S. W. 98; Pochila v. Calvert &c. R. Co., 31 Tex. Civ. App. 398, 72 S. W. 255. But compare Sloan v. Railroad Co., 137 N. Y. 595, 33 N. E. 335; Saxton v. Railroad Co., 139 N. Y. 320, 34 N. E. 728. The erection of a depot in the vicinity can not be regarded as having especially benefited the property, so as to offset the damages, where the benefit caused by the building of the depot has affected alike all property located in its neighborhood. Pochila v. Calvert &c. R. Co., 31 Tex. Civ. App. 398, 72 S. W. 255. See also Buckhannon &c. R. Co. v. Great Scott Coal &c. Co., 75 W. Va. 423, 83 S. E. 1031.

<sup>58</sup> St. Louis &c. R. Co. v. Brown, 58 Ill. 61; Ham v. Wisconsin &c. R. Co., 61 Iowa 716, 17 N. W. 157; Kansas City &c. R. Co. v. Merrill, 25 Kans. 421; Meacham v. Fitchburg R. Co., 4 Cush. (Mass.) 291; Lexington v. Long, 31 Mo. 369; New York &c. R. Co. v. LeFevre, 27 Hun (N. Y.) 537; Philadelphia &c. R. Co. v. Gilson, 8 Watts (Pa.) 243; Paducah &c. R. Co. v. Stovall, 12 Heisk. (Tenn.) 1; Buffalo Bayou &c. R. Co. v. Ferris, 26 Tex. 588; Welch v. Milwaukee &c. R. Co., 27

part is actually appropriated.<sup>59</sup> That benefit to separate and distinct lots, parcels or tracts can not be considered in estimating the benefits is well settled, but what shall be considered part of the tract or parcel seized, it is sometimes difficult to determine. We suppose, however, that no general rule can be laid down which will justly apply to all cases, but that in most instances the question is one of fact to be determined from the evidence in the particular case.<sup>60</sup>

**§ 1253 (990a). Benefits from abandonment of an existing line across premises.**—The question as to the right of a railroad company to apply benefits arose in a case where a railroad company on constructing a line across a land-owner's premises abandoned its old line across the same premises but remote from the new location. The railroad company contended that it was entitled to have any benefit from the abandonment of the old line set off against the damage done the land adjoining the new line. The conclusion reached—and it seems a proper one in a case where the old line was entirely outside of the zone of damage caused by the construction of the new line and where the railroad company was not compelled to relinquish its title to the old right of way on acquiring title to the new—was, that the railroad company could only offset the benefits which directly affected the land adjacent to the new right of way.<sup>61</sup>

Wis. 108; post, § 1257. A personal benefit to the owner, such as his profits from the sale of materials to the company, is not to be deducted from the damages to the land. *Minnesota &c. R. Co. v. Doran*, 17 Minn. 188.

<sup>59</sup> *Pittsburgh &c. R. Co. v. Reich*, 10 Ill. 157; *Cleveland &c. R. Co. v. Ball*, 5 Ohio St. 568; *Portland &c. City Ry. Co. v. Sanders*, 86 Ore. 62, 167 Pac. 564; *Louisville &c. R. Co. v. Glazebrook*, 1 Bush (Ky.) 325; *White Water Valley R. Co. v. McClure*, 29 Ind. 536, and authorities cited in last note, *supra*.

See also *Cameron v. Chicago &c. R. Co.*, 42 Minn. 75, 43 N. W. 785; *Farrar v. Midland Elec. R. Co.*, 101 Mo. App. 140, 74 S. W. 500; *Evansville &c. R. Co. v. Charlton*, 6 Ind. App. 56, 33 N. E. 129.

<sup>60</sup> See *Pittsburgh &c. Ry. Co. v. Crockett*, 182 Ind. 490, 106 N. E. 875; *Hoyt v. Chicago &c. R. Co.*, 117 Iowa 296, 90 N. W. 724; *Kossler v. Pittsburgh &c. R. Co.*, 208 Pa. St. 50, 57 Atl. 66.

<sup>61</sup> *Oregon &c. R. Co. v. Fox*, 28 Utah 311, 78 Pac. 800, citing *Chicago & E. R. Co. v. Blake*, 116 Ill. 163, 4 N. E. 488; *Meacham v. Fitch-*

§ 1254 (991). **Remote or conjectural damages can not be allowed.**—Remote and fanciful injuries, which rest wholly in conjecture, and do not admit of an estimate in damages, can not be proven as elements of damage for which compensation is to be made.<sup>62</sup> Thus an interference with the quiet and privacy of the plaintiff's premises by the construction of a railroad overlooking them,<sup>63</sup> or by bringing crowds of visitors into his neighborhood,<sup>64</sup> is not an injury for which he can claim compensation. Neither is an injury to the plaintiff's business resulting from competition induced by the improvement,<sup>65</sup> nor the liability of horses used on plaintiff's farm to take fright from passing trains,<sup>66</sup> nor the danger to the owner of the premises or others

burg R. Co., 4 Cush. (Mass.) 291; Winona &c. R. Co. v. Waldron, 11 Minn. 515 (Gil. 392), 83 Am. Dec. 100; Chicago &c. R. Co. v. Wiebe, 25 Nebr. 542, 41 N. W. 297; Little Miami R. Co. v. Collet, 6 Ohio St. 182.

<sup>62</sup> Atlantic &c. R. Co. v. Postal &c. Tel. Co., 120 Ga. 268, 48 S. E. 15; Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515; St. Louis &c. R. Co. v. Knapp, 160 Mo. 396, 61 S. W. 300; Conness v. Indiana &c. R. Co., 193 Ill. 464, 62 N. E. 221; Indianapolis &c. Trac. Co. v. Larrabee, 168 Ind. 237, 80 N. E. 413 (citing text). See also Richmond &c. R. Co. v. Seaboard &c. R. Co., 103 Va. 399, 49 S. E. 512; Chicago &c. R. Co. v. Alexander, 47 Wash. 131, 91 Pac. 626 and authorities cited in following notes.

<sup>63</sup> Penny, In re, 7 El. & Bl. 660. An award of damages for the possible exercise by the company of a right to cut down trees on either side of the road can not be sustained. Such right should be considered only so far as it affects the present market value of the

land. Ontario &c. R. Co., In re, 6 Ont. 338. See Pittsburgh &c. R. Co. v. McCloskey, 110 Pa. St. 436, 1 Atl. 555.

<sup>64</sup> First Parish of Woburn v. Middlesex, 7 Gray (Mass.) 106; Patten v. Northern Cent. R. Co., 33 Pa. St. 426, 75 Am. Dec. 612.

<sup>65</sup> Petition of Mount Washington Road Co., 35 N. H. 134; Adden v. White Mts. R. Co., 55 N. H. 413, 20 Am. Rep. 220; Harvey v. Lackawanna &c. R. Co., 47 Pa. St. 428.

<sup>66</sup> Atchison &c. R. Co. v. Lyon, 24 Kans. 745; Chicago &c. R. Co. v. Mason, 26 Ind. App. 395, 59 N. E. 185, 186 (quoting text); Indianapolis &c. Trac. Co. v. Larrabee, 168 Ind. 237, 80 N. E. 413 (but cutting field so as to make it inconvenient to water stock and get to certain parts are elements of damage to be considered). In Wooster v. Sugar River &c. R. Co., 57 Wis. 311, 15 N. W. 401, the court held that a witness could properly testify as to the effect upon the market value of the property due to the probability or possibility that horses might be frightened or

in crossing and recrossing the proposed tracks,<sup>68</sup> and the increased risk of orchards through which a railroad is built by reason of leaving them more free to access of thieves is so remote and speculative an element of damages as not to be entitled to consideration by the jury.<sup>69</sup>

**§ 1255 (991a). Remote, sentimental or conjectural damages continued.**—Under the rule of the foregoing section it has been held that a land-owner is not entitled to compensation for inconvenience, injury to his business, loss of profits, damage to personal property, or the expense of removing it.<sup>70</sup> So where the property selected for a depot was shown to have a market value capable of ascertainment, it was held that its sentimental value as an old homestead was not to be considered by the jury.<sup>71</sup> It has also been held that the jury may not consider the fact that the land sought to be condemned was available for a public park and that the owner intended to improve the same for that purpose and use it as a source of revenue in connection with an electric railway.<sup>72</sup> In another case it was found necessary to decide that the fact that the person holding title to property sought to be condemned has formulated a great plan for the upbuilding and salvation of the people, and professes to believe with his followers, that by the intervention of Divine Providence the property is rendered unusually valuable as a place of residence for his followers, does not impress the property with an increased value that must be recognized when a part of it is demanded in

fire communicated by passing locomotives and trains. *Snyder v. Western Union R. Co.*, 25 Wis. 60; *Hutchinson v. Chicago &c. R. Co.*, 37 Wis. 582, 41 Wis. 541. But see *Illinois &c. R. Co. v. Freeman*, 210 Ill. 270, 71 N. E. 444; *Swain v. Boston El. R. Co.*, 188 Mass. 405, 74 N. E. 672.

<sup>68</sup> *Illinois &c. R. Co. v. Freeman*, 210 Ill. 270, 71 N. E. 444; *Chicago &c. R. Co. v. Mawman*, 206 Ill. 182, 69 N. E. 66.

<sup>69</sup> *Kansas City &c. R. Co. v. Kregelo*, 32 Kans. 608, 5 Pac. 58.

<sup>70</sup> *St. Louis &c. R. Co. v. Knapp Stout & Co.*, 160 Mo. 396, 61 S. W. 300. See also *Buckhannon &c. R. Co. v. Great Scott Coal Co.*, 75 W. Va. 423, 83 S. E. 1031.

<sup>71</sup> *Cane Belt R. Co. v. Hughes*, 31 Tex. Civ. App. 565, 72 S. W. 1020.

<sup>72</sup> *Richmond &c. R. Co. v. Seaboard &c. R. Co.*, 103 Va. 399, 49 S. E. 512.

condemnation proceedings, but the property is to be measured as other property owned by other people in the same vicinity and similarly situated.<sup>73</sup>

**§ 1256 (991b). Remote and speculative damages—Possibility of negligence in construction or operation of road.**—The increase in the risk of loss to the owner of premises from fire, if any, may usually be considered only so far as it effects a depreciation in the market value of the property not taken. The likelihood of damage from loss by fire which may result from negligence of the railroad company is generally deemed too remote and speculative to be considered in condemnation proceedings, for the law neither presumes nor anticipates negligence.<sup>74</sup> "The distinction is this," says the Supreme Court of Illinois: "It is proper for the jury to consider the increased risk of loss from fire and the increased danger to live stock if, and in so far as, the market value of land not taken is thereby depreciated; but it is not proper for the jury to anticipate damages of any character which may, but will not certainly, result from the operation of the railroad and allow anything by their verdict for such anticipated damages. Damages which may in the future follow upon the happening of some possible, but uncertain, event, are not for their consideration. Whether the value of the land not taken will be depreciated in the market by increased danger from fire or by increased danger to live stock is for their consideration."<sup>75</sup> The rule is the same as to the likelihood of damage from the neg-

<sup>73</sup> *Dowie v. Chicago &c. R. Co.*, 214 Ill. 49, 73 N. E. 354.

<sup>74</sup> *Chicago &c. R. Co. v. Nolin*, 221 Ill. 367, 77 N. E. 435; *St. Louis Belt &c. R. Co. v. Mendonsa*, 193 Mo. 518, 91 S. W. 65; *St. Louis &c. R. Co. v. Continental Brick Co.*, 198 Mo. 698, 96 S. W. 1011; *Illinois &c. R. Co. v. Freeman*, 210 Ill. 270, 71 N. E. 444; *Conness v. Indiana &c. R. Co.*, 193 Ill. 464, 62 N. E. 221. But see post, § 1262. It will be observed that this is not

the same question as to whether danger from fire in the proper operation of the road is an element of damages, especially if it already depreciated the value of the property.

<sup>75</sup> *Chicago &c. R. Co. v. Nolin*, 221 Ill. 367, 77 N. E. 435; *St. Louis &c. R. Co. v. Oliver*, 17 Okla. 589, 87 Pac. 423. See also *Indianapolis &c. Trac. Co. v. Larrabee*, 168 Ind. 237, 80 N. E. 413.

ligent construction or operation of the railroad.<sup>76</sup> Thus the jury should not take into account the danger to which stock belonging to the land-owner might be exposed by reason of the negligent operation of a railroad, especially as the statutes compel railroads to fence their tracks, and create remedies to the adjacent land-owners for injuries to stock caused by a failure to observe these statutes.<sup>77</sup>

§ 1257 (992). **Damages confined to particular tract.**—The compensation is awarded only for damages to the particular tract of land of which a part is taken,<sup>78</sup> or to land which is used in connection with and as a part of that tract.<sup>79</sup> Thus, the owner of a mill, no part of which is taken, can not recover for damages

<sup>76</sup> *Chicago &c. R. Co. v. Nolin*, 221 Ill. 367, 77 N. E. 435; *Montana R. Co. v. Freeser*, 29 Mont. 210, 74 Pac. 407.

<sup>77</sup> *Conness v. Indiana &c. R. Co.*, 193 Ill. 464, 62 N. E. 221. See also *Indianapolis Ry. Co. v. Bransor*, 172 Ind. 383, 388, 86 N. E. 834, 836 (citing text).

<sup>78</sup> *St. Louis &c. R. Co. v. Brown*, 58 Ill. 61; *Chicago &c. R. Co. v. Kelly*, 221 Ill. 498, 77 N. E. 916; *Union Traction Co. v. Pfeil*, 39 Ind. App. 51, 78 N. E. 1052; *Fleming v. Chicago &c. R. Co.*, 34 Iowa 353; *Lough v. Minneapolis &c. R. Co.*, 116 Iowa 31, 89 N. W. 77; *Bangor &c. R. Co. v. McComb*, 60 Maine 290; *Meacham v. Fitchburg R. Co.*, 4 Cush. (Mass.) 291; *Minnesota Valley R. Co. v. Doran*, 15 Minn. 230; *St. Paul &c. R. Co. v. Murphy*, 19 Minn. 500; *Sherwood v. St. Paul &c. R. Co.*, 21 Minn. 127; *Lexington v. Long*, 31 Mo. 369; *Matter of New York Cent. &c. R. Co.*, 6 Hun (N. Y.) 149; *Paducah &c. R. Co. v. Stovall*, 12 Heisk. (Tenn.) 1. So held where the

tracts were divided by the right of way of another railroad. *Kansas City &c. Ry. Co. v. Littler*, 70 Kans. 556, 79 Pac. 114.

<sup>79</sup> *Renwick v. Davenport &c. R. Co.*, 49 Iowa 664, affirmed, *Davenport &c. R. Co. v. Renwick*, 102 U. S. 180, 26 L. ed. 51; *Driver v. Western Union R. Co.*, 32 Wis. 569, 14 Am. Rep. 726; *Robbins v. Milwaukee &c. R. Co.*, 6 Wis. 636. Compare *Buckhannon &c. R. Co. v. Great Scott Coal Co.*, 75 W. Va. 423, 83 S. E. 1031. The fact that the land is divided by a highway or otherwise into two or more lots, does not prevent the award of damages for injuries to it as an entirety, if the several parts are still used together for a common purpose. *Keithsburg &c. R. Co. v. Henry*, 79 Ill. 290. See also *Chicago &c. R. Co. v. Dresel*, 110 Ill. 89; *Cummins v. Des Moines &c. R. Co.*, 63 Iowa 397, 19 N. W. 268; *Haggard v. Algona School Dist.*, 113 Iowa 486, 85 N. W. 777. Where land within a village, and adjoining farm land are owned by



inflicted upon it by the construction of a railroad, in a proceeding by the railroad to condemn another and distinct tract of land at some distance from the mill.<sup>80</sup> And where several village lots are merely held for sale or use as building lots,<sup>81</sup> or are permitted to lie entirely idle and unoccupied,<sup>82</sup> injuries to the lots not taken can not be considered in assessing damages. So, if a man owns two adjoining farms, one of which he occupies while he rents the other, the assessment of damages must be confined to the farm of which part is taken.<sup>83</sup> And similarly where a person owned a tract of land, from which a right of way was taken for a railroad, and also the remainder after a life estate in an undivided half of an adjacent tract, and had farmed the two tracts as one, the buildings and improvement being on the latter tract, it was held that the jury could not take into account the

the same person, but held as distinct tracts and for separate uses, compensation can not be claimed for injuries to the farm because of its separation from a part of the village property by the line of a railroad. *Haines v. St. Louis & C. R. Co.*, 65 Iowa 216, 21 N. W. 573.

<sup>80</sup> *Selma & C. R. Co. v. Camp*, 45 Ga. 180. But where the property is used together for a common purpose the fact that different parts lie some distance from each other will not prevent them from being considered as forming a single property. Thus the owners of an ore mine and a railroad four or five miles long connecting the mine with a railroad are entitled, upon condemnation of a part of their line of road for railroad purposes, to damage to the whole property, including the ore mine. *Poughkeepsie & C. R. Co., Matter of*, 63 Barb. (N. Y.) 151.

<sup>81</sup> *Pittsburgh & C. R. Co. v. Reich*, 101 Ill. 157. See also *Fleming v. Chicago & C. R. Co.*, 34 Iowa 353;

*Gorgas v. Philadelphia & C. R. Co.*, 215 Pa. 501, 64 Atl. 680.

<sup>82</sup> *Wilcox v. St. Paul & C. R. Co.*, 35 Minn. 439, 29 N. W. 148.

<sup>83</sup> *Minnesota Valley R. Co. v. Doran*, 15 Minn. 230. See also *Sharpe v. United States*, 112 Fed. 893, 57 L. R. A. 932, affirmed in 191 U. S. 341, 24 Sup. Ct. 114, 48 L. ed. 211. But the jury are entitled to pass upon the question whether two tracts of land constitute a single farm, even though they are separated by a public highway, and one has been rented for two years preceding the condemnation. *St. Paul & C. R. Co. v. Murphy*, 19 Minn. 500. Where a man owned two tracts of land as designated on the government survey, both of which constituted one farm, and released the right of way through one tract, it was held that he could not afterward recover for damages done to that tract by condemning a right of way across the remainder of the farm. *St. Louis & C. R. Co. v. Brown*, 58 Ill. 61. But

fact that the right of way will divide the two interests of such person in the tracts, but should consider each interest separately, since the interest in the two tracts were distinct at law.<sup>84</sup> But all the land owned and used as one farm must be considered as a single tract, although it is divided by a highway,<sup>85</sup> or canal,<sup>86</sup> or lies in two or more counties.<sup>87</sup> It will not be regarded as a single body where lands intervene across which the owner has no right of passage—as for example the right of way of another railroad,<sup>88</sup> or the detached land is an island in a river.<sup>89</sup> Where the separate owners of three quarter sections of land operated them jointly as a single stock farm under a contract by which water for the whole farm was furnished by the owner of the quarter section on which water was found, it was held that in assessment of damages for the location of a highway across the farm, such owner was entitled to damages for the interference with his rights under the contract.<sup>90</sup> Where two or more contiguous village lots are used together for a common purpose, they may be held to form a single tract. Thus, where land was subdivided into blocks or lots, but the lots were not sold and the

it is difficult to see why a man's willingness to have a railroad built across one part of his farm should prevent him from recovering damages for the road where he did not want it built.

<sup>84</sup> *Conness v. Indiana &c. R. Co.*, 193 Ill. 464, 62 N. E. 221.

<sup>85</sup> *Hartshorn v. Burlington &c. R. Co.*, 52 Iowa 613; *Ham v. Wisconsin &c. R. Co.*, 61 Iowa 716, 17 N. W. 157; *Kansas City &c. R. Co. v. Merrill*, 25 Kans. 421; *New York &c. R. Co. Matter of v. Le Fevre*, 27 Hun (N. Y.) 537; *State v. Superior Court*, 44 Wash. 108, 87 Pac. 40; *Welch v. Milwaukee &c. R. Co.*, 27 Wis. 108.

<sup>86</sup> *Boston &c. R. Co., Matter of*, 31 Hun (N. Y.) 461.

<sup>87</sup> *Atchison &c. R. Co. v. Gough*, 29 Kans. 94. See also *Keithsburg*

*&c. R. Co. v. Henry*, 79 Ill. 290; *Chicago &c. R. Co. v. Huncheon*, 130 Ind. 529, 30 N. E. 636.

<sup>88</sup> *Kansas City &c. R. Co. v. Litter*, 70 Kans. 556, 79 Pac. 114.

<sup>89</sup> *St. Louis &c. R. Co. v. Aubuchon*, 199 Mo. 352, 97 S. W. 867.

<sup>90</sup> *Commissioners v. Labore*, 37 Kans. 480, 15 Pac. 577. Numerous cases have held that a single farm may consist of several subdivisions as laid out in the government survey. *Wyandotte &c. R. Co. v. Waldo*, 70 Mo. 629; *Cedar Rapids &c. R. Co. v. Ryan*, 37 Minn. 38, 33 N. W. 6; *Wilmes v. Minneapolis &c. R. Co.*, 29 Minn. 242, 13 N. W. 39; *Ham v. Wisconsin &c. R. Co.*, 61 Iowa 716, 17 N. W. 157; *Kansas City &c. R. Co. v. Merrill*, 25 Kans. 421.

land continued to be used for agricultural purposes, it was held that damages to the entire piece of land could be recovered when but a part of the lots were taken.<sup>91</sup>

§ 1258 (993). **Injuries to part of tract or parcel of land not actually taken.**—Where part only of a tract of land is taken, injuries to the part not actually taken may be caused by the construction of a railroad, and where there are such special injuries the general rule is that the property owner is entitled to compensation.<sup>92</sup> It is so held where a farm is divided by the line of

<sup>91</sup> *Sheldon v. Minneapolis &c. R. Co.*, 29 Minn. 318, 13 N. W. 134; *Welch v. Milwaukee &c. R. Co.*, 27 Wis. 108. See also *Chicago &c. R. Co. v. Dresel*, 110 Ill. 89; *Cummins v. Des Moines &c. R. Co.*, 63 Iowa 397, 19 N. W. 268; *Cox v. Mason City &c. R. Co.*, 77 Iowa 20, 41 N. W. 475; *Reisner v. Atchison &c. Co.*, 27 Kans. 382; *Koerper v. St. Paul &c. R. Co.*, 42 Minn. 340, 44 N. W. 195; *Gorgas v. Philadelphia &c. R. Co.*, 215 Pa. 501, 64 Atl. 680; *Munkwitz v. Chicago &c. R. Co.*, 64 Wis. 403, 25 N. W. 438. But the burden of showing that separately platted and numbered contiguous lots with the lots taken constituted a single tract is held to be upon the landowner. *Pittsburgh &c. R. Co. v. Crockett*, 182 Ind. 490, 106 N. E. 875.

<sup>92</sup> *Pine Bluff &c. R. Co. v. Kelly*, 93 Ark. 562, 93 S. W. 562; *Selina &c. R. Co. v. Keith*, 53 Ga. 178; *White v. Metropolitan &c. Co.*, 154 Ill. 620, 39 N. E. 270; *Chicago &c. R. Co. v. Mawman*, 206 Ill. 182, 69 N. E. 66; *Freiberg v. South Side El. R. Co.*, 221 Ill. 508, 77 N. E. 920; *Illinois Central R. Co. v. Wolf*, 95 Ill. App. 74; *Indiana Stone R. Co. v. Strain*, 27 Ind. App. 694, 62

N. E. 63; *White v. Cincinnati &c. R. Co.*, 34 Ind. App. 287, 71 N. E. 276; *Ferdinand Co. v. Bretz*, 47 Ind. App. 642, 94 N. E. 1046; *Kucheman v. Chicago &c. R. Co.*, 46 Iowa 366; *Louisiana R. &c. Co. v. Jones*, 113 La. Ann. 29, 36 So. 877; *Bangor &c. R. Co. v. McComb*, 60 Maine 290; *Virginia &c. R. Co. v. Henry*, 8 Nev. 165; *South Buffalo &c. R. Co. v. Kirkover*, 176 N. Y. 301, 68 N. E. 366; *Pittsburgh &c. R. Co. v. Rose*, 74 Pa. St. 362; *Baker v. Pennsylvania R. Co.*, 236 Pa. St. 479, 84 Atl. 959. See also *White's Supp. to Thomp. Corp.*, § 2755, and cases there cited. As shown by these authorities, and others that might be cited, the general rule is that the owner is entitled to compensation not only for the part actually taken but also for damages caused to the remainder of the tract. Against the latter, however, is set off the benefits, and, in most jurisdictions such benefits may be set off as against the damages both for what is actually taken and for the injury to the rest of the tract. *Tucker v. Massachusetts &c. R. Co.*, 118 Mass. 546; *McReynolds v. Burlington &c. R. Co.*, 106 Ill. 152. In

the railroad, or where cuts, ditches or embankments are made upon the right of way where it crosses the land.<sup>93</sup> But it is to be observed that for remote and speculative injuries no compensation can be awarded.<sup>94</sup>

§ 1259 (994). **Elements of value.**—The general rule is that a single assessment should be made covering all the various items of damage,<sup>95</sup> and it is held that the amount of this assessment should just equal the difference between the market value of the property, after the improvement is made, and the market value

this latter case, it was held that the fact that evidence as to the inconvenience occasioned by a railroad track which divides a farm is largely conjectural and not capable of definite ascertainment, was not a reason for excluding such evidence from the jury. The jury are entitled to know how the line of the road divides the farm, in case of farm lands, as to the location of water, pasturage, improvements, etc., and also, the dangers and inconveniences in the perpetual use of the track for the movement of trains. *Rockford &c. R. Co. v. McKinley*, 64 Ill. 338. Inconvenience in opening gates and bars to cross the railroad may be considered by the jury. *Minnesota &c. R. Co. v. Doran*, 17 Minn. 188. So may the inconvenience and danger of frequently crossing the track (in this case as often as one hundred times a day) in hauling clay from one part of the plaintiff's brickyard to another part that has been cut off by the railroad. *Sherwood v. St. Paul &c. R. Co.*, 21 Minn. 127. See *Winona R. Co. v. Waldron*, 11 Minn. 515, 88 Am. Dec. 100 and note. Damage to remainder of the tract from en-

hanced danger from floods because of interference with escape of waters is a proper element of damages. *Colusa &c. R. Co. v. Leonard*, 176 Cal. 109, 167 Pac. 878.

<sup>93</sup> *St. Louis &c. R. Co. v. Anderson*, 39 Ark. 167; *Chicago &c. R. Co. v. Hoffman* (Ind. App.), 119 N. E. 169; *Atchison &c. R. Co. v. Blackshire*, 10 Kans. 477; *Missouri Pacific R. Co. v. Hays*, 15 Nebr. 224, 18 N. W. 51; *Wilmington &c. R. Co. v. Stauffer*, 60 Pa. St. 374, 100 Am. Dec. 574; *Pittsburgh &c. R. Co. v. Rose*, 74 Pa. St. 362. See also *Red River &c. Ry. Co. v. Hughes*, 36 Tex. Civ. App. 472, 81 S. W. 1235; *Cook v. Boone &c. R. Co.*, 122 Iowa 437, 98 N. W. 293. note in 85 Am. St. 312; *State v. Superior Court*, 44 Wash. 108, 87 Pac. 40; *Arkansas Val. &c. Ry. Co. v. Witt*, 19 Okla. 262, 91 Pac. 897, 13 L. R. A. (N. S.) 237, and additional cases there cited in note.

<sup>94</sup> *East &c. R. Co. v. Miller*, 201 Ill. 413, 66 N. E. 275; *Indianapolis &c. R. Co. v. Hill*, 172 Ind. 402, 86 N. E. 414, 416 (citing text).

<sup>95</sup> *Metropolitan West Side El. R. Co. v. Goll*, 100 Ill. App. 323; *Indianapolis &c. R. Co. v. Branson*, 172 Ind. 383, 86 N. E. 834, 88 N. E. 594.

of like property to which no injury has been done,<sup>96</sup> or the difference between the market value of the entire tract and the market value of what is left.<sup>97</sup> In one jurisdiction the measure of damages is held to be the difference between the market value of the property just before it was generally known that the work was to be done, and the market value after the completion of the

<sup>96</sup> *Henry v. Dubuque &c. R. Co.*, 2 Iowa 288; *Chicago &c. R. Co. v. Carey*, 90 Ill. 514. "The inconvenience arising from a division of the property, or from increased difficulty of access; the burden of increased fencing, the ordinary danger from accidental fires to the fences, fields or farm buildings, not resulting from negligence, and generally all such matters as, owing to the particular location of the road, may effect the convenient use and future enjoyment of the property, are proper matters for consideration, but they are to be considered in comparison with the advantages, only as they affect the market value of the land. The jury can not include in the verdict a fund to cover the costs of fencing, or to provide an indemnity against losses by fire, or casualties to the cattle and stock upon the farm. Such an assessment must necessarily be purely speculative, as the matters, thus sought to be provided against, are in their nature altogether ideal and fanciful. A rearrangement of the farm may obviate the necessity for any increased fencing; its future occupancy may be such as to require none; casualties, by fire or otherwise, may never occur; and, therefore, the injury from these causes can only be computed as they af-

fect the market value of the land." *Pittsburgh &c. R. Co. v. McCloskey*, 110 Pa. St. 436, 1 Atl. 431. The cost of erecting such buildings as are upon the land taken is not an element of damage unless it is shown that they would actually increase the value of the premises to that extent. *Jacksonville &c. R. Co. v. Walsh*, 106 Ill. 253. See also *Lough v. Minneapolis &c. R. Co.*, 116 Iowa 31, 89 N. W. 77; *Davenport &c. R. Co. v. Sisset*, 111 Ill. App. 75; *Illinois Cent. R. Co. v. Lockard*, 112 Ill. App. 423; *Illinois &c. R. Co. v. Easterbrook*, 211 Ill. 624, 71 N. E. 1116; *Buffalo &c. R. Co. v. Sheeps*, 102 N. Y. S. 214; *Eastern Texas R. Co. v. Eddings*, 30 Tex. Civ. App. 170, 70 S. W. 98. Where land was rendered inaccessible by the construction of a railroad embankment, etc., the difference in the value of the land just before and just after the construction of the road was the measure of damages, and not the cost of constructing a road from the land to existing highways. *Red River &c. R. Co. v. Hughes*, 36 Tex. Civ. App. 472, 81 S. W. 1235.

<sup>97</sup> *St. Louis &c. R. Co. v. Anderson*, 39 Ark. 167; *Eberhart v. Chicago &c. R. Co.*, 70 Ill. 347; *Illinois Central R. Co. v. Turner*, 194 Ill. 575, 62 N. E. 798; *Chicago &c. R. Co. v. Kelly*, 221 Ill. 498, 77 N. E.

work.<sup>98</sup> If the property has a special value because of its adaptation for railroad purposes,<sup>99</sup> or for some other use for which

916; *Freiberg v. South Side El. R. Co.*, 221 Ill. 508, 77 N. E. 920; *Indiana &c. R. Co. v. Allen*, 100 Ind. 409; *Cleveland &c. R. Co. v. Garman*, 63 Ind. App. 289, 109 N. E. 234, 112 N. E. 411; *Lance v. Chicago &c. R. Co.*, 57 Iowa 636, 11 N. W. 612; *Blue Earth Co. v. St. Paul &c. R. Co.*, 28 Minn. 503, 11 N. W. 73; *Farrar v. Midland Electric R. Co.*, 101 Mo. App. 140, 74 S. W. 500; *Omaha &c. R. Co. v. McDermott*, 25 Nebr. 714, 41 N. W. 648; *Dearborn v. Boston &c. R. Co.*, 24 N. H. 179; *Coatsworth v. Lehigh Valley R. Co.*, 100 N. Y. S. 504; *Hewitt v. Pittsburg &c. R. Co.*, 19 Pa. Super. Ct. 304; *William H. Moudy Mfg. Co. v. Pennsylvania R. Co.*, 64 Pa. St. 373, 64 Atl. 373; *Pennsylvania &c. R. Co. v. Bunnell*, 81 Pa. St. 414; *St. Louis &c. R. Co. v. Hughes* (Tex. Civ. App.), 73 S. W. 976; *Parks v. Wisconsin Cent. R. Co.*, 33 Wis. 413; notes in 5 Am. St. 537-540, 88 Am. Dec. 113-121, and 85 Am. St. 293-314. See also for recent cases, most of them stating the rule in like or somewhat similar terms, *Alabama Cent. R. Co. v. Musgrove*, 169 Ala. 424, 53 So. 1009; *Kansas City So. R. Co. v. Boles*, 88 Ark. 533, 115 S. W. 375 (market value at time petition is filed); *Stuttgart &c. R. Co. v. Kocourek*, 101 Ark. 47, 141 S. W. 511; *In re City of Meriden*, 88 Conn. 427, 91 Atl. 439 (in view of the new conditions so created); *Muncie &c. Trac. Co. v. Citizens Gas &c. Co.*, 179 Ind. 322, 100 N. E. 65; *Cleveland &c. R. Co. v. Smith*,

177 Ind. 524, 97 N. E. 164; *Louisiana &c. R. Co. v. Sarpy*, 125 La. 388, 51 So. 433 (at time suit is filed); *Beckman v. Lincoln &c. R. Co.*, 85 Nebr. 228, 122 N. W. 994, 133 Am. St. 655.

<sup>98</sup> *Louisville &c. R. Co. v. Cumnock*, 25 Ky. L. 1330, 77 S. W. 933.

<sup>99</sup> *Johnson v. Freeport &c. R. Co.*, 111 Ill. 413; *Little Rock &c. R. Co. v. Woodruff*, 49 Ark. 381, 5 S. W. 792, 4 Am. St. 51. But see *Boston &c. R. Co., In re*, 22 Hun (N. Y.) 176. It is not meant that more should be allowed merely because of the particular need of the railroad company. It depends on what the landowner loses rather than on the benefit to the condemnor. *Rawson &c. Lumber Co. v. Richardson*, 26 Idaho 37, 141 Pac. 74. *In Union Depot St. R. &c. Co. v. Brunswick*, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789, the court says: "Suppose a railroad was intended to be built through some canyon or mountain pass, the soil of which was of little or no practical value, would it be competent to permit the owner to show that it furnished the only possible route for the road? We apprehend not. These are extreme cases, but not different in principle from the one under consideration." See also *Tracy v. Mt. Pleasant*, 165 Iowa 435, 146 N. W. 78; *Stinson v. Chicago &c. R. Co.*, 27 Minn. 284, 6 N. W. 784; *Virginia &c. R. Co. v. Elliott*, 5 Nev. 358. Compare *Yazoo &c. R. Co. v. Longview Sugar Co.*, 135 La. Ann. 542, 65 So. 638.

the business needs of the neighborhood create a demand,<sup>1</sup> or if the owner has adapted the land to use in connection with other property, by which it has acquired a special and peculiar value, such value must usually be taken as the basis in assessing damages,<sup>2</sup> but, as elsewhere suggested the special value must be real and substantial, not fanciful or fictitious. The use that was made by the owner of the property taken may, of course, be shown, as bearing on the question of his damages; and the better opinion is that its adaptability for any valuable use to which a reasonably prudent man might be expected to devote it should also be considered, so far as this affects the market price.<sup>3</sup> The existing business and wants of the community, and such as may reasonably be expected in the immediate future, should be taken into account, together with the adaptability of the property to

<sup>1</sup> *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206.

<sup>2</sup> *Little Rock &c. R. Co. v. Woodruc*, 49 Ark. 381, 5 S. W. 792, 4 Am. St. 51; *St. Louis &c. R. Co. v. Kirby*, 104 Ill. 345 (training track for horses on a stock farm); *Chicago &c. R. Co. v. Chicago &c. R. Co.*, 112 Ill. 589 (landing used by a railroad company); *Dupuis v. Chicago &c. R. Co.*, 115 Ill. 97, 3 N. E. 720; *Chicago &c. R. Co. v. Ward*, 128 Ill. 350, 18 N. E. 828, 21 N. E. 562; *Ohio Valley R. Co. v. Kerth*, 130 Ind. 314, 30 N. E. 298; *Grand Rapids &c. R. Co. v. Weiden*, 70 Mich. 390, 38 N. W. 294; *King v. Minneapolis Union R. Co.*, 32 Minn. 224, 20 N. W. 135; *Duluth &c. R. Co. v. West*, 51 Minn. 163, 53 N. W. 197; *Beckett v. Midland R. Co.*, L. R. 3 C. P. 82. "The value of land consists in its fitness for use, present or future, and before it can be taken for public use the owner must have just compensation. If he has adopted a peculiar mode of using that land by

which he derives profit, and he is to be deprived of that use, justice requires he should be compensated for the loss. That loss is the loss to himself. It is the value which he has, and of which he is deprived, which must be made good by compensation." *St. Louis &c. R. Co. v. Kirby*, 104 Ill. 345. Where a person owned a piece of ground used as a stock ranch and the railroad was so constructed as to run diagonally through one quarter section, so as to cut off the water, timber, house and corrals from the main body of the land, the owner was held entitled to recover for the injury done to the property, considered as a whole, and not for that only done to the quarter section over which the road was built. *Kansas City &c. R. Co. v. Merrill*, 25 Kans. 421.

<sup>3</sup> *Montana R. Co. v. Warren*, 137 U. S. 348, 11 Sup. Ct. 96, 34 L. ed. 681; *Five Tracts of Land v. United States*, 101 Fed. 661; *Young v. Harrison*, 17 Ga. 30; *Harlam v. Galena*

meet those wants.<sup>4</sup> But there must be substantial grounds on which to rest an expectation of future advancement in the value of the property, and conjecture is not a basis for an award of damages. Where it was shown that the land lay in the edge of the city of St. Paul, and near certain public institutions, it was held proper to prove its market value as enhanced by its adapt-

&c. R. Co., 64 Ill. 353; Chicago &c. R. Co. v. Jacobs, 110 Ill. 414; West Virginia &c. R. Co. v. Gibson, 94 Ky. 234, 21 S. W. 1055; First Parish v. Middlesex, 7 Gray (Mass.) 106; Eastern R. Co. v. Boston &c. R. Co., 111 Mass. 125, 15 Am. Rep. 13; Drury v. Midland R. Co., 127 Mass. 571; Colvill v. St. Paul &c. R. Co., 19 Minn. 283; King v. Minneapolis &c. R. Co., 32 Minn. 224, 20 N. W. 135; Louisville &c. R. Co. v. Ryan, 64 Miss. 399, 8 So. 173; Metropolitan St. R. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860; Cochran v. Missouri &c. R. Co., 94 Mo. App. 469, 68 S. W. 367; Somerville &c. R. Co. v. Doughty, 22 N. J. L. 495; Currie v. Waverly &c. R. Co., 52 N. J. L. 381, 20 Atl. 56, 19 Am. St. 452 and note; New York Central &c. R. Co., In re, 6 Hun (N. Y.) 149; New York L. &c. R. Co., In re, 27 Hun (N. Y.) 116; Fushman Street, In re, 17 Wend. (N. Y.) 551, 670; Goodin v. Cincinnati &c. Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95; Cincinnati &c. R. Co. v. Longworth, 30 Ohio St. 108; William H. Mouldy Mfg. Co. v. Pennsylvania R. Co., 64 Pa. St. 373, 64 Atl. 373; Rieber v. Butler &c. R. Co., 201 Pa. 49, 50 Atl. 311; Cox v. Philadelphia &c. R. Co., 215 Pa. 506, 64 Atl. 729; Richmond &c. R. Co. v. Chamblin, 100 Va. 401, 41 S. E. 750; Regina v. Brown, L. R.

2 Q. B. 630. See also Sacramento So. R. Co. v. Heillron, 156 Cal. 408, 104 Pac. 979; New York &c. R. Co. v. New Haven, 81 Conn. 581, 71 Atl. 780; Chicago &c. R. Co. v. Simons, 200 Mich. 76, 166 N. W. 960; Wadsworth Land Co. v. Piedmont Trac. Co., 162 N. Car. 503, 78 S. E. 299; Stone v. Delaware &c. R. Co., 257 Pa. St. 456, 101 Atl. 813. But see Chicago &c. R. Co. v. Staley, 221 Ill. 405, 77 N. E. 437, where it is held that the only future use that can be properly considered is that to which the land is at present adapted and which affects its present value. In St. Louis Elec. Terminal Ry. Co. v. McAdaran, 257 Mo. 448, 166 S. W. 307, a pre-existing contract and plan of improvement was held admissible to show that defendants were not entitled to increased value.

<sup>4</sup> Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; St. Louis &c. R. Co. v. Theodore Maxfield Co., 94 Ark. 135, 126 S. W. 83, 26 L. R. A. (N. S.) 1111; Gardner v. Brookline, 127 Mass. 358; Low v. Concord &c. R. Co., 63 N. H. 557, 3 Atl. 739; Munkwitz v. Chicago &c. R. Co., 64 Wis. 403, 25 N. W. 438; Pierce v. Chicago &c. Elec. R. Co., 137 Wis. 550, 119 N. W. 297. See also note in Ann. Cas. 1912C, 1238. But see Chicago &c. R. Co. v. Sta-



ability for suburban residences.<sup>5</sup> So, where the land was shown to have a mine under its surface, it was held that that fact might be considered if the mine added to the market value of the land, even though such mine had never been used.<sup>6</sup> But it has been held that the intentions of the owner as to the future use of his property can not be proved,<sup>7</sup> nor can evidence be offered without limitation of the probable advantages from all possible uses to which the property might be put,<sup>8</sup> nor of any elements of dam-

ley, 221 Ill. 405, 77 N. E. 437; Sullivan v. Missouri &c. R. Co., 29 Tex. Civ. App. 429, 68 S. W. 745.

<sup>5</sup> Sherman v. St. Paul &c. R. Co., 30 Minn. 227, 15 N. W. 239. In Washburn v. Milwaukee &c. R. Co., 59 Wis. 364, 18 N. W. 328, it was held that if the present value of the lands taken was enhanced by reason of the fact that it might be platted and sold as city lots, such increased present value was the proper basis of assessment. To the same effect, Chicago &c. R. Co. v. Röttgering, 26 Ky. L. 1167, 83 S. W. 584.

<sup>6</sup> Haslam v. Galena &c. R. Co., 64 Ill. 353. See also Montana R. Co. v. Warren, 6 Mont. 275, 12 Pac. 641; Twin Lakes &c. Min. Co. v. Colorado &c. R. Co., 16 Colo. 1, 27 Pac. 258; Doud v. Mason City &c. R. Co., 76 Iowa 438, 41 N. W. 65; Cameron v. Chicago &c. R. Co., 51 Minn. 153, 53 N. W. 199; Burlington &c. R. Co. v. White, 28 Nebr. 166, 44 N. W. 95.

<sup>7</sup> Sherwood v. St. Paul &c. R. Co., 21 Minn. 127; Fairbanks v. Fitchburg, 110 Mass. 224; Twin Lakes &c. Syndicate v. Colorado &c. R. Co., 16 Colo. 1, 27 Pac. 258. See Goodwin v. Evans, 134 Ind. 262, 33 N. E. 1031. In Welch v. Milwaukee &c. R. Co., 27 Wis. 108,

Chief Justice Dixon said in his opinion: "And while speculative damages can not be allowed, yet actual damages, its value to the owner, his use being considered, must always be. . . . The actual use and intention of the proprietor, together with all surrounding circumstances, must be considered." See also Rondout &c. R. Co. v. Dego, 5 Lans. (N. Y.) 438. And compare Illinois Cent. R. Co. v. Lofant, 167 Ill. 85, 47 N. E. 62 (holding that railroad property in use can have a general market value and company can show that it intends to make improvements enhancing its value but not merely that it may do so). Cincinnati &c. R. Co. v. Longworth, 30 Ohio St. 108; Ripley v. Great Northern R. Co., 31 L. T. N. S. 869.

<sup>8</sup> Selma &c. R. Co. v. Keith, 53 Ga. 178; Fleming v. Chicago &c. R. Co., 34 Iowa 353; Worcester v. Great Falls &c. Co., 41 Maine 159, 66 Am. Dec. 217; Gardner v. Brookline, 127 Mass. 358; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co., 30 Ohio St. 604; Powers v. Hazelton &c. R. Co., 33 Ohio St. 429; Searle v. Lackawanna &c. R. Co., 33 Pa. St. 57; Dorlan v. East Brandywine &c. R. Co., 46 Pa. St. 520. The fact that the lands taken would be ren-

age which lie wholly in conjecture.<sup>9</sup> Evidence as to the value of a reversion in the railway location will not be received, where it is impossible to know when the existing easement will terminate, or whether it will ever terminate.<sup>10</sup>

**§ 1260 (994a). Compensation for additional burden on right of way.**—The owner of a right of way is generally entitled to compensation for any new burden on the easement not contemplated in the original condemnation.<sup>11</sup> Such a burden, it has been held, will be imposed by the construction of a line of telegraph on the right of way unless constructed for the use and benefit of the railroad company in the operation of its road and

dered more valuable by the construction of a canal along the south side of the tract, which might or might not be built at sometime in the future by the public authorities, and that the railroad, as built, would cut off access to the canal from a large part of the owner's land, was held to be too remote and speculative an element of damages to sustain an assessment. *Munkwitz v. Chicago &c. R. Co.*, 64 Wis. 403, 25 N. W. 438. In *Watson v. Milwaukee &c. R. Co.*, 57 Wis. 332, 15 N. W. 468, an instruction was approved which laid down the rule for assessing damages, as follows: "In determining the value of land actually taken, you are to be governed by the fair market value (at the time of the taking)—what was the fair market value of the land at that time, for any purpose for which it might reasonably be used in the immediate future—not what would lots sell for in the distant future if a street were opened and lots offered for sale. Nor, indeed, is the price per lot a measure of value, either in the

near or the distant future." *Munkwitz v. Chicago &c. R. Co.*, 64 Wis. 403, 25 N. W. 438.

<sup>9</sup> *Central Pacific R. Co. v. Pearson*, 35 Cal. 247; *Elizabethtown &c. R. Co. v. Helm*, 8 Bush. (Ky.) 681; *Troy &c. R. Co. v. Northern Turnp. Co.*, 16 Barb. (N. Y.) 100. See also *Chicago &c. R. Co. v. Bowman*, 122 Ill. 595, 13 N. E. 814; *Union R. &c. Co. v. Moore*, 80 Ind. 458; *Tallman v. Metropolitan &c. R. Co.*, 121 N. Y. 119, 23 N. E. 1134, 8 L. R. A. 173 and note; *Willock v. Beaver Val. R. Co.*, 229 Pa. St. 526, 79 Atl. 138; *San Diego &c. Co. v. Neale*, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604 and note.

<sup>10</sup> *Boston &c. R. Co. v. Old Colony &c. R. Co.*, 3 Allen (Mass.) 142. As to the measure of damages where leasehold is condemned, see *Bales v. Wichita &c. R. Co.*, 92 Kans. 771, 141 Pac. 1009.

<sup>11</sup> *Wallach v. New York &c. R. Co.*, 111 App. Div. 273, 97 N. Y. S. 717. See *Town of Euricie v. Louisiana &c. R. Co.*, 135 La. Ann. 882, 66 So. 257.

reasonably necessary for that purpose.<sup>12</sup> But the fact that the line was constructed under a contract between the railroad company and the telegraph company does not entitle the land-owner to an accounting of the rents and profits received by the railroad company. The primary question is the land-owner's injury and not the other party's profit.<sup>13</sup> The authorities generally allow a railroad company to construct as many tracks and side tracks on its right of way as it deems necessary for the transaction of its business without paying the owner of the fee any additional compensation.<sup>14</sup> And it seems clear that a railroad company may change the location of its tracks, within the limits of its right of way, without being charged with subjecting the right of way to a new use.<sup>15</sup> Where, however, the railroad company acquires land under a deed given with the express understanding that it is to be used for a main line only, the railroad company can not lay side tracks thereon without paying additional compensation.<sup>16</sup>

**§ 1261 (995). Measure of damages—Illustrative cases.—**The general rule is that where the entire tract is taken, the measure of damages is its market value,<sup>17</sup> taking into consideration its surroundings, improvements, and capabilities for valuable

<sup>12</sup> American Tel. &c. Co. v. Smith, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200 and note; Western Union Tel. Co. v. Rich, 19 Kans. 517, 27 Am. Rep. 159. See post, § 1264.

<sup>13</sup> Chicago &c. R. Co. v. Snyder, 120 Iowa 532, 95 N. W. 183.

<sup>14</sup> East Tennessee &c. R. Co. v. Telford, 89 Tenn. 293, 14 S. W. 776, 10 L. R. A. 855; Pottsville v. People's R. Co., 148 Pa. St. 175, 23 Atl. 900; White v. Chicago &c. R. Co., 122 Ind. 317, 23 N. E. 782, 7 L. R. A. 257. See also Hanselman v. Grand Trunk &c. R. Co., 163 Mich. 496, 128 N. W. 732; Chicago &c. R. Co. v. Rehnke, 113 Minn. 390, 129 N. W. 771; ante § 1170. But compare Stubblefield v. Hous-

ton &c. Ry. Co. (Tex. Civ. App.), 203 S. W. 936.

<sup>15</sup> Brinkley v. Southern R. Co., 135 N. Car. 654, 47 S. E. 791. See also Bryan v. Louisville &c. R. Co., 244 Fed. 650 (relocation of road not a taking or injuring of property near old location).

<sup>16</sup> Donisthrope v. Fremont &c. R. Co., 30 Nebr. 142, 46 N. W. 240, 27 Am. St. 387.

<sup>17</sup> Bangor &c. R. Co. v. McComb, 60 Maine 290; Virginia &c. R. Co. v. Henry, 8 Nev. 165; Dearborn v. Boston &c. R. Co., 24 N. H. 179; Petition of Mt. Washington R. Co., 35 N. H. 134; Albany &c. R. Co. v. Dayton, 10 Abb. Pr. N. S. (N. Y.) 182; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co., 17 W. Va. 812.

uses of any kind.<sup>18</sup> And where part only of a tract of land is taken, but the part taken bears such a relation to the residue of the tract, or is to be devoted to such a use (as by cuts, embankments, switch-yards, or the like) that the value of such residue is depreciated, the land-owner is entitled to damages, in most jurisdictions, not only for the value of the land actually taken, but for the injury to the part not taken. Such damages must be

See also *Alabama Cent. R. Co. v. Musgrove*, 169 Ala. 424, 53 So. 1009; *Union Trac. Co. v. Pfeil*, 39 Ind. App. 51, 78 N. E. 1052, 1054 (citing text); *Vaulx v. Tennessee Cent. R. Co.*, 120 Tenn. 316, 108 S. W. 1142. But in determining what the market value is, it is proper to take into consideration matters which give the property appropriated a special value. Mere matters of fancy, conjecture, or the like, should, however, be excluded from consideration. *Kerr v. South Park Commissioners*, 117 U. S. 379, 6 Sup. Ct. 801, 29 L. ed. 924; *Shoemaker v. United States*, 147 U. S. 282, 13 Sup. Ct. 361, 37 L. ed. 170.

<sup>18</sup> *Little Rock &c. R. Co. v. Woodruff*, 49 Ark. 381, 5 S. W. 792, 4 Am. St. 51; *Haslam v. Galena &c. R. Co.*, 64 Ill. 353; *Central Branch &c. R. Co. v. Andrews*, 26 Kans. 702; *Bailey v. Boston &c. Corp.*, 182 Mass. 537, 66 N. E. 203; *Louisville &c. R. Co. v. Ryan*, 64 Miss. 399, 8 So. 173; *Low v. Railroad Co.*, 63 N. H. 557; *Pittsburgh &c. R. Co. v. Vance*, 115 Pa. St. 325, 8 Atl. 764; *Eastern Texas R. Co. v. Eddings*, 30 Tex. Civ. App. 170, 70 S. W. 98; *Weyer v. Chicago &c. R. Co.*, 68 Wis. 180, 31 N. W. 710. Quality and productiveness of the land: *Ragan v. Kansas City &c. R.*

*Co.*, 144 Mo. 623, 46 S. W. 602; *Weyer v. Chicago &c. R. Co.*, 68 Wis. 180, 31 N. W. 710. Rental value: *Fremont &c. R. Co. v. Bates*, 40 Nebr. 381, 58 N. W. 959. See also *Mineral Springs: Kossler v. Pittsburgh &c. R. Co.*, 208 Pa. 50, 57 Atl. 66. Factory buildings: *White v. Cincinnati &c. R. Co.*, 34 Ind. App. 287, 71 N. E. 276. Improvements on farms: *Illinois &c. R. Co. v. Humiston*, 208 Ill. 100, 69 N. E. 880. Valuable frontage on another railroad destroyed: *Wray v. Knoxville &c. R. Co.*, 113 Tenn. 544, 82 S. W. 471. Suitableness of land for raising ducks: *Cox v. Philadelphia &c. R. Co.*, 215 Pa. 506, 64 Atl. 729. As to rights of owners of mines under the English Railway act of 1845, see *Lord Gerard and London &c.*, In re, L. R. (1894) 2 Q. B. 915, and *Chamber &c. Co. v. Rochdale Canal*, L. R. (1894) 2 Q. B. 632. It has been held that although the owner had testified that a certain portion of his farm crossed by the railroad was adapted for pasture, and that he had intended to use it for stock purposes, it was error to limit the witnesses testifying to the market value of the farm to a consideration of this particular purpose. *Lough v. Minneapolis &c. R. Co.*, 116 Iowa 31, 89 N. W. 77.

given in most jurisdictions whether the statute mentions them or not.<sup>19</sup> While damages for such incidental injuries may be awarded, the general rule, according to the weight of authority, is that purely consequential damages can not be awarded. The rule generally enforced is that the owner is entitled to the difference between the market value of the whole lot or tract before the taking, and the market value of what remains to him after such taking, uninfluenced by any general rise in values of property due to the improvement.<sup>20</sup> This seems to us to be the sound

<sup>19</sup> *St. Louis &c. R. Co. v. Anderson*, 39 Ark. 167; *Selma &c. R. Co. v. Redwine*, 51 Ga. 470; *Peoria &c. R. Co. v. Sawyer*, 71 Ill. 361; *Illinois &c. R. Co. v. Humiston*, 208 Ill. 100, 69 N. E. 880; *Baltimore &c. R. Co. v. Lansing*, 52 Ind. 229; *Kuchemian v. Chicago &c. R. Co.*, 46 Iowa 366; *Atchison &c. R. Co. v. Gough*, 29 Kans. 94; *Richmond &c. Turnp. R. Co. v. Rogers*, 1 Duv. (Ky.) 135; *Walker v. Old Colony R. Co.*, 103 Mass. 10, 4 Am. Rep. 409; *Wilmie v. Minneapolis &c. R. Co.*, 29 Minn. 242, 13 N. W. 39; *Wyandotte &c. R. Co. v. Waldo*, 70 Mo. 629; *Fremont &c. R. Co. v. Lamb*, 11 Nebr. 592, 10 N. W. 493; *Virginia &c. R. Co. v. Henry*, 8 Nev. 165; *Dearborn v. Boston &c. R. Co.*, 4 Fost. (N. H.) 179; *South Buffalo &c. R. Co. v. Kirkover*, 176 N. Y. 301, 68 N. E. 366; *Raleigh &c. R. Co. v. Wicker*, 74 N. Car. 220; *Cleveland &c. R. Co. v. Ball*, 5 Ohio St. 568; *Blincoe v. Choctaw &c. R. Co.*, 16 Okla. 286, 83 Pac. 903; *Watson v. Pittsburgh &c. R. Co.*, 37 Pa. St. 469; *Baltimore &c. R. Co. v. Pittsburgh &c. R. Co.*, 17 W. Va. 812; *Parks v. Wisconsin Central &c. Co.*, 33 Wis. 413; *Chapman v. Oshkosh &c. R. Co.*, 33 Wis. 629.

<sup>20</sup> *Little Rock &c. R. Co. v. Allen*, 41 Ark. 431; *Imlay v. Union Branch R. Co.*, 26 Conn. 249, 68 Am. Dec. 392; *Wilson v. Rockford &c. R. Co.*, 59 Ill. 273; *Chicago &c. R. Co. v. Hall*, 90 Ill. 42; *Chicago &c. R. Co. v. Mawman*, 206 Ill. 182, 69 N. E. 66; *White Water Valley R. Co. v. McClure*, 29 Ind. 536; *Grand Rapids &c. R. Co. v. Horn*, 41 Ind. 479; *Baltimore &c. R. Co. v. Lansing*, 52 Ind. 229; *Sater v. Burlington &c. R. Co.*, 1 Iowa 386; *Fleming v. Chicago &c. R. Co.*, 34 Iowa 353; *Brooks v. Davenport &c. R. Co.*, 37 Iowa 99; *Atchison &c. R. Co. v. Blackshire*, 10 Kans. 477; *Henderson &c. R. Co. v. Dickerson*, 17 B. Mon. (Ky.) 173, 66 Am. Dec. 148; *Robb v. Maysville &c. R. Co.*, 3 Metc. (Ky.) 117; *Bangor &c. R. Co. v. McCormb*, 60 Maine 290; *Meacham v. Fitchburg R. Co.*, 4 Cush. (Mass.) 291, 299; *Presbrey v. Old Colony &c. R. Co.*, 103 Mass. 1; *Grand Rapids &c. R. Co. v. Heisel*, 47 Mich. 393, 11 N. W. 212; *Winona &c. R. Co. v. Waldron*, 11 Minn. 515, 88 Am. Dec. 100 and note; *Lake Superior &c. R. Co. v. Greve*, 17 Minn. 322; *Scott v. St. Paul &c. R. Co.*, 21 Minn. 322; *Quincy &c. R. Co. v. Ridg *, 57 Mo. 599; *P tition of Mount*

general doctrine.<sup>21</sup> By the market value, as the cases generally hold, is meant the price for which the property could be sold, not at a forced sale, but at a sale conducted by the owner with due

Washington Road Co., 35 N. H. 134; Troy &c. R. Co. v. Lee, 13 Barb. (N. Y.) 169; Poughkeepsie &c. R. Co., In re, 63 Barb. (N. Y.) 151; Prospect &c. R. Co., In re, 13 Hun 345, 16 Hun (N. Y.) 261; Henderson v. New York Central R. Co., 78 N. Y. 423, 17 Hun 344; Cincinnati &c. R. Co. v. Longworth, 30 Ohio St. 108; Powers v. Hazelton &c. R. Co., 33 Ohio St. 429; Searle v. Lackawanna &c. R. Co., 33 Pa. St. 57; Harvey v. Lackawanna &c. R. Co., 47 Pa. St. 428; Hornstein v. Atlantic &c. R. Co., 51 Pa. St. 87; East Brandywine &c. R. Co. v. Ranck, 78 Pa. St. 454; Pennsylvania &c. R. Co. v. Bunnell, 81 Pa. St. 414; Pittsburgh &c. R. Co. v. Bentley, 88 Pa. St. 178; Greenville &c. R. Co. v. Partlow, 5 Rich. L. (S. Car.) 428; Charleston &c. R. Co. v. Blake, 12 Rich. (S. Car.) 634; Woodfolk v. Nashville &c. R. Co., 2 Swan (Tenn.) 422; Eastern Texas R. Co. v. Eddings, 30 Tex. Civ. App. 170, 70 S. W. 98; Pochila v. Calvert &c. R. Co., 31 Tex. Civ. App. 398, 72 S. W. 255; Seattle &c. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. 864; Robbins v. Milwaukee &c. R. Co., 6 Wis. 636; Driver v. Western Union R. Co., 32 Wis. 569, 14 Am. Rep. 726. "What was the fair market value of the whole property, and then what would be the fair marketable value of the property not taken? The difference would be the true amount of compensation to be awarded."

Canandaigua &c. R. Co. v. Payne, 16 Barb. (N. Y.) 273; Pittsburgh &c. R. Co. v. Rose, 74 Pa. St. 362; Delaware &c. R. Co. v. Burson, 61 Pa. St. 369; Chicago &c. R. Co. v. Francis, 70 Ill. 238. But in Illinois and some other states, the latest decisions are to the effect that if the improvement actually enhances the value of the property this benefit may be set off even though it is common to all the property in the neighborhood or along the route of the railroad. Peoria &c. Trac. Co. v. Vance, 225 Ill. 270, 80 N. E. 134, 9 L. R. A. (N. S.) 781; Brand v. Union Elev. R. Co., 258 Ill. 133, 101 N. E. 247, L. R. A. 1918A, 878. The notes to these two cases as last reported cite other authorities on both sides. The fact that the land-owner obtained a reversion in the property taken does not lessen the amount of his damages, but they must be assessed by reference to the full market value of the property. Hollingsworth v. Des Moines &c. R. Co., 63 Iowa 443, 19 N. W. 325.

<sup>21</sup> See New Orleans &c. R. Co. v. Lagarde, 10 La. Ann. 150; Sater v. Burlington &c. Plank R. Co., 1 Iowa 386; Elizabethtown &c. R. Co. v. Helm, 8 Bush. (Ky.) 681; Carli v. Stillwater &c. R. Co., 16 Minn. 260; Minneapolis &c. Trac. Co. v. Harkins, 108 Minn. 478, 122 N. W. 450; Carolina &c. R. Co. v. Armfield, 167 N. Car. 464, 83 S. E. 809.

regard to his own interest.<sup>22</sup> The estimate which the owner puts upon his property, so far as it is influenced by a fondness for the particular premises, is not to be taken as the true measure of damages.<sup>23</sup> Neither, it seems, is it conclusive what some particular person, even though willing to buy the land, will give for the land.<sup>24</sup> The inquiry is as to the fair market value at a sale made in ordinary course of business, taking into consideration advantages of location and like circumstances. The necessity of the company is not to be considered as enhancing the value of the land,<sup>25</sup> nor, on the other hand, can the value be ascertained

<sup>22</sup> *Little Rock &c. R. Co. v. McGehee*, 41 Ark. 202; *Dupuis v. Chicago &c. R. Co.*, 115 Ill. 97, 3 N. E. 720; *Everett v. Union Pacific R. Co.*, 59 Iowa 243, 13 N. W. 109; *Elizabethtown &c. R. Co. v. Helm*, 8 Bush. (Ky.) 681; *Tufts v. Charlestown*, 4 Gray (Mass.) 537; *Virginia &c. R. Co. v. Elliott*, 5 Nev. 358; *Low v. Concord R. Co.*, 63 N. H. 557, 3 Atl. 739; *Somerville &c. R. Co. v. Doughty*, 22 N. J. L. 495; *Giesy v. Cincinnati &c. R. Co.*, 4 Ohio St. 308, 331; *Searle v. Lackawanna &c. R. Co.*, 33 Pa. St. 57; *Woodfolk v. Nashville &c. R. Co.*, 2 Swan (Tenn.) 422; *McKinney v. Nashville*, 102 Tenn. 131, 52 S. W. 781, 73 Am. St. 859. See also *Idaho &c. R. Co. v. Columbia Conference*, 20 Idaho 568, 119 Pac. 60; *Weiser Val. Land &c. Co. v. Ryan*, 190 Fed. 417. The price which the owner gave may be put in evidence, and the owner may show under what circumstances he purchased it, and the value of the improvements he put upon it. *Swan v. Middlesex Co.*, 101 Mass. 177. Where the land has been fitted by the owner for use in connection with other property, and has no market value apart from such use,

its value must be determined by the uses to which it is applied. *Lake Shore &c. R. Co. v. Chicago &c. R. Co.*, 100 Ill. 21; *Chicago &c. R. Co. v. Jacobs*, 110 Ill. 414; *Chicago &c. R. Co. v. Chicago &c. R. Co.*, 112 Ill. 589.

<sup>23</sup> *Tufts v. Charlestown*, 4 Gray (Mass.) 537; *Furman Street, Matter of*, 17 Wend. (N. Y.) 649. See also *Harrison v. Iowa Midland R. Co.*, 36 Iowa 323. But in *Robb v. Maysville &c.*, 3 Metc. (Ky.) 117, the peculiar value of the land to the owner was taken as the measure of damages.

<sup>24</sup> *Chicago &c. R. Co. v. Kelly*, 221 Ill. 498, 77 N. E. 916.

<sup>25</sup> *Henry v. Dubuque &c. R. Co.*, 2 Iowa 288; *Henderson &c. R. Co. v. Dickerson*, 17 B. Mon. (Ky.) 173, 66 Am. Dec. 148; *Union Depot St. R. &c. Co. v. Brunswick*, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789; *St. Louis &c. R. Co. v. Knapp, Stout & Co.*, 160 Mo. 396, 61 S. W. 300; *Virginia &c. R. Co. v. Elliott*, 5 Nev. 358. See also *Lambert v. Giffin*, 257 Ill. 152, 100 N. E. 496; *Broadway Coal Min. Co. v. Smith*, 136 Ky. 725, 125 S. W. 157.

by considering what the property would bring at a forced sale. In arriving at the probable difference between the market value of the property before and after the construction of the railroad or other public work, the influence upon that value exercised by different causes is a proper subject for consideration by the jury. But neither annoyances of a kind which affect the whole public,<sup>26</sup> nor benefits that are shared by the community in general,<sup>27</sup> can be proven as affecting the question of damages. So, in most jurisdictions, a mere general and public benefit or increase of value received by the plaintiff's land, in common with other lands in the neighborhood, is not to be taken into consideration.<sup>28</sup> Where the personal property is destroyed by the taking of land for a railroad right of way, its value is a proper element of damage. This rule is applied in cases where growing crops are destroyed in building the road,<sup>29</sup> and where the rights of a

<sup>26</sup> *St. Louis &c. R. Co. v. Haller*, 82 Ill. 208; *Ham v. Wisconsin &c. R. Co.*, 61 Iowa 716, 17 N. W. 157; *First Parish v. County of Middlesex*, 73 Mass. (7 Gray) 106; *Presby v. Old Colony &c. R. Co.*, 103 Mass. 1; *Walker v. Old Colony &c. R. Co.*, 103 Mass. 10, 4 Am. Rep. 509; *Gulf &c. R. Co. v. Fuller*, 63 Tex. 467; *Chicago &c. R. Co. v. Ritter (Tex.)*, 10 Am. & Eng. R. Cas. 202. See also *Lavelle v. Julesburg*, 49 Colo. 290, 112 Pac. 774; *Illinois Cent. R. Co. v. Elliott*, 33 Ky. L. 537, 110 S. W. 817; *Bangor R. Co. v. McComb*, 60 Maine 290; *Idaho &c. R. Co. v. Nagle*, 184 Fed. 598. Compare also *Hatch v. Vermont Central R. Co.*, 28 Vt. 142; *Lansing v. Smith*, 8 Cow. (N. Y.) 151.

<sup>27</sup> *Keithsburg &c. R. Co. v. Henry*, 79 Ill. 290; *Chicago &c. R. Co. v. Hall*, 90 Ill. 42; *Brand v. Union Elev. R. Co.*, 258 Ill. 133, 101 N. E. 247, Ann. Cas. 1914B, 473; *Tobie v. Comrs. of Brown Co.*, 20 Kans. 14; *Sexton v. North Bridgewater*,

116 Mass. 200; *Winona &c. R. Co. v. Waldron*, 11 Minn. 515, 88 Am. Dec. 100 and note; *St. Louis &c. R. Co. v. Richardson*, 45 Mo. 466; *Putnam v. Douglas Co.*, 6 Ore. 328, 25 Am. Rep. 527.

<sup>28</sup> *Page v. Chicago &c. R. Co.*, 70 Ill. 324; *Mix v. Lafayette &c. R. Co.*, 67 Ill. 319; *Bangor &c. R. Co. v. McComb*, 60 Maine 290. *Adden v. White Mountains R. Co.*, 55 N. H. 413, 20 Am. R. 220; ante n. 23. See also *Routh v. Texas Trac. Co. (Tex. Civ. App.)*, 148 S. W. 1152; *Fowler v. Norfolk &c. R. Co.*, 68 W. Va. 274, 69 S. E. 811. But see contra *Brand v. Union Elevated R. Co.*, 258 Ill. 733, 101 N. E. 247, L. R. A. 1918A, 878, affirmed by a divided court in 238 U. S. 586, 35 Sup. Ct. 846, 59 L. ed. 1471.

<sup>29</sup> *Lance v. Chicago &c. R. Co.*, 57 Iowa 636, 11 N. W. 612; *Gilmore v. Pittsburgh &c. R. Co.*, 104 Pa. St. 275; *Seattle &c. R. Co. v. Scheike*, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503.



lessee of land are condemned.<sup>30</sup> There are cases holding that where the railroad has been actually constructed at the time the assessment is made, the jury in assessing damages may take into consideration the manner in which it was actually built,<sup>31</sup> and may, where such right exists, consider the right of the company to change its grade and manner of construction without making additional compensation.<sup>32</sup> Some of the cases hold that where no part of the plaintiff's land is taken, he is not entitled to damages for annoyance caused by throwing smoke, dust and soot upon his premises, unless some peculiar constitutional or statutory provision gives damages for such injuries.<sup>33</sup> But it is doubtful whether the doctrine of these cases can be reconciled with that declared by other decisions.<sup>34</sup>

<sup>30</sup> *Booker v. Venice &c. R. Co.*, 101 Ill. 333. See also *Schreiber v. Chicago &c. R. Co.*, 115 Ill. 340, 3 N. E. 427; *North Coast R. Co. v. Gentry*, 58 Wash. 82, 107 Pac. 1060.

<sup>31</sup> *Thompson v. Milwaukee &c. R. Co.*, 27 Wis. 93; *Cummins v. Des Moines &c. R. Co.*, 63 Iowa 397, 19 N. W. 268; *Union Railroad &c. Co. v. Moore*, 80 Ind. 458. See *Hayes v. Ottawa &c. R. Co.*, 54 Ill. 373. And compare *Cleveland &c. R. Co. v. Smith*, 177 Ind. 524, 97 N. E. 164.

<sup>32</sup> *March v. Portsmouth &c. R. Co.*, 19 N. H. 372. But it seems to us that some of the cases go entirely too far, at all events the doctrine is to be carefully limited and cautiously applied. It is doubtless true that the right to make ordinary changes should be taken into consideration as well as the ordinary inconveniences resulting from the operation of the railroad in a reasonably careful mode.

<sup>33</sup> *Hatch v. Vermont Central R. Co.*, 25 Vt. 49; *Cogswell v. New York &c. R. Co.*, 48 N. Y. Super.

Ct. 31, reversed 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; *Walker v. Old Colony &c. R. Co.*, 103 Mass. 10, 57 Am. Rep. 701; *Dimmick v. Council Bluffs &c. R. Co.*, 62 Iowa 409, 17 N. W. 595. See also *Harrison v. Denver &c. Tramway Co.*, 54 Colo. 593, 131 Pac. 409, 44 L. R. A. (N. S.) 1164; *Fink v. Cleveland &c. Ry. Co.*, 181 Ind. 539, 105 N. E. 116; *Atchison &c. R. Co. v. Armstrong*, 71 Kans. 366, 80 Pac. 978, 1 L. R. A. (N. S.) 113, 114 Am. St. 474.

<sup>34</sup> *Lake Erie &c. R. Co. v. Scott*, 132 Ill. 429, 24 N. E. 78, 8 L. R. A. 330 and note; *Springer v. Chicago*, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609 and note; *Chicago &c. R. Co. v. Leah*, 152 Ill. 249, 38 N. E. 556; *Seaside El. R. Co., Matter of*, 83 Hun 143, 31 N. Y. S. 630; *Ft. Worth &c. Co. v. Daniels* (Tex. Civ. App.), 29 S. W. 695; ante, § 1235; note in 85 Am. St. 309, et seq. See generally upon the subject notes to *Tidewater R. Co. v. Shartzer*, 17 L. R. A. (N. S.) 1954; *Rasch v. Nassana Elec. R. Co.*, 36 L. R.

**§ 1262 (996). Matters to be considered in estimating damages—Illustrative instances.**—If the construction of private or farm crossings is made necessary, the probable cost of making them must be considered by the jury in assessing damages,<sup>35</sup> unless the road is bound to build and maintain such crossings, in which case that fact must be considered.<sup>36</sup> Where the construction of the road makes necessary the removal of buildings,<sup>37</sup> or the erec-

A. (N. S.) 673; *Hyde v. Minnesota &c. R. Co.*, 40 L. R. A. (N. S.) 48; and the opinion in *Choctaw &c. R. Co. v. Drew*, 37 Okla. 396, 130 Pac. 1149, 44 L. R. A. (N. S.) 38. See also these cases which uphold a recovery for this species of injury. *Missouri &c. R. Co. v. Calkins* (Tex. Civ. App.), 79 S. W. 852; *Mason City &c. R. Co. v. Wolf*, 148 Fed. 961; *Davenport & R. Co. v. Sinnet*, 111 Ill. App. 75; *Illinois Central R. Co. v. Turner*, 194 Ill. 575, 62 N. E. 798, affirming 97 Ill. App. 219; *Baltimore Bell R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 654; *Syracuse &c. Co. v. Rome &c. R. Co.*, 43 App. Div. 203, 60 N. Y. S. 40, affirmed in 168 N. Y. 650, 61 N. E. 1135.

<sup>35</sup> *Cedar Rapids &c. R. Co. v. Raymond*, 37 Minn. 204, 33 N. W. 704; *Atchison &c. R. Co. v. Gough*, 29 Kans. 94; *Mason v. Kennebec &c. R. Co.*, 31 Maine 215; *Kittell v. Missisquoi R. Co.*, 56 Vt. 96; *Silver Creek &c. Co. v. Mangum*, 64 Miss. 682, 2 So. 11, note in 85 Am. St. 305. See also cases cited in notes to preceding section.

<sup>36</sup> *Kansas City &c. R. Co. v. Kregelo*, 32 Kans. 608, 5 Pac. 15; *March v. Portsmouth &c. R. Co.*, 19 N. H. 372; *Lough v. Minneapolis &c. R. Co.*, 116 Iowa 31, 89 N. W. 77. Under the Minnesota

statute, the land-owner has no right to private crossings except as reserved and defined by the condemnation proceedings, and the assessment should be made accordingly. *Cedar Rapids &c. R. Co. v. Raymond*, 37 Minn. 204, 33 N. W. 704. A Canadian court holds that where the value of a piece of land cut off from the rest of a farm by a railroad is less than the cost of constructing a farm crossing, the court may, in its discretion, authorize the payment of the value of the land to the owner, instead of requiring the construction of a crossing. *Martin v. Maine Cent. R. Co.*, Rap. Jud. Que., 19 C. S. 561. Damages awarded for appropriation of an additional strip along the right of way have been held to cover damages incident to temporary interference with the land-owner's right of crossing, but not to cover permanent loss of the crossing. *Pittsburg &c. R. Co. v. Kearns*, 58 Ind. App. 694, 108 N. E. 873.

<sup>37</sup> *Oregon &c. R. Co. v. Barlow*, 3 Ore. 311. The jury may take the cost of removing an obstruction to the enjoyment of his property as the basis for calculating his damages. *Chicago &c. R. Co. v. Carey*, 90 Ill. 514. Interference with access to rooms through a hall which

tion of structures of any kind in order that the property not taken may be restored to a condition for use, it has been held that the cost of such removals or erections may be considered by the jury in assessing damages.<sup>38</sup> But there are well considered decisions to the contrary,<sup>39</sup> and in any event a reasonable expense only can be incurred for this cause, and the owner will not be permitted to collect as damages the cost of improvements by which his property is rendered more valuable than it was before any part of it was taken. So, where the construction of the road compels the land-owner to build additional fences, their cost is a proper element of damages, for which compensation must be made,<sup>40</sup> except where the duty of building fences is by law im-

was torn down in the construction of the road, was held such a damage as to lessen their rental value and entitle the lessees to compensation. *Ford v. Metropolitan &c. R. Co.*, L. R. 17 Q. B. Div. 12, 25 Am. & Eng. R. Cas. 182.

<sup>38</sup> *St. Louis &c. R. Co. v. Mollet*, 59 Ill. 235; *Chicago &c. R. Co. v. Hock*, 118 Ill. 587, 9 N. E. 205; *Commonwealth v. Boston &c. R. Co.*, 3 Cush. (Mass.) 25; *Presbey v. Old Colony &c. R. Co.*, 103 Mass. 1; *Chase v. Worcester*, 108 Mass. 60; *Bemis v. Springfield*, 122 Mass. 110; *Forney v. Fremont &c. R. Co.*, 23 Nebr. 465, 36 N. W. 806; *Easterbrook v. Erie R. Co.*, 51 Barb. (N. Y.) 95; *Price v. Milwaukee &c. R. Co.*, 27 Wis. 98. In *Terre Haute &c. R. Co. v. Crawford*, 100 Ind. 550, the court approved an instruction by which the jury were permitted to consider the cost of filling the remaining land from two to five feet, the entire length of the line appropriated, as an element of his damages.

<sup>39</sup> See *Central Pac. R. Co. v. Pearson*, 35 Cal. 247; *White v. Cin-*

*cinnati &c. R. Co.*, 34 Ind. App. 287, 71 N. E. 276; *Chicago &c. R. Co. v. Knuffke*, 36 Kans. 367, 13 Pac. 582; *Mississippi River Bridge Co. v. Ring*, 58 Mo. 495; *Kansas City v. Morse*, 105 Mo. 510, 16 S. W. 893; *St. Louis &c. Ry. Co. v. Mendensa*, 193 Mo. 518, 91 S. W. 65; *Schuchardt v. Mayor*, 53 N. Y. 202; *Finn v. Providence Gas &c. Co.*, 99 Pa. St. 631. This is upon the theory that he is compensated for the buildings as part of the realty. In some jurisdictions, however, the owner is entitled to remove the buildings and recover the reasonable cost of removal. See as to damage for separating part of farm with the building separated from the rest. *Prather v. Chicago &c. R. Co.*, 221 Ill. 190, 77 N. E. 430.

<sup>40</sup> *St. Louis &c. R. Co. v. Anderson*, 39 Ark. 167; *Sacramento &c. R. Co. v. Moffatt*, 6 Cal. 74; *California &c. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 7 Pac. 123; *Vandegrift v. Delaware &c. R. Co.*, 2 Houst. (Del.) 287; *St. Louis &c. R. Co. v. Mitchell*, 47 Ill. 165; *St.*

posed upon the railroad company.<sup>41</sup> But it is held that the expense of fencing should only be considered to the extent that it

Louis &c. R. Co. v. Kirby, 104 Ill. 345; Leavenworth &c. R. Co. v. Paul, 28 Kans. 816; Winona &c. R. Co. v. Waldron, 11 Minn. 515, 88 Am. Dec. 100 and note; Crowell v. New Orleans &c. R. Co., 61 Miss. 631; New York &c. R. Co. v. Stanley, 35 N. J. Eq. 283; Rensselaer &c. R. Co., In re, 4 Paige (N. Y.) Ch. 553; Raleigh &c. R. Co. v. Wicker, 74 N. Car. 220; Pennsylvania &c. R. Co. v. Bunnell, 81 Pa. St. 414; Greenville &c. R. Co. v. Partlow, 5 Rich. L. (S. Car.) 428; note in 85 Am. St. 304. Where damages were assessed for the cost of fencing along the right of way, it was held that the land-owner, his heirs and assigns became legally bound to maintain fences. St. Louis &c. R. Co. v. Mitchell, 47 Ill. 165. In Northeastern R. Co. v. Sineath, 8 Rich. L. (S. Car.) 185, it was held that where the road passed through uncleared and uncultivated land, for which no fences would be required, that no damages for the increased cost of fencing could be awarded. But it would seem that the jury should have considered the increased cost of adapting the land to cultivation (including the construction of fences) as an element of damages. See Raleigh &c. R. Co. v. Wicker, 74 N. Car. 220; Montgomery &c. Co. v. Stockton, 43 Ind. 328. And see generally Pacific Coast R. Co. v. Porter, 74 Cal. 261, 15 Pac. 774; Newgass v. St. Louis &c. R. Co., 54 Ark. 140, 15 S. W. 188; Jones v. Western North Car. R. Co., 95 N.

Car. 328; Pittsburg &c. R. Co. v. McCloskey, 110 Pa. St. 436, 1 Atl. 555; Seattle &c. R. Co. v. Gilchrist, 4 Wash. 509, 30 Pac. 738.

<sup>41</sup> Winona &c. R. Co. v. Waldron, 11 Minn. 515, 88 Am. Dec. 100; St. Joseph &c. R. Co. v. Shambaugh, 106 Mo. 557, 17 S. W. 581. See also Indianapolis &c. R. Co. v. Bronson, 172 Ind. 383, 86 N. E. 834, 88 N. E. 594 (citing text). Where the company was held bound to maintain one-half of the fence, it was held that the cost of the other half, which would fall on the land-owner, was properly included in the assessment of damages. Rensselaer &c. R. Co., In re, 4 Paige (N. Y.) 553; Henry v. Dubuque &c. R. Co., 2 Iowa 288, 305. In Baltimore &c. R. Co. v. Lansing, 52 Ind. 229, the court approved the following instruction given by the court below: "You may also consider as damages any additional amount of fencing necessary to a safe and proper use of the defendant's improved farm, or fields already inclosed, as the law does not impose on the company any obligation to fence their right of way, except so far as they may choose to do so for the protection of their own interests, the law simply imposing on them the obligation to pay for animals killed by them on their track, where it is not, but might be, securely fenced." The decisions on this point vary greatly with the fence laws of the several states. Where the company is only re-

depreciates the market value of the remaining land.<sup>42</sup> Any interference with the flow of water upon or across the land is an element of damages where the farm is thereby depreciated in value.<sup>43</sup> Some of the courts hold that damages to adjoining property from the vibrations occasioned by passing trains,<sup>44</sup> and from the annoyance due to the noise and confusion<sup>45</sup> which they

quired to fence within six months, the jury may consider the consequences of keeping the land thrown open that long. *St. Louis &c. R. Co. v. Kirby*, 104 Ill. 345. In *Raleigh &c. R. Co. v. Wicker*, 74 N. Car. 220, the court held that the cost of fencing uncleared and uncultivated land, which the law did not require the owner to fence, could not be included in the damages awarded, basing its opinion upon the fact that the legislature had not deemed it necessary to require railroads to fence their roads, and that the assessment of damages for fences where none were required by law, and none would, in all probability, be built, would impose upon them the burden which the legislature had failed to impose without securing the benefits arising from requiring the road to be fenced. To the effect that a city in condemning for a street across a railroad is not bound to make compensation for fencing, flanking and the like required of the company, see *Chicago &c. R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 591, 592, 41 L. ed. 979, and cases cited.

<sup>42</sup> *Pennsylvania &c. R. Co. v. Bunnell*, 81 Pa. St. 414; *Delaware &c. R. Co. v. Burson*, 61 Pa. St. 369. Where the law requires a railroad to erect and maintain suit-

able cattle guards and wing fences at the points of entrance upon land through which it has obtained a right of way, the land-owner may recover the value of crops destroyed by reason of its neglect to perform this duty. *Houston &c. R. Co. v. Adams*, 63 Tex. 200.

<sup>43</sup> *Pfeegar v. Hastings &c. R. Co.*, 28 Minn. 510, 11 N. W. 72.

<sup>44</sup> *New York Central &c. R. Co., In re*, 15 Hun (N. Y.) 63; *Henderson v. New York Central R. Co.*, 17 Hun (N. Y.) 344; *Croft v. London &c. R. Co.*, 113 Eng. C. L. (3 B. & S.) 435; *Penny, In re*, 90 Eng. C. L. 660; *Cohen v. Cleveland*, 43 Ohio St. 190.

<sup>45</sup> *Little Rock &c. R. Co. v. Allen*, 41 Ark. 431; *Mix v. Lafayette &c. R. Co.*, 67 Ill. 319; *Chicago &c. R. Co. v. Nix*, 137 Ill. 141, 27 N. E. 81; *Wilson v. Des Moines &c. R. Co.*, 67 Iowa 509, 25 N. W. 754; *Bangor &c. R. Co. v. McComb*, 60 Maine 290; *Blue Earth Co. v. St. Paul &c. R. Co.*, 28 Minn. 503, 11 N. W. 73; *Ode v. Manhattan &c. R. Co.*, 56 Hun 199, 9 N. Y. S. 338; *Duyckinck v. New York El. R. Co.*, 125 N. Y. 710, 26 N. E. 755; *White v. Charlotte &c. R. Co.*, 6 Rich. L. (S. Car.) 47; *Gulf &c. R. Co. v. Eddins*, 60 Tex. 656; *Gainesville R. Co. v. Hall*, 78 Tex. 169, 14 S. W. 259, 9 L. R. A. 298 and note, 22 Am. St. 42 and note. *Contra New*

occasion, may be recovered by the property holder.<sup>46</sup> The increased danger from fire emitted from the locomotives,<sup>47</sup> the in-

Orleans &c. R. Co. v. Barton, 43 La. Ann. 171, 9 So. 19; Republican Valley &c. R. Co. v. Linn, 15 Nebr. 234, 18 N. W. 35; Hammersmith &c. R. Co. v. Brand, L. R. 4 H. L. Cas. 171; Glasgow U. R. Co. v. Hunter, L. R. 2 H. L. Sc. 78. See St. Louis &c. R. Co. v. Haller, 82 Ill. 208; Metropolitan &c. El. R. Co. v. Gall, 100 Ill. App. 323; Illinois Central R. Co. v. School Trustees, 212 Ill. 406, 72 N. E. 39. The lawful construction and operation of a horse railway in the streets of a city does not entitle the owner of property which is damaged thereby to compensation unless special damage is alleged and shown; and for this purpose evidence is admissible to prove that the damage was caused by noise, smoke, dust and the like, but these must have resulted in actual damage, and not merely in annoyance or inconvenience. Campbell v. Metropolitan St. R. Co., 82 Ga. 320, 9 S. E. 1078. Inconvenience of a permanent nature, such as rattle of train, noise of whistle, smoke, etc., are elements of damage. Bowen v. Atlantic &c. R. Co., 17 S. Car. 574. See also Logan v. Boston El. R. Co., 188 Mass. 414, 74 N. E. 663. See ante, § 1261.

<sup>46</sup> But while injuries of this class are admitted as an element for consideration in estimating the depreciation in value of the residue of property, part of which has been taken, many authorities refuse to allow compensation therefor, when unaccompanied by any physical in-

jury or taking. Bordentown &c. Turnp. Co. v. Camden &c. R. Co., 17 N. J. L. 314; Hammersmith &c. R. Co. v. Brand, L. R. 4 H. L. 171, L. R. 2 Q. B. 223, L. R. 1 Q. B. 130; Duke of Buccleuch v. Metropolitan Board of Works, L. R. 5 Exch. 221. Under the Texas constitutional provision that "no person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made," one can recover for diminution in the value of his property arising from the noise, smoke, and vibration produced by the operation of a railroad near the property, though not along a public highway. Gainesville &c. R. Co. v. Hall, 78 Tex. 169, 14 S. W. 259, 9 L. R. A. 298 and note, 22 Am. St. 42 and note.

<sup>47</sup> St. Louis &c. R. Co. v. Springfield &c. R. Co., 96 Ill. 274; Swinney v. Fort Wayne &c. R. Co., 59 Ind. 205; Lafayette &c. R. Co. v. Murdock, 68 Ind. 137; Kansas City &c. R. Co. v. Kregelo, 32 Kans. 608, 5 Pac. 15; Pierce v. Worcester &c. R. Co., 105 Mass. 199; Colvill v. St. Paul &c. R. Co., 19 Minn. 283; Adden v. White Mountains &c. R. Co., 55 N. H. 413, 20 Am. Rep. 220; Utica &c. R. Co., In re, 56 Barb. (N. Y.) 456; Oregon &c. R. Co. v. Barlow, 3 Ore. 311; Wilmington &c. R. Co. v. Stauffer, 60 Pa. St. 374, 100 Am. Dec. 574. See also Cleveland &c. R. Co. v. Smith, 177 Ind. 524, 97 N. E. 164; Beckman v. Lincoln &c. R. Co., 85 Nebr. 228, 122 N. W. 994, 133 Am. St. 655;

Idaho &c. R. Co. v. Coey, 73 Wash. 291, 131 Pac. 810. St. Louis Belt &c. R. Co. v. Mendonsa, 193 Mo. 518, 91 S. W. 65 (the depreciation in value of the part not taken because of the danger from fire but not the mere possibility of the destruction of buildings); note in 85 Am. St. 308. In Ontario &c. R. Co., In re, and Taylor, 6 Ont. 338, 17 Am. & Eng. R. Cas. 100, it was held that the greater liability to injury by fire by reason of the working of the railway, are too remote contingencies to be taken into consideration in estimating the value of the land taken where there are no buildings to be endangered. In Lance v. Chicago &c. R. Co., 57 Iowa 636, 11 N. W. 612, the court held that it was error to admit evidence of the value of a grove through which the road was laid out, and of a dwelling-house standing on the opposite side of the grove, to which it was claimed that fire could run upon the dry leaves of the grove. The court said: "The compensation allowed for right of way should be direct and proximate, and not remote and contingent upon circumstances which may or may not transpire. . . . It is plain that no estimate can be made in the way of compensation for the value of the property which may be destroyed by fire and without the fault of the railroad company. The most that can be claimed is that it is competent to take into consideration the risk of fire set out by the defendant without its fault, and by reason of the operation of the road through the premises. But this risk or

hazard or exposure of the property is an entirely different question from that involved in its destruction by fire without fault of the company. In the one case, while the risk may somewhat decrease the value of the property, and is a legitimate consideration for what it may be worth, in fixing the compensation to the owner, in the other case the destruction of buildings, groves, or the like, by fires, is a field of inquiry so remote and contingent as to be without and beyond any range of damages known to the law. Of course, it will be understood that we are treating of such risks and hazard from fire as result from the operation of the road in such a manner that if fire should escape there would be no liability against the railroad company. For its negligence it would be liable to the owner, and this element should not be taken into account in estimating the compensation." For other cases in which prospective damages from fires were held not a proper element for consideration by the jury see Wilmington &c. R. Co. v. Stauffer, 60 Pa. St. 374, 100 Am. Dec. 574; Patten v. Northern Central R. Co., 33 Pa. St. 426, 75 Am. Dec. 612; Lehigh Valley R. Co. v. Lazarus, 28 Pa. St. 203; Union Village &c. R. Co., In re, 53 Barb. (N. Y.) 457; Rodemacher v. Milwaukee &c. R. Co., 41 Iowa 297, 20 Am. Rep. 592. Where the buildings on a tract of land are at such a distance that there is no real imminent danger from fire such danger can not be considered. Jones v. Chicago &c. R. Co., 68 Ill.

creased cost of insuring buildings and their contents,<sup>48</sup> injuries to business carried on in the property taken,<sup>49</sup> the destruction of valuable accessories—as for example a frontage on another railroad;<sup>50</sup> the obstruction of ingress to and egress from the prem-

380; *Hatch v. Cincinnati &c. R. Co.*, 18 Ohio St. 92; *Proprietors of Locks and Canals v. Nashua &c. R. Co.*, 10 Cush. (Mass.) 385. The fact that the railroad is responsible for all damages, whether resulting from negligence or not, may properly be taken into consideration by the jury in estimating the amount of compensation. *Bangor &c. R. Co. v. McComb*, 60 Maine 290. But even where the railroad is so liable, depreciation in the value of property resulting from apprehension of fire has been held a proper element of damages. *Keithsburg R. Co. v. Henry*, 79 Ill. 290; *Adden v. White Mountains R. Co.*, 55 N. H. 413, 20 Am. Rep. 220; *Pierce v. Worcester R. Co.*, 105 Mass. 199; *Somerville R. Co. v. Doughty*, 22 N. J. L. 495; *Bangor R. Co. v. McComb*, 60 Maine 290. But see *Illinois &c. R. Co. v. Freeman*, 210 Ill. 270, 71 N. E. 444, with which compare *Chicago Southern R. Co. v. Nolin*, 221 Ill. 367, 77 N. E. 435.

<sup>48</sup> *Wooster v. Sugar Run V. R. Co.*, 57 Wis. 311, 15 N. W. 401; *Lafayette &c. R. Co. v. Murdock*, 68 Ind. 137; *Webber v. Eastern R. Co.*, 2 Metc. (Mass.) 147.

<sup>49</sup> *South Carolina R. Co. v. Steiner*, 44 Ga. 546; *St. Louis &c. R. Co. v. Capps*, 67 Ill. 607, 72 Ill. 188; *Lafayette &c. R. Co. v. Murdock*, 68 Ind. 137; *Boston &c. R. Co. v. Old Colony R. Co.*, 12 Cush. (Mass.) 605. 3 Allen 142; *Grand Rapids &c. R. Co. v. Weiden*, 70 Mich. 390, 38 N. W. 294; *Western*

*Pennsylvania R. Co. v. Hill*, 56 Pa. St. 460; *Driver v. Western Union R. Co.*, 32 Wis. 569, 14 Am. Rep. 726; *Cameron v. Charing Cross R. Co.*, 16 C. B. N. S. 430; *Wood v. Stourbridge R. Co.*, 16 C. B. N. S. 222. In *Jacksonville &c. R. Co. v. Walsh*, 106 Ill. 253, the court said: "The purposes for which (the property) was used and designed, its location and advantages as to situation were proper matters of consideration by the jury; but the profits of the business of the past and conjectural profits for the future were too speculative and uncertain upon which to ascertain the market or cash value of the property." See also *Becker v. Philadelphia &c. R. Co.*, 177 Pa. St. 252, 35 Atl. 617, 35 L. R. A. 583; *Edmands v. Boston*, 108 Mass. 535; *Lake Shore &c. R. Co. v. Cincinnati &c. R. Co.*, 30 Ohio St. 604; *Richmond &c. R. Co. v. Chamblin*, 100 Va. 401, 41 S. E. 750. But see *Bailey v. Boston &c. Corp.*, 182 Mass. 537, 66 N. E. 203, where it is held that in the absence of special statutory provisions, the loss of business as such, arising from the taking of property adjoining that on which the business was conducted for a right of way can not be considered. For the extent and limits of the general doctrine see 1 *Elliott Roads & Sts.* (3rd ed.), § 287.

<sup>50</sup> *Wray v. Knoxville &c. R. Co.*, 113 Tenn. 544, 82 S. W. 471.



ises;<sup>51</sup> the destruction of mineral wells or springs;<sup>52</sup> inconvenience and increase of expense of using premises not taken;<sup>53</sup> and

<sup>51</sup> *Cincinnati &c. R. Co. v. Miller*, 36 Ind. App. 26, 72 N. E. 827. See also *Puget Sound &c. Ry. Co. v. Foster* (Wash.), 146 Pac. 154 (where the right of way condemned cut a county road at such an acute angle that access to the road was cut off for about three hundred feet).

<sup>52</sup> *Kossler v. Pittsburg &c. R. Co.*, 208 Pa. St. 50, 57 Atl. 66. The value of a salt water well on the premises is to be determined not by the profits in operating the same, but from its selling value. *Ibid.* See also *Smith v. Commonwealth*, 210 Mass. 259, 96 N. E. 666, Ann. Cas. 1912C, 1236 and note: And for distinction see ante, § 1234. Compare also *Cleveland &c. R. Co. v. Hadley*, 179 Ind. 429, 101 N. E. 473.

<sup>53</sup> *Richmond &c. R. Co. v. Chamblin*, 100 Va. 401, 41 S. E. 750; *Illinois Cent. R. Co. v. Turner*, 194 Ill. 575, 62 N. E. 793; *Prather v. Chicago Southern R. Co.*, 221 Ill. 190, 77 N. E. 430; *Chicago &c. R. Co. v. Curless*, 27 Ind. App. 306, 60 N. E. 467. Speculative opinions as to the amount of business that might be carried on in the property, and the probable profits therefrom have been held, in many cases, incompetent as evidence from which the jury could assess damages. *Mount Washington Road Co.*, In re, 35 N. H. 134; *Cobb v. Boston*, 109 Mass. 438; *Eddings v. Seabrook*, 12 Rich. L. (S. Car.) 504; *Ricket v. Metropolitan R. Co.*, 5 Best & S. 149, 117

Eng. C. L. 149; *Union Village &c. R. Co.*, Matter of, 53 Barb. (N. Y.) 457. The rule is laid down by the Lord Chancellor in *Metropolitan Board of Works v. McCarthy*, L. R. 7 Eng. & I. App. Cas. 243, 253, as follows: "That where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value." Evidence as to the amount of business that was or could be done upon the property taken, or of the profits gained from past business, or that could probably be made in the future is inadmissible. *Jacksonville &c. R. Co. v. Walsh*, 106 Ill. 253. Under the constitution and laws of Kentucky, the jury may consider as an element of damage, the inconvenience and loss resulting to the owner of property condemned from being deprived of his home and established place of business. *Covington &c. R. Co. v. Piel*, 87 Ky. 267, 8 S. W. 449. The increased cost of working a mine by tunnelling under the track is a proper element of damages. *Midland R. Co. v. Miles*, L. R. 30 Chan. Div. 634.

the decreased rental value of buildings,<sup>54</sup> occasioned by the construction of a railroad, have all been held proper subjects for compensation in damages.<sup>55</sup> The use to which the land taken is to be put, as for the running of railway trains, with its probable effect upon the plaintiff's property, is also to be considered in many jurisdictions by the jury in assessing his damages.<sup>56</sup> Buildings on the right of way are regarded, by some courts, as a part of the freehold and to be paid for as such, and where this is the case there is a presumption that such damages are included in the award.<sup>57</sup> One purchasing land over which a right of way

<sup>54</sup> *Lafayette &c. R. Co. v. Murdock*, 68 Ind. 137. So also the loss of rents occasioned by the construction of the work. *Henderson v. New York &c. R. Co.*, 17 Hun (N. Y.) 344, 78 N. Y. 423; *Pittsburgh &c. R. Co. v. Rose*, 74 Pa. St. 362. The fact that the plaintiff continues to occupy the property is no defense to a claim for a decrease in its rental value due to the railroad. *Scott v. Indianapolis &c. R. Co.* (Marion Sup. Ct. Ind.), 10 Am. & Eng. R. Cas. 189.

<sup>55</sup> In *Chicago &c. R. Co. v. Staley*, 221 Ill. 405, 77 N. E. 437, an instruction authorizing the jury, in assessing damages, to consider danger of stock being killed or injured in the future, damage from fire by passing engines, and all other damages that the jury might believe were reasonably to be expected to ensue, was held erroneous for failure to confine the jury's consideration of such matters to their effect on the market value of the land not taken, and an instruction that, in estimating the damages to adjacent land not taken, the jury should consider the depreciation in value of such land not taken for any present or future

use to which the land might conveniently and lawfully be put on account of such proposed railroad, and should allow such sum as the property taken was reasonably worth, considering its present use and any use to which it may reasonably be put in the future, was held erroneous; and the court said that the only future use that could properly be considered was that to which the land was at present adapted and which affected its present market value.

<sup>56</sup> *Kucheman v. Chicago, C. & D. R. Co.*, 46 Iowa 366; *Atchison &c. R. Co. v. Blackshire*, 10 Kans. 477; *Bangor &c. R. Co. v. McComb*, 60 Maine 290; *Pacific R. Co. v. Chrystal*, 25 Mo. 544; *Utica &c. R. Co., Matter of*, 56 Barb. (N. Y.) 456; *Cleveland &c. R. Co. v. Ball*, 5 Ohio St. 568. Contra, *Prospect Park &c. R. Co., Matter of*, 13 Hun (N. Y.) 345; *Black River &c. R. Co. v. Barnard*, 9 Hun (N. Y.) 104; *Albany Northern R. Co. v. Lansing*, 16 Barb. (N. Y.) 68. See generally *Hamilton v. Pittsburg &c. R. Co.*, 190 Pa. St. 51, 42 Atl. 369, 51 L. R. A. 319 and note.

<sup>57</sup> *White v. Cincinnati &c. R. Co.*, 34 Ind. App. 287, 71 N. E. 276.

has already been taken by a railroad company is clearly entitled to nothing for the incidental injury to the land by reason of the right of way. His measure of damages, when he is entitled to recover at all, is simply the value of the ground taken.<sup>58</sup>

**§ 1263 (996a). Measure of damages for property of railroad company taken for other public use—Railroad and street railroad crossings.**—A railroad,<sup>59</sup> or, according to some decisions, street railroad company,<sup>60</sup> intending to cross railroad tracks rightfully maintained in a public street can not effect the crossing until it has first compensated the railroad company for the resulting damages. In the case of a street railroad crossing it has been held that these damages will include pay for the construction of the crossing, and any change in the tracks necessitated by the crossing, but not damages for the impairment of the easement in the street.<sup>61</sup> In most jurisdictions it is held that a street railway is not an additional burden. The subject of compensation for railroad crossings is discussed in a later volume to which the reader is referred.<sup>62</sup>

**§ 1264 (996b). Measure of damages for property of railroad company taken for other public use—Telegraph lines.**—A telegraph company can not enter upon a railroad right of way and construct its lines until it has paid a just compensation therefor which, it is held, is to be ascertained by resorting to the state laws relative to eminent domain even though the company is

<sup>58</sup> *Whitecotton v. St. Louis &c. R. Co.*, 104 Mo. App. 65, 78 S. W. 318. See post, § 1272; also *Bridges v. Southern Ry.*, 86 S. Car. 267, 68 S. E. 551, Ann. Cas. 1912A, 1066 and note.

<sup>59</sup> *Atlantic &c. R. Co. v. Seaboard &c. R. Co.*, 116 Ga. 412, 42 S. E. 761. Where a railroad company, in condemning the right to cross with its track spur tracks of another railroad, takes nothing but the easement of crossing, the interruption in business, increased

liability to accident, and the flagging of trains at crossings as required by law, did not constitute elements of damage. *Kansas City &c. R. Co. v. Louisiana &c. R. Co.*, 116 La. 178, 40 So. 627.

<sup>60</sup> *Central Passenger R. Co. v. Philadelphia &c. R. Co.*, 95 Md. 428, 52 Atl. 752.

<sup>61</sup> *Central Passenger R. Co. v. Philadelphia &c. R. Co.*, 95 Md. 428, 52 Atl. 752.

<sup>62</sup> Post, § 1607. See also ante, § 1234.

authorized by federal laws to construct the line upon post roads.<sup>63</sup> Speaking generally the measure of damages is the decrease in the value of the right of way for railroad purposes,<sup>64</sup> and these damages are generally regarded as merely nominal, or practically so, since the telegraph company does not necessarily and appreciably interfere with the right of way or the operation of the railroad<sup>65</sup> but, on the contrary, is usually a convenience rather than a detriment. But there may be cases in which there is such interference of diminution in the value of the use of the remainder of the right of way, or of the railroad company's own telegraph or telephone system, or the like, and in such cases the damages are not merely nominal. Indeed, some courts have held that something more than nominal damages should usually be awarded.<sup>66</sup> The annoyance and inconvenience of a railroad from the construction and operation of the telegraph lines upon its

<sup>63</sup> *Postal Tel. Cable Co. v. Oregon &c. R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. 705; *Atlantic &c. Tel. Co. v. Chicago &c. R. Co.*, 6 Bis. 158. See also *Kester v. Western Union Tel. Co.*, 108 Fed. 926; *Western Union Tel. Co. v. Pennsylvania R. Co.*, 120 Fed. 352, 123 Fed. 33; *Canadian Pac. R. Co. v. Moosehead Tel. Co.*, 106 Maine 363, 76 Atl. 885, 29 L. R. A. (N. S.) 703 and note.

<sup>64</sup> *Postal &c. Co. v. Oregon &c. R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. 705; *Cleveland &c. R. Co. v. Ohio &c. Cable Co.*, 68 Ohio St. 306, 67 N. E. 890, 62 L. R. A. 941; *Atlantic &c. R. Co. v. Postal &c. Co.*, 120 Ga. 268, 48 S. E. 15. See also *Mobile &c. R. Co. v. Postal Tel. Co.*, 120 Ala. 21, 24 So. 408; *Western &c. R. Co. v. Western Union Tel. Co.*, 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225; *Illinois Tel. &c. Co. v. Meine*, 242 Ill. 568, 90 N. E. 230, 26 L. R. A. (N. S.) 189.

<sup>65</sup> *Postal &c. Co. v. Oregon &c. R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. 705; *Ohio Postal Tel. Co. v. Cleveland &c. R. Co.*, 8 Ohio N. P. 121, 11 Ohio S. & C. P. Dec. 52. See also *Mobile &c. R. Co. v. Postal Tel. Co.*, 101 Tenn. 62, 46 S. W. 571, 41 L. R. A. 403; *Chicago &c. R. Co. v. Chicago*, 166 U. S. 248, 17 Sup. Ct. 992, 41 L. ed. 989; *Postal Tel. &c. Co. v. Oregon Short Line R. Co.*, 114 Fed. 787; *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 104 Fed. 623, 111 Fed. 842; *St. Louis &c. R. Co. v. Postal Tel. Co.*, 173 Ill. 508, 51 N. E. 382; *Gulf &c. R. Co. v. Southwestern Tel. &c. Co.* (Tex. Civ. App.), 52 S. W. 87.

<sup>66</sup> *Mobile &c. R. Co. v. Postal &c. Co.*, 76 Miss. 731, 26 So. 370, 45 L. R. A. 223; *American Tel. &c. Co. v. St. Louis &c. R. Co.*, 202 Mo. 656, 101 S. W. 576; *Louisville &c. R. Co. v. Western Union Tel. Co.*, 249 Fed. 385.

right of way, to warrant the allowance of damages therefor, must be real and such as will interfere with the operation of the railroad.<sup>67</sup> Thus, on the ground of remoteness, it has been held that the jury could not consider as elements of damage such items, as the danger of poles falling across the tracks,<sup>68</sup> the added expense of burning grass on the right of way on account of the position of the poles,<sup>69</sup> the vague suggestion that at some future date the railroad company might lay additional tracks or build structures for railroad purposes on the right of way,<sup>70</sup> the benefit the railroad company might derive from a contract with another telegraph company already occupying its right of way.<sup>71</sup>

§ 1265 (996c). **Measure of damages for property of railroad company taken for public use—Streets and highways.**—Where land is taken from the right of way for a street or road the railroad company is entitled to compensatory damages properly shown and not mere nominal damages.<sup>72</sup> And it is said to matter not whether the right of the railroad company in the land was a mere easement or a fee-simple title. "It had acquired its right by its own condemnation proceedings and was entitled to the uninterrupted use and enjoyment of the right of way, subject only, as all property is, to the right of eminent domain; and, when even a small portion of the land composing its right of way is taken from it and dedicated to another and different public use, actual and not nominal damages should be allowed."<sup>73</sup> On the question

<sup>67</sup> Atlantic &c. R. Co. v. Postal &c. Co., 120 Ga. 268, 48 S. E. 15.

<sup>68</sup> Atlantic &c. R. Co. v. Postal &c. Co., 120 Ga. 268, 48 S. E. 15.

<sup>69</sup> Postal &c. Co. v. Oregon &c. R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. 705.

<sup>70</sup> Atlantic &c. R. Co. v. Postal &c. Co., 120 Ga. 268, 48 S. E. 15.

<sup>71</sup> Atlantic &c. R. Co. v. Postal &c. R. Co., 120 Ga. 268, 48 S. E. 15.

<sup>72</sup> Missouri Pac. R. Co. v. Cass Co., 76 Nebr. 396, 107 N. W. 773. See also post, §§ 1571, 1572. We are not here referring to mere

highway crossings where the statute requires the company to keep and maintain such crossings and dispenses with compensation. See New York &c. R. Co. v. Rhodes, 171 Ind. 521, 86 N. E. 840, 24 L. R. A. (N. S.) 1225. The general rule in such cases, as shown in the note referred to, is that compensation is required in the absence of such a statute but that such a statute is constitutional and may dispense with compensation.

<sup>73</sup> Missouri Pac. R. Co. v. Cass Co., 76 Nebr. 396, 107 N. W. 773.

of the measure of damages the Supreme Court of the United States has said: "The value to the railroad company of that which was taken from it is, as we have said, the difference between the value of the right to the exclusive use of the land in question for the purposes for which it was being used, and for which it was always likely to be used, and that value after the city acquired the privilege of participating in such use by the opening of a street across it, leaving the railroad tracks untouched."<sup>74</sup> The railroad company has also been held entitled to damages for improvements it has placed in the streets which must be removed to permit the public to use the street,<sup>75</sup> and for the expense of changes in the tracks made necessary by the condemnation.<sup>76</sup> Where it was sought to condemn a way under the tracks the railroad company was held entitled to compensation for the cost of a bridge to carry its trains over the tracks.<sup>77</sup> And where in making proper approaches to a railroad track at a highway crossing it is necessary to grade through all the right of way

See also *Terre Haute v. Evansville &c. R. Co.*, 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189; *Boston &c. R. Co. v. Cambridge*, 159 Mass. 283, 34 N. E. 382; *Southern Kans. R. Co. v. Oklahoma City*, 12 Okla. 82, 69 Pac. 1050. But, as shown in the next note where the two uses coexist without material interference the damages may be merely nominal.

<sup>74</sup> *Chicago &c. R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. ed. 979. See also *Illinois Cent. R. Co. v. Chicago*, 169 Ill. 329, 48 N. E. 492. Under this rule, as held in the cases cited and others, the damages in case of an ordinary crossing are usually only nominal. See *Illinois Cent. R. Co. v. Normal*, 175 Ill. 562, 51 N. E. 781; *Grand Rapids v. Grand Rapids &c. R. Co.*, 58 Mich. 641, 26 N. W. 159; *Morris &c. R. Co. v. Orange*, 63

N. J. L. 252, 43 Atl. 730, 47 Atl. 363.

<sup>75</sup> *New York &c. R. Co. v. Blackstone*, 184 Mass. 491, 69 N. E. 315; *Southern Kansas R. Co. v. Oklahoma City*, 12 Okla. 82, 69 Pac. 1050.

<sup>76</sup> *Southern Kansas R. Co. v. Oklahoma City*, 12 Okla. 82, 69 Pac. 1050. In Missouri a railroad company is entitled, as a general rule, to compensation for all damages that may be reasonably anticipated and ascertained where there is a condemnation for a highway over its right of way, but it is not entitled to damages for the expense of installing and maintaining an electric bell at the crossing as a safeguard against accidents. *Franklin County v. Missouri Pac. R. Co. (Mo.)*, 210 S. W. 874, and cases there cited on p. 876.

<sup>77</sup> *Cincinnati &c. R. Co. v. Troy*, 68 Ohio St. 510, 67 N. E. 1051.

on either side of the track it has been held that the railroad company should be allowed such sum for damages as the county would have been compelled to expend in making the public road had the railroad never been built.<sup>78</sup> But the railroad company, under the weight of authority, is not entitled to anything for the extra expense necessary for the maintenance of the crossing under mere police regulations such, for example, as the cost of putting in cattle guards, building wing fences, erecting gates, maintaining flagmen, and the like.<sup>79</sup> As said by the supreme court of the United States: "The expenses that will be incurred by the railroad company in erecting gates, planking the crossing and maintaining flagmen, in order that its road may be safely operated—if all that should be required—necessarily result from the maintenance of a public highway, under legislative sanction; and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the state. Such expenses must be regarded as incidental to the exercise of the police powers of the state. What was obtained and all that was obtained, by the condemnation proceedings for the public was the right to open a street across the land within the crossing that was used, and was always likely to be used, for railroad tracks. While the city was bound to make compensation for that which was actually taken it can not be required to compensate the defendant for obeying lawful regulations enacted for the safety of the lives and property of the people."<sup>80</sup>

**§ 1266 (996d). Railroads and street railroads in streets—Compensation to abutters.**—The question whether railroads<sup>81</sup> and

<sup>78</sup> Missouri Pac. R. Co. v. Cass Co., 76 Nebr. 396, 107 N. W. 773.

<sup>79</sup> Missouri Pac. R. Co. v. Cass Co., 76 Nebr. 396, 107 N. W. 773; Chicago &c. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. ed. 979; Chicago &c. R. Co. v. Chicago, 149 Ill. 457, 37 N. E. 78. See also post, § 1571; and notes in 22 L. R. A. (N. S.) 1 and 24 L. R. A. (N. S.) 1231-1236.

<sup>80</sup> Chicago &c. R. Co. v. Chicago,

166 U. S. 226, 17 Sup. Ct. 581, 41 L. ed. 979.

<sup>81</sup> Post, § 1435, et seq. See also Atlanta &c. R. Co. v. Atlanta &c. R. Co., 125 Ga. 529, 54 S. E. 736; notes in 9 L. R. A. (N. S.) 496, 26 L. R. A. (N. S.) 226, 36 L. R. A. (N. S.) 698; Henry v. Mason City &c. R. Co., 140 Iowa 201, 118 N. W. 310; Keil v. Grays Harbor &c. R. Co., 71 Wash. 163, 127 Pac. 1113.

street railroads<sup>82</sup> impose an additional servitude on the street or highway over which they are operated is reserved for discussion in later chapters. At this point it is only intended to refer to the matter of measure of damages, where there is a liability, against railroads. Street railroads operating strictly as such are generally not regarded as imposing any extra burden on the street. The measure of these damages in the case of railroads is usually held to be the substantial depreciation of the value of the abutting property consequent upon the use of the street by the railroad. But the difference in value must be substantial and not fanciful or conjectural.<sup>83</sup> In determining this question it has been held that the jury may consider the decline in the value of the property because of the noise, smoke, loss of light and air, increased risk of fire, and material interference with ingress and egress so far as they depreciate the value of the abutting property.<sup>84</sup> Where a railroad condemns the whole of a dedicated street it has been held that the abutting owner is entitled to compensation for the full value of the land taken.<sup>85</sup> In a case where residence property was situated on the corner of two streets, and after the construction of a railroad in one of the streets another road sought to condemn the owner's rights as abutting owner in the other street, it was held that such owner was not entitled to compensation from the condemning road because of an additional nuisance from the other road, owing to its being compelled to stop its trains in front of the residence and to give signals, as required by the statutes in relation to the intersec-

<sup>82</sup> Post, § 1447, et seq. See also *Galveston &c. R. Co. v. Houston Elec. Co.*, 57 Tex. Civ. App. 170, 122 S. W. 287; *Wagner v. Belt Line R. Co.*, 108 Va. 594, 62 S. E. 391.

<sup>83</sup> *Harrington v. Iowa Cent. R. Co.*, 126 Iowa 388, 102 N. W. 139; *Camden &c. R. Co. v. Smiley*, 27 Ky. L. 134, 84 S. W. 523; *Grossman v. Houston &c. R. Co.*, 99 Tex. 641, 92 S. W. 836; *South Bound R. Co. v. Burton*, 67 S. Car. 515, 46 S. E. 340.

<sup>84</sup> *South Bound R. Co. v. Burton*, 67 S. Car. 515, 46 S. E. 340. But, as elsewhere shown, all authorities do not agree as to all of these matters. See generally ante, § 1235, and post, § 1435, et seq; *Smith v. St. Paul &c. Ry. Co.*, 39 Wash. 355, 109 Am. St. 889, and elaborate note.

<sup>85</sup> *Suffolk &c. R. Co. v. West &c. Imp. Co.*, 137 N. Car. 330, 49 S. E. 350.



tions of railroads.<sup>86</sup> In the course of the decision announcing this principle the court said that when the first railroad's right of way "was acquired in front of this house, then compensation was made, or an opportunity had for compensation to be made, for all present and future damages to flow from the operation of the road in the due course of its business. It is part of the due course of the road's operation to make such stops and give such signals as the law or good railroading may require, and all annoyance, inconvenience, and injury from such an incident of railroad operation can be, and should be, compensated at the time of the acquisition of the right of way. When once acquired, then the railroad may lawfully use it in any way which good service and proper conduct of its affairs require, and for such conduct there is no resulting damage to the abutting property owner."<sup>87</sup>

**§ 1267 (996e). Elevated railroads.**—While the courts do not all agree that an elevated railroad constructed on permanent structures in the street by the consent of the municipal authorities does impose an added servitude on the street,<sup>88</sup> there is a general concurrence of opinion that the abutting property owner whose property is depreciated by the road, is to that extent deprived of his property under the eminent domain and is entitled to the damage suffered by him.<sup>89</sup> A court holding the

<sup>86</sup> *Bracey v. St. Louis &c. R. Co.*, 79 Ark. 124, 95 S. W. 151.

<sup>87</sup> *Hill, C. J., in Bracey v. St. Louis &c. R. Co.*, 79 Ark. 124, 95 S. W. 151.

<sup>88</sup> In Missouri these railroads are held to add a burden. *De Geofroy v. Merchants' &c. R. Co.*, 179 Mo. 698, 79 S. W. 386, 64 L. R. A. 939, 101 Am. St. 524. In Illinois the opposite conclusion is reached, *Doane v. Lake St. &c. R. Co.*, 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. 265. For a further consideration and statement of the rule in various jurisdictions see ante, §§ 9, 1231, 1235, and post

§ 1435; note in 36 L. R. A. (N. S.) 727, 736. See as to viaduct, *DeLucca v. North Little Rock*, 142 Fed. 597, and cases there cited.

<sup>89</sup> *Caldwell v. New York &c. R. Co.*, 111 App. Div. 164, 97 N. Y. S. 588; *Aldis v. Union Elevated R. Co.*, 203 Ill. 567, 68 N. E. 95; *Baker v. Boston Elevated R. Co.*, 183 Mass. 178, 66 N. E. 711; *Auchincloss v. Metropolitan &c. R. Co.*, 69 App. Div. 63, 74 N. Y. S. 534; *Muhlker v. New York &c. R. Co.*, 197 U. S. 544, 25 Sup. Ct. 522, 49 L. ed. 872. And see note in 36 L. R. A. (N. S.) 673.

view that an elevated railroad is not necessarily an added servitude has said: "At the time said streets were dedicated or condemned, appellants or their grantors did not part with, but retained as appurtenant to said property, the right of access to said streets, the view, and the comfortable and safe enjoyment of their property; and if the appellee has constructed and is engaged in operating an elevated railroad in said streets in front of appellant's property, the effect of which is to destroy these rights and thereby depreciate the value of appellant's property, it would seem too clear for argument that the property of the appellants had been damaged, and if damaged, that the appellants have not waived or been paid such damages."<sup>90</sup> A New York court stating the rule of damages has held that it was proper to award to abutting owners, not owners of the street, an amount equal to the difference between the value of the property before and after the taking, less the consequential damages due to the annoyance caused by noise, vibration, unsightliness of structure, and all elements other than the value of easements of light, air and access.<sup>91</sup> In a case where an elevated railroad company, having the right to construct its road on a strip of land in the center of the street, erected such structure so as to extend it beyond such strip on either side, it was held that the entire structure was unlawful, and abutting property owners were entitled to rental and ice damages for the trespass, without a deduction for the portion which could have been lawfully erected.<sup>92</sup>

**§ 1268 (996f). Damages where land taken is abandoned before conclusion of condemnation proceedings.**—Where a railroad company takes possession on instituting proceedings to condemn land for a right of way and after a short use of the same abandons it, before the conclusion of the condemnation proceedings the measure of damages has been held to be the rental value of the land for the time it was occupied and the depreciation in the value thereof by reason of the acts done thereon by the railroad company, together with the damage resulting to the other land

<sup>90</sup> *Aldis v. Union Elevated R. Co.*, 203 Ill. 567, 68 N. E. 95. *re*, 113 App. Div. 817, 99 N. Y. S. 222.

<sup>91</sup> *Brooklyn Elevated R. Co., In* <sup>92</sup> *Siegel v. New York &c. R. Co.*,

from the construction of the road bed and from the flooding of the land caused by the embankment, and this is to be computed from the time of the entry by the railroad company. All other damages, it is said, are to be recovered in a separate action specially brought for that purpose.<sup>93</sup> Much may depend, however, upon the statute and practice in the particular jurisdiction.<sup>94</sup>

**§ 1269 (1997). Improvements made by company under unauthorized entry—Views of the authors.**—Some of the courts carry the rule against railroad companies which enter on land without authority very far and vest in the land-owner all right and title to improvements made by the company. Some of the cases, as we believe, go entirely too far, for they lose sight altogether of the doctrine of estoppel, as well as the doctrine of leave and license. Where a company enters and makes improvements under claim and color of right, even though the claim be not well founded we think that the land-owner ought not to be allowed to recover the value of such improvements, but it may perhaps be otherwise where the entry is over the objection of the owner and is a mere naked trespass. In our judgment the value of such improvements should not be included in the computation of damages where the statute permits appropriation proceedings after entry and such proceedings are taken pursuant to the statute.<sup>95</sup>

**§ 1270 (1998). Improvements made by company under unauthorized entry—Illustrative cases.**—Where the company has entered upon land with the consent of the owner and constructed

62 App. Div. 290, 70 N. Y. S. 1088.

<sup>93</sup> Pine Bluff &c. R. Co. v. Kelly, 78 Ark. 83, 93 S. W. 562.

<sup>94</sup> See, generally, post, §§ 1324, 1325, 1326, and note in 28 L. R. A. (N. S.) 91.

<sup>95</sup> This section is cited with approval in Charleston &c. R. Co. v. Hughes, 105 Ga. 1, 30 S. E. 972, 982; McClarien v. Jefferson School Twp., 169 Ind. 140, 82 N. E. 73, 13

L. R. A. (N. S.) 417. See also Seattle &c. R. Co. v. Corbett, 22 Wash. 189, 60 Pac. 127, and authorities cited in notes to next following section. As to whether the owner can maintain ejectment where he acquiesces, see Southern R. Co. v. Hood, 126 Ala. 312, 28 So. 662, 85 Am. St. 32, and note in 92 Am. 615.

its road,<sup>96</sup> the value of rails, ties and the like can not be considered in estimating compensation in subsequent appropriation proceedings. And even where the entry of the company amounted to a technical trespass because of its failure to pursue with strictness the appropriate proceedings to condemn, if it has acted in good faith it can afterward proceed to condemn the land upon payment of its value, not including the value of improvements which it has made.<sup>97</sup> Where the railroad company entered under a void charter, so that it had no authority at all for the entry, it was held in a subsequent proceeding to condemn brought by the same company operating under a new charter, that the landowner could only claim a fair, just, and equitable compensation for his land, and that justice and equity did not require that the value added to the land by the roadbed, ties, rails, and the like placed upon it by the company, should be included in the assess-

<sup>96</sup> *California &c. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 7 Pac. 123, 20 Am. & Eng. R. Cas. 309; *California &c. R. Co. v. Armstrong*, 46 Cal. 85; See *North Hudson Co. R. Co. v. Booram*, 28 N. J. Eq. 450; *Mitchell v. Illinois &c. R. Co.*, 85 Ill. 566; *Emerson v. Western Union R. Co.*, 75 Ill. 176; *Chicago &c. R. Co. v. Goodwin*, 111 Ill. 273, 53 Am. Rep. 622. See also *Indiana &c. R. Co. v. Allen*, 100 Ind. 409; *Baltimore &c. R. Co. v. Bouvier*, 70 N. J. Eq. 158, 62 Atl. 868. The consent of one in possession of the land under voidable tax deeds is sufficient to relieve the railroad company of the character of a trespasser. *Cohen v. St. Louis &c. R. Co.*, 34 Kans. 158, 8 Pac. 138, 55 Am. Rep. 242. See also *Ellis v. Rock Island &c. R. Co.*, 125 Ill. 82, 17 N. E. 62; *St. Louis &c. R. Co. v. Nyce*, 61 Kans. 394, 59 Pac. 1040, 48 L. R. A. 241; *St. Johnsbury &c. R. Co. v. Willard*, 61 Vt. 134, 17 Atl. 38, 21 L.

R. A. 528, 15 Am. St. 886. The railroad company can enter and remove rails laid by it upon the land of another under a parol license. *Northern Central R. Co. v. Canton Co.*, 30 Md. 347; *Dietrich v. Murdock*, 42 Mo. 279. See also the well considered case of *Charleston &c. R. Co. v. Hughes*, 105 Ga. 1, 30 S. E. 972, 982 (citing text).

<sup>97</sup> *Jones v. New Orleans &c. R. Co.*, 70 Ala. 227; *Daniels v. Chicago &c. R. Co.*, 41 Iowa 52; *Cohen v. St. Louis &c. R. Co.*, 34 Kans. 158, 8 Pac. 138, 55 Am. Rep. 242; *Morgan v. Chicago &c. R. Co.*, 39 Mich. 675; *Toledo &c. R. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271; *Hays v. Texas &c. R. Co.*, 62 Tex. 397; *Lyon v. Green Bay &c. R. Co.*, 42 Wis. 538. See also *Newgass v. St. Louis &c. R. Co.*, 54 Ark. 140, 15 S. W. 188; *Jacksonville &c. R. Co. v. Adams*, 28 Fla. 631, 10 So. 465, 14 L. R. A. 533; *Louisville &c. R. Co. v. Dickson*, 63 Miss. 380, 56 Am. Rep. 809; *Oregon*

ment.<sup>98</sup> This we think is the true doctrine.<sup>99</sup> It is thus stated in general terms in a recent case: "When a person, corporation, or body, invested with the power of eminent domain, enters upon land with or without the consent of the owner, express or implied, and places improvements thereon, and subsequently institutes proceedings to condemn the same land, the common-law rule that a structure erected by a tortfeasor becomes a part of the land does not apply, and the owner is not entitled to the

&c. R. Co. v. Mosier, 14 Ore. 519, 13 Pac. 300, 58 Am. Rep. 321; Chicago &c. R. Co. v. Vaughn, 206 Ill. 234, 69 N. E. 113. This general rule is conceded, but its application is denied under the particular circumstances in Omaha Bridge &c. R. Co. v. Whitney, 68 Nebr. 389, 99 N. W. 525, and Van Husen v. Omaha Bridge &c. Co., 118 Iowa 366, 92 N. W. 47. In Baltimore &c. R. Co. v. Bouvier, 70 N. J. Eq. 158, 62 Atl. 868, where a railroad company had entered upon land under a right of way deed binding it to double-track its road and to erect a passenger station on the vendor's property, which grant it thereafter forfeited by failure to comply with the terms thereof, and a judgment in ejectment was recovered against it, it was held that this did not give the vendor such a new and independent title as to prevent the application of equitable principles in condemnation proceedings thereinafter instituted, in determining whether or not the vendor was entitled to compensation for improvements made by the railroad company before the forfeiture. It has been held that a land-owner can recover damages, but such as were agreed upon when the rail-

road was built, although the license under which the road was constructed was given by parol. Buchanan v. Logansport &c. R. Co., 71 Ind. 265. But on this point there is conflict of authority.

<sup>98</sup> Greve v. First Div. St. Paul &c. R. Co., 26 Minn. 66, 1 N. W. 816.

<sup>99</sup> Toledo &c. R. Co. v. Dunlap, 47 Mich. 456, 11 N. W. 271, 5 Am. & Eng. R. Cas. 378; Morgan's Appeal, 39 Mich. 675; Aldridge v. Board of Education, 15 Okla. 354, 82 Pac. 827. In Toledo &c. Co. v. Dunlap, supra, Campbell, J., in delivering the opinion of the court, said: "The railroad company, whether rightfully or wrongfully, laid this track while in possession and for purposes entirely distinct from any use of the land as an isolated parcel. It would be absurd to apply to land so used, and to a railway track laid on it, the technical rules which apply in some other cases to structures inseparably attached to the freehold. Whatever rule might apply in case of abandonment, it is clear that this superstructure was never designed to be incorporated with the soil except for purposes attending the possession; and in a proceeding to obtain a legal and

value of such improvements."<sup>1</sup> It has been held, however, that if a railroad company enters upon the land of another without any color or claim of right or privilege whatever, and constructs a railroad track on such land, such railroad track becomes the property of the land-owner,<sup>2</sup> but some of the broad statements in the opinions in the cases cited we regard as clearly wrong. It has also been held that where the state constitution requires that compensation shall precede the taking of private property, the entry upon lands by a railroad company without consent of the land-owner, and without an assessment and tender of the damages, confers upon it no right whatever of which it may take advantage in a subsequent proceeding to condemn the land.<sup>3</sup> Of

permanent right to occupy the land for this very purpose there would be no sense in compelling them to buy their own property. Whatever right of redress, if any, Dunlap may have for the tortious occupancy previous to these proceedings, or whatever right of property he might have in case the company abandoned the road entirely and left the track entrenched, we think that so long as it is in possession and legal measures are proceeding to secure a right to retain it there, this structure belongs to the company, whether intruders or not." See also *Illinois Cent. R. Co. v. Hoskins*, 80 Miss. 730, 32 So. 150, 92 Am. St. 612; *Justice v. Nesquehoning Valley R. Co.*, 87 Pa. St. 28. But see where the subsequent condemnation proceedings are by a different company, *De Buol v. Freeport &c. R. Co.*, 111 Ill. 499; *Trimmer v. Pennsylvania &c. R. Co.*, 55 N. J. L. 46, 25 Atl. 932. Compare however *San Francisco &c. R. Co. v. Taylor*, 86 Cal. 246, 24 Pac. 1027; *Cochran v. Missouri &c. R. Co.*, 94 Mo. App. 469, 68

S. W. 367 (new company succeeding to rights of old); *Seattle &c. R. Co. v. Corbett*, 22 Wash. 189, 60 Pac. 127.

<sup>1</sup> *McClarren v. Jefferson School Twp.*, 169 Ind. 140, 82 N. E. 73, 13 L. R. A. (N. S.) 417, 419 (citing text and many other authorities).

<sup>2</sup> *United States v. Land in Monterey County*, 47 Cal. 515; *Graham v. Connersville &c. R. Co.*, 36 Ind. 463, 10 Am. Rep. 56; *Blue Earth Co. v. St. Paul &c. R. Co.*, 28 Minn. 503, 11 N. W. 73; *Morin v. St. Paul &c. R. Co.*, 30 Minn. 100, 14 N. W. 460; *Hunt v. Missouri Pac. R. Co.*, 75 Mo. 252; *Price v. Weehawken Ferry Co.*, 31 N. J. Eq. 31; *Long Island R. Co.*, In re, 6 T. & C. (N. Y.) 298; *Kimball v. Adams*, 52 Wis. 554, 9 N. W. 170. It has been held that the railroad company can not enter to remove rails laid upon the land of another when it has failed to file a location and to make compensation as required by law. *Meriam v. Brown*, 128 Mass. 391.

<sup>3</sup> *Graham v. Connersville &c. R. Co.*, 36 Ind. 463, 468, 10 Am. Rep. 56. This decision is approved and

the opinion in the case cited we feel bound to say that in much of the reasoning there is manifest error. Other cases hold that where there is color or claim of right, the owner can recover damages only as of the date of the original taking or entry.<sup>4</sup> The presumption is that rails and similar structures placed by a railroad company upon land taken by it for a right of way are affixed to the land with a manifest intention to use them in the operation of the railroad, and hence, are not to be regarded as fixtures forming part of the real estate.<sup>5</sup> A land-owner who knows that a railroad company is constructing a railroad upon his land for its own use can not assume that the structures placed on it are for his benefit, but, on the contrary, the assumption should be that the company placed them there as its own. If the land-owner in such a case obtains the full value of his land in the condition it was in at the time of the entry, he secures all that he is entitled to receive. In one case a railroad company which had purchased a right of way one hundred feet wide across a tract of land, went upon the adjoining land and built a section house without the consent of the land-owner, and with knowledge that it was building outside the limits of its right of way. Afterward, the land-owner instituted an action to recover the land, whereupon the railroad company began proceedings to condemn, and the court held that the house, being capable of use in connection with the land upon which it stood, without being detached and converted into personalty, was not governed by the

quoted from in *St. Johnsville v. Smith*, 184 N. Y. 341, 77 N. E. 617, 619, 5 L. R. A. (N. S.) 922. See also *St. Lawrence &c. R. Co., Matter of*, 133 N. Y. 270, 31 N. E. 218. But it is distinguished and in part disapproved in *McClarren v. Jefferson School Twp.*, 169 Ind. 140, 82 N. E. 73, 13 L. R. A. (N. S.) 417.

<sup>4</sup> *Central Branch &c. R. Co. v. Andrews*, 26 Kans. 702; *Cohen v. St. Louis &c. R. Co.*, 34 Kans. 158, 55 Am. Rep. 242.

<sup>5</sup> *Northern Cent. R. Co. v. Canton Co.*, 30 Md. 347; *Wagner v.*

*Cleveland &c. R. Co.*, 22 Ohio St. 563, 10 Am. Rep. 770; *Hays v. Texas &c. R. Co.*, 62 Tex. 397. The act of a railroad in entering upon land under irregular proceedings does not amount to a dedication by it to the land-owner of the property placed upon the land. *Justice v. Nesquehoning Valley R. Co.*, 87 Pa. St. 28; *Illinois Cent. R. Co. v. Hoskins*, 80 Miss. 730, 32 So. 150, 92 Am. St. 612. But see *Price v. Weehawken Ferry Co.*, 4 Stewart (N. J.) 31.

rule applying to ties and rails, but that it became a part of the freehold, and that the owner was entitled to have its value included in an assessment of his damages upon condemnation.<sup>6</sup>

§ 1271 (999). **Deviation from proposed line—Change of route.**—It is laid down in some of the cases that a railroad company is liable for injuries caused by deviation from the line upon which it proposed to construct its road.<sup>7</sup> We do not believe that the mere fact that there is a deviation from the line proposed will entitle the property owner to damages. We suppose, however, that if an assessment is made upon a designated line, which is afterwards substantially changed, and the change causes additional injury to the property owner, he is entitled to compensation to the extent of the injury caused by the change. Where there is a radical and unusual change in the line of the road, and the change is of such a character as to inflict additional injury upon the property owner, then, as we believe, the rule that damages are assessed once for all can not apply. But if the change is such as might have been reasonably contemplated at the time the assessment was made, or such as is ordinarily made by railroad companies, then, in our opinion, if there is no limitation in the instrument of appropriation or otherwise, it is covered by the original award of compensation.<sup>8</sup>

<sup>6</sup> *Hendry v. Trinity & Sabine R. Co.* (Tex.), 24 Am. & Eng. R. Cas. 286. In the case cited the court distinguished the case of *Texas & Co. v. Hays*, 5 Tex. L. 771, in which it was held that rails, ties and the like were not to be considered in estimating the landowner's damages.

<sup>7</sup> *Jacksonville &c. R. Co. v. Kidder*, 21 Ill. 131; *Peoria &c. R. Co. v. Birkett*, 62 Ill. 332; *Chicago &c. R. Co. v. Chicago &c. R. Co.*, 112 Ill. 589; *Wabash &c. R. Co. v. McDougall*, 118 Ill. 229, 8 N. E. 678; *Kansas City &c. R. Co. v. Kregelo*, 32 Kans. 608, 5 Pac. 15; *Carpenter*

*v. Easton &c. R. Co.*, 24 N. J. Eq. 249, 408, 26 N. J. Eq. 168. See *Hill v. Mohawk &c. R. Co.*, 7 N. Y. 152. In *Chicago &c. Co. v. Henneberry*, 153 Ill. 354, 38 N. E. 1043, it was held that where there is such a material alteration of the railroad as causes the lands of an adjoining owner to overflow he is entitled to damages.

<sup>8</sup> *Perry v. Lehigh &c. R. Co.*, 9 Misc. 515, 30 N. Y. S. 140, citing *Dearborn v. Boston &c. R. Co.*, 24 N. H. 179, 186; *Hollins v. Demorest*, 129 N. Y. 676, 29 N. E. 1093, 15 L. R. A. 487 and note. See *Atchison &c. R. Co. v. Pratt*, 53 Ill. App.



§ 1272 (1000). Owner at time possession is taken is entitled to damages—Vendor and vendee.—The settled general rule is that where a railroad company has entered into actual possession of lands, the right to the damages vests in the person owning the land at the time possession is taken.<sup>9</sup> The right to the damages is a personal right vested in the vendor. As the right is a personal one, it is governed by the general doctrine that personal rights do not pass by a conveyance of the land, and hence the right of action remains in the vendor.<sup>10</sup> Under a code providing

263; *Cleveland &c. R. Co. v. Hadley*, 179 Ind. 429, 439, 440.

<sup>9</sup> *Roberts v. Northern Pacific R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. ed. 873; *Hood v. Southern R. Co.*, 133 Ala. 374, 31 So. 937; *Little Rock &c. R. Co. v. Greer*, 77 Ark. 387, 96 S. W. 129; *Bruce v. Seaboard &c. R. Co.*, 52 Fla. 461, 41 So. 883; *McLendon v. Atlanta &c. R. Co.*, 54 Ga. 293; *Green v. South-Bound R. Co.*, 112 Ga. 849, 38 S. E. 81; *Illinois Central R. Co. v. Lockard*, 112 Ill. App. 423; *Church v. Grand Rapids &c. R. Co.*, 70 Ind. 161; *Indiana &c. R. Co. v. Allen*, 100 Ind. 409; *Scovell v. St. Louis &c. R. Co.*, 117 La. 459, 41 So. 723; *Wood v. Commissioners*, 122 Mass. 394; *Drury v. Midland R. Co.*, 127 Mass. 571; *Dunlap v. Toledo &c. R. Co.*, 46 Mich. 190, 9 N. W. 249, 50 Mich. 470, 15 N. W. 555; *Hilton v. St. Louis*, 99 Mo. 199; *Hentz v. Long Island &c. R. Co.*, 13 Barb. (N. Y.) 646; *King v. Mayor &c. of New York*, 102 N. Y. 171, 6 N. E. 395; *McFadden v. Johnson*, 72 Pa. St. 335, 13 Am. Rep. 681; *Warrell v. Wheeling &c. R. Co.*, 130 Pa. St. 600, 10 Atl. 1014; *Smith v. Railway Co.*, 88 Tenn. 611, 13 S. W. 128; *Milwaukee &c. R. Co. v. Strange*, 63 Wis. 178, 23

N. W. 432; *Walton v. Green Bay &c. R. Co.*, 70 Wis. 414, 36 N. W. 10. Or at the time of the appropriation or taking. *Ft. Wayne Trac. Co. v. Ft. Wayne &c. R. Co.*, 170 Ind. 49, 83 N. E. 665; *Spencer v. Connecticut &c. Power Co.*, 78 N. H. 468, 101 Atl. 528; *Quade v. Columbia &c. R. Co.*, 233 Pa. St. 20, 81 Atl. 813. We are not at this place referring to the rights of tenants, mortgagees, lienholders and the like, but only to the rights of vendors and vendees. See generally *Bridges v. Southern Ry. Co.*, 86 S. Car. 267, 68 S. E. 551, Ann. Cas. 1912A, 1056 and note. And compare *Obst v. Covell*, 93 Minn. 30, 100 N. W. 650; *Northeastern &c. R. Co. v. Frazier*, 25 Nebr. 42, 40 N. W. 604, as to rule or exception where property is sold at intermediate stage of condemnation proceedings. And see also as to this last question, *Griffith v. Drainage Dist.*, 182 Iowa 1291, 166 N. W. 570; *In re Twelfth Ave.*, 74 Wash. 132, 132 Pac. 868, Ann. Cas. 1915A, 731, and other cases there cited in note.

<sup>10</sup> *Indiana &c. R. Co. v. Allen*, 100 Ind. 409; *Sargent v. Machias*, 65 Maine 591; *New York &c. R. Co. v. Drury*, 133 Mass. 167; *Dun-*

for the assignment of rights of action, however, the claim may be assigned.<sup>11</sup>

*Iap v. Toledo &c. R. Co.*, 50 Mich. 470, 15 N. W. 155; *Chicago &c. R. Co. v. Englehart*, 57 Nebr. 444, 77 N. W. 1092; *Schuylkill Navigation Co. v. Decker*, 2 Watts (Pa.) 343; *McFadden v. Johnson*, 72 Pa. St. 334; *Warrell v. Wheeling P. & B. R. Co.*, 130 Pa. St. 600, 18 Atl. 1014; *Pomeroy v. Chicago &c. R. Co.*, 25 Wis. 641. And to the same effect are the following recent cases: *Mobile &c. R. Co. v. Fowl River Lumber Co.*, 152 Ala. 320, 44 So. 471; *Lumerate v. St. Louis &c. R. Co.*, 149 Mo. App. 47, 136 S. W. 448; *Quade v. Columbia &c. R. Co.*, 233 Pa. St. 20, 81 Atl. 813; *King v. Southern R. Co.*, 119 Fed. 1017. But see a line of decisions in North Carolina to the effect that the purchaser is entitled to the damages to the land: *Beal v. Durham &c. R. Co.*, 136 N. Car. 298, 48 S. E. 674; *Livermon v. Roanoke &c. R. Co.*, 109 N. Car. 52, 13 S. E. 734; *Phillips v. Postal &c. Co.*, 130 N. Car. 513, 41 S. E. 1022, 89 Am. St. 868. In the case last cited the court says: "A subsequent purchaser can not recover for a completed act of injury to the land,—as, for instance, the unlawful cutting down of trees; but if the trespasser unlawfully remains upon the land after the sale, or returns and carries away the trees, he becomes liable to the then owner in the first case as for a continuing trespass, and in the latter for a fresh injury. If, in addition to this, the trespasser seeks to ac-

quire the right to remain, he can do so only by the consent of the owner, or under the principle of eminent domain. This is not the perpetration of a wrong, but the lawful acquisition of a right, and the damages incident thereto must be paid to the owner from whom the right is acquired." In *Nebraska* a purchaser of land, pending proceedings to appropriate the same for public use, may prosecute a claim for damages for such appropriation in his own name when such compensation has been wholly denied to his grantor.—*Ashley v. Burt County*, 73 Nebr. 159, 102 N. W. 272. See *Bridgman v. St. Johnsberry &c. R. Co.*, 58 Vt. 198, 2 Atl. 467; *Inge v. Police Jury*, 14 La. Ann. 117; *Wood v. Commissioners*, 122 Mass. 394; *Pinkerton v. Boston &c. R. Co.*, 109 Mass. 527; *Harshbarger v. Midland R. Co.*, 131 Ind. 177, 180, 27 N. E. 352, 30 N. E. 1083.

<sup>11</sup> See *Frey v. Duluth &c. R. Co.*, 91 Wis. 309, 64 N. W. 1038, and *Indiana &c. R. Co. v. Allen*, 113 Ind. 308, 311, 15 N. E. 451, 3 Am. St. 650; and see *McFadden v. Johnston*, 72 Pa. St. 335, 13 Am. Rep. 681; *Pomeroy v. Chicago &c. R. Co.*, 25 Wis. 641, to the effect that the right of compensation may pass if the deed expressly so provides. See also *Magee v. Brooklyn*, 144 N. Y. 265, 39 N. E. 87; *Tucker v. Chicago &c. R. Co.*, 91 Wis. 576, 65 N. W. 515.

§ 1273 (1000a). **Who is owner.**—It is sometimes difficult to determine who is the owner entitled to compensation. And, in many instances, compensation must be made not only to the owner of the land itself, but also to the owner of some interest or estate therein less than a fee. In considering the subject of parties in condemnation proceedings we shall have occasion to fully discuss the question as to who are “owners”;<sup>12</sup> but it may be said generally in this connection that the term usually includes any and all persons who have an interest in the land or property taken and who are so damaged thereby that they are entitled to compensation.<sup>13</sup> Thus it may happen that holders of different interests or estates are all entitled to compensation, each for the damage to his particular interest or estate.<sup>14</sup> But mere trespassers or the like are not owners.<sup>15</sup>

§ 1274 (1001). **Who is entitled to the compensation where the land is conveyed after appropriation proceedings are com-**

<sup>12</sup> See post, § 1310.

<sup>13</sup> See *Crane v. Elizabeth*, 36 N. J. Eq. 339 (holder of equitable title); *Butterworth &c. Co. v. Central R. Co.*, 72 N. J. Eq. 568, 66 Atl. 198 (owner of easement); *Andrew v. Nantasket &c. R. Co.*, 152 Mass. 506, 25 N. E. 966 (holder of possessory title); *Pinkerton v. Boston &c. R. Co.*, 109 Mass. 527; *Rule v. Sioux County*, 94 Nebr. 736, 144 N. W. 806; *Hill v. Glendon &c. Co.*, 113 N. Car. 259, 18 S. E. 171 (tenants in common); *Galveston &c. R. Co. v. Pfeufer*, 56 Tex. 66 (same); *Fulton Co. v. Amorous*, 89 Ga. 614, 16 S. E. 201; *Tucker v. Chicago &c. R. Co.*, 91 Wis. 576, 65 N. W. 515 (tenant in common having acquired entire interest entitled to entire compensation); *Hutchinson v. Parkersburg*, 25 W. Va. 226; *Virginia &c. R. Co. v. Booker*, 99 Va. 633, 39 S. E. 591; *Georgia &c. R. Co. v. Scott*, 38 S. Car. 34, 16

S. E. 185, 839; *Pecksport &c. R. Co. v. West*, 20 App. Div. 636, 47 N. Y. S. 230; *Ellisworth &c. R. Co. v. Gates*, 41 Kans. 574, 21 Pac. 632; *Spokane Falls &c. R. Co. v. Ziegler*, 167 U. S. 65, 17 Sup. Ct. 728, 42 L. ed. 79. Holder of bond for deed entitled to damages, *Brown v. Arkansas Central R. Co.*, 72 Ark. 456, 81 S. W. 613.

<sup>14</sup> See post, §§ 1277, 1278; also *Mills v. Samuels*, 230 Mass. 1, 118 N. E. 861.

<sup>15</sup> *Rosa v. Missouri &c. R. Co.*, 18 Kans. 124; *Rooney v. Sacramento Valley R. Co.*, 6 Cal. 638; *Norris v. Pueblo*, 12 Colo. App. 290, 55 Pac. 747. See also *Monati-quot &c. Mills v. Commonwealth*, 164 Mass. 227, 41 N. E. 280 (licensee from state); *Patten v. New York El. R. Co.*, 3 Abb. N. Cas. (N. Y.) 306; *Shaaber v. Reading*, 150 Pa. St. 402, 24 Atl. 692.

**menced—Vendor and vendee.**—The rule supported by the great weight of authority, as already indicated, is that the person who owns the property at the time possession is taken, or title vests in the railroad company, is entitled to the compensation.<sup>16</sup> But there is difficulty in the practical application of the rule. If a railroad company begins proceedings against all whom the record shows to have any title to, interest or estate in the land sought to be appropriated, there is certainly some reason for holding those who acquire rights subsequently by purchase or otherwise, should be held to take notice of the proceedings, and that if the compensation is, in good faith, paid to the persons who appeared of record to be entitled thereto at the time the proceedings were commenced, the railroad company must be regarded as having done its duty and can not be made liable to one who acquires rights subsequent to the commencement of the appropriation proceedings. We do not doubt that the

<sup>16</sup> *Curran v. Shattuck*, 24 Cal. 427; *Rice v. Chicago*, 57 Ill. App. 558; *Bean v. Warner*, 38 N. H. 247; *Magee v. Brooklyn*, 144 N. Y. 265, 39 N. E. 87; *Carli v. Stillwater &c. R. Co.*, 16 Minn. 260; *Kiebler v. Holmes*, 58 Mo. App. 119; *Megginnis v. Nunamaker*, 64 Pa. St. 374. See *Lawrence's Appeal*, 78 Pa. St. 365; *Stevenson v. Loehr*, 57 Ill. 509, 11 Am. Rep. 36; *Chicago &c. R. Co. v. Metropolitan &c. R. Co.*, 152 Ill. 519, 38 N. E. 736; *Kuhn v. Freeman*, 15 Kans. 423; *Pinkerton v. Boston &c. R. Co.*, 109 Mass. 527; *McIntyre v. Easton &c. R. Co.*, 26 N. J. Eq. 425; *Stokes v. Parker*, 53 N. J. L. 183, 20 Atl. 174; *Kohn v. Manhattan &c. R. Co.*, 11 Misc. 23, 31 N. Y. S. 859; *Clarke v. Cleveland*, 9 Ohio C. C. 118; *Davis v. Titusville &c. R. Co.*, 114 Pa. St. 308, 6 Atl. 736. The rule asserted by the New York cases is held not to apply where the grantor reserves

a right to the damages. *Kingsland v. Kings County R. Co.*, 83 Hun 151, 31 N. Y. S. 582. But see *Kernochan v. New York &c. R. Co.*, 128 N. Y. 559, 29 N. E. 65; *Pappenheim v. Metropolitan &c. R. Co.*, 128 N. Y. 463, 28 N. E. 518; *Pegram v. New York &c. R. Co.*, 147 N. Y. 135, 41 N. E. 424. As to right of remainder-man to intervene in proceedings against life tenant, see *Jones v. Asheville*, 116 N. Car. 817, 21 S. E. 691. See generally *In re Twelfth Ave.*, 74 Wash. 132, 132 Pac. 868, Ann. Cas. 1915A, 731 and note; *Frey v. Duluth &c. R. Co.*, 91 Wis. 309, 64 N. W. 1038; ante, § 1272. In a case where a road was projected but abandoned and afterwards revived, it was held that one who obtained title under a sale on a judgment, was entitled to receive the compensation awarded upon the revival of the enterprise. *Jones v. Miller (Va.)*, 23 S. E. 35.

owner at the time the right to compensation accrues may obtain it by an intervening petition or other appropriate procedure, but we do doubt the correctness of the doctrine of some of the cases that the railroad company is bound to examine the record to ascertain what persons acquire interest after the appropriation proceedings are commenced.<sup>17</sup> The rule, as laid down in many cases, is that it is sufficient to make parties those shown by the record or by possession to have an interest in the land,<sup>18</sup> and a necessary sequence is that the railroad company may safely pay such persons the compensation unless it has actual notice that they are not entitled to receive it, or, at all events, unless it has such notice or constructive notice by the recording of the conveyance before it is too late.

**§ 1275 (1001a). Temporary use of premises.**—A railroad company may be charged with the taking of private property, in a sense at least, where it temporarily occupies the same without

<sup>17</sup> It has been held that a vendee who acquires title while the proceedings are pending and before they are concluded is entitled to the compensation. *Carli v. Stillwater &c. R. Co.*, 16 Minn. 260; *Roberts v. Williams*, 15 Ark. 43; *Curran v. Shattuck*, 24 Cal. 427; *Bean v. Warner*, 38 N. H. 247; *Meginnis v. Nunamaker*, 64 Pa. St. 374; *Paducah &c. R. Co. v. Stovall*, 12 Heisk. (Tenn.) 1; *Rand v. Townshend*, 26 Vt. 670. See also *Beal v. Durham &c. R. Co.*, 136 N. Car. 298, 48 S. E. 674; *Ashley v. Burt County*, 73 Nebr. 159, 102 N. W. 272; *Condemnation of Lands, &c.*, In re, 93 Minn. 30, 100 N. W. 650; *Chandler v. Morey*, 195 Ill. 596, 63 N. E. 512; *Northeastern &c. R. Co. v. Frazier*, 25 Nebr. 42, 40 N. W. 604; *Virginia &c. R. Co. v. Booker*, 99 Va. 633, 39 S. E. 591.

<sup>18</sup> *Bell v. Cox*, 122 Ind. 153, 23

N. E. 705; *Brown v. County Commissioners*, 12 Metc. (Mass.) 208; *Pickford v. Lynn*, 98 Mass. 491; *Drury v. Midland R. Co.*, 127 Mass. 571; *Stewart v. White*, 98 Mo. 226, 11 S. W. 568; *King v. New York*, 102 N. Y. 171, 6 N. E. 395; *Plumer v. Wausau &c. Co.*, 49 Wis. 449, 5 N. W. 232. See also *Ft. Wayne &c. Trac. Co. v. Ft. Wayne &c. R. Co.*, 170 Ind. 49, 83 N. E. 665; *Birge v. Chicago &c. R. Co.*, 65 Iowa 440, 21 N. W. 767; *Cool v. Crommet*, 13 Maine 250; *Lawrence v. Nahant*, 136 Mass. 477; *Board of Levee Com. v. Johnson*, 66 Miss. 248, 6 So. 199; *Chambers v. Carteret &c. Co.*, 54 N. J. L. 85, 22 Atl. 995; *Gilligan v. Providence*, 11 R. I. 258; *Barre R. Co. v. Montpelier &c. R. Co.*, 61 Vt. 1, 17 Atl. 923, 4 L. R. A. 785; *Elliott Roads and Streets*, 236.

the consent of the owner. This question often arises in cases where a railroad company occupies a highway during some readjustment of its tracks or roadway and thereby interferes with the use of the highway by the public and obstructs the abutting owner's ingress to or egress from his premises. The right to recover damages in such cases is upheld in a series of recent Connecticut<sup>19</sup> and Massachusetts<sup>20</sup> decisions. It is held that the fact that the tracks were placed in the highway merely as a temporary expedient in aid of a lawful work and were to be removed as soon as the work was completed did not affect the principle and was only important in determining the amount of compensation to which the owner was entitled.<sup>21</sup> The measure of damages for a temporary occupancy which cuts off access from a place of business is held to be the reasonable value of the use of the premises to the owners for the purposes for which they were using them, including compensation for such damages to their premises and goods and necessary expenses incurred in saving them from further damage, not included in the diminution in value of the use of the premises, as were caused by the railroad company's acts and which the owners could not have avoided by the use of reasonable care and forethought.

**§ 1276 (1002). Notice to purchaser by existence of railroad.—**One who purchases land after the construction of the railroad must take notice of the rights of the company as shown by the occupancy of the land and the construction of the road.<sup>22</sup> Such

<sup>19</sup> *McKeon v. New York &c. R. Co.*, 75 Conn. 343, 53 Atl. 656, 61 L. R. A. 730; *Knapp &c. Cowles Mfg. Co. v. New York &c. R. Co.*, 76 Conn. 311, 56 Atl. 512, 100 Am. St. 994; *Vincent Bros. v. New York &c. R. Co.*, 77 Conn. 431, 59 Atl. 491. That no damage is recoverable for a temporary obstruction of a street, unless it is unreasonably prolonged, see *Shepherd v. Baltimore &c. R. Co.*, 130 U. S. 426, 9 Sup. Ct. 598, 32 L. ed. 970.

<sup>20</sup> *Bailey v. Boston &c. Corp.*, 182 Mass. 537, 66 N. E. 203.

<sup>21</sup> *McKeon v. New York &c. R. Co.*, 75 Conn. 343, 53 Atl. 656, 61 L. R. A. 730. See also upon the general subject of temporary use of or interference with property as a taking or damaging, *Great Northern R. Co. v. State*, 102 Wash. 348, 173 Pac. 40, L. R. A. 1918E, 987 and note.

<sup>22</sup> *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756,

a purchaser does not obtain a title superior to that of the railroad company. He may, however, maintain an action for damages, caused by a substantial change in the construction of the road which was not contemplated in the original grant of a right of way or award of compensation.<sup>23</sup>

**§ 1277 (1003). To whom compensation should be paid.**—In considering at another place the question who should be made parties to condemnation proceedings we have discussed the question as to who is entitled to receive the compensation or damages for property appropriated under the right of eminent domain.<sup>24</sup> At this place we shall very briefly consider the general question and direct attention to some of the authorities. It may be said generally that compensation must be paid to the persons owning estates or interests in the property. Different interests may be held by different persons, but all must be compensated according to their respective interests or estates. It has been held that damages for land held by a trustee will belong to the cestui que trust,<sup>25</sup> and while this is true, we suppose that ordinarily the trustee would be entitled to receive and hold the money for the purposes of the trust, and that if the trustee were made a party to the proceedings the beneficiary would be bound.<sup>26</sup> It is held that where lands subject to a life estate are condemned the life

39 L. ed. 873; *Railroad Co. v. Morgan*, 72 Ill. 155; *Chicago &c. R. Co. v. Henneberry*, 153 Ill. 354, 38 N. E. 1043; *Paul v. Connersville &c. R. Co.*, 51 Ind. 527; *Jeffersonville &c. R. Co. v. Oyler*, 60 Ind. 383; *Indiana &c. R. Co. v. McBroom*, 114 Ind. 198, 15 N. E. 831. See also *Whitecotton v. St. Louis &c. R. Co.*, 104 Mo. App. 65, 78 S. W. 318; ante, § 1177.

<sup>23</sup> *Chicago &c. R. Co. v. Henneberry*, 153 Ill. 354, 38 N. E. 1043.

<sup>24</sup> Post, § 1310; see ante, § 1272, 1273, 1274. As a general rule all persons who have an interest in the property should be made

parties. *State v. Superior Court*, 80 Wash. 417, 141 Pac. 906.

<sup>25</sup> *Whitney v. Milwaukee*, 57 Wis. 639, 16 N. W. 12. Executor is not ordinarily a necessary party. *Highway Comrs. of Ross v. Chambers*, 265 Ill. 113, 106 N. E. 492.

<sup>26</sup> The general rule is that beneficiaries are bound by a judgment or decree against the trustee. *Kerrison v. Stewart*, 93 U. S. 155, 23 L. ed. 843; *Vetterlein v. Barnes*, 124 U. S. 169, 8 Sup. Ct. 441; 31 L. ed. 400; *Campbell v. Railroad Co.*, 1 Woods (U. S.) 368; *Robertson v. Van Cleave*, 129 Ind. 217, 220, 26 N. E. 899, 29 N. E. 781, 15 L. R. A.

tenant is entitled to the use of the damages during his tenancy,<sup>27</sup> but, ordinarily, the damages are apportioned between them.<sup>28</sup> If the land is in the possession of a tenant he must compensated,<sup>29</sup> and if a tenant from year to year, he should receive the value of his crops, while the owner of the fee should have damages for injuries to the land.<sup>30</sup> It is generally held that a mortgagee of the land taken is entitled to have the damages applied in payment of his debt,<sup>31</sup> and where he is not made a party he may

68 and note; *Shaw v. Norfolk &c. Co.*, 5 Gray (Mass.) 162; *Winslow v. Minnesota &c. R. Co.*, 4 Minn. 313, 77 Am. Dec. 519; *Rogers v. Rogers*, 3 Paige (N. Y.) 379; *Campbell v. Watson*, 8 Ohio 498. Compare *Trustees v. McMahon*, 265 Ill. 83, 106 N. E. 486.

<sup>27</sup> *Kansas City &c. R. Co. v. Weaver*, 86 Mo. 473. In *Colcough v. Nashville &c. R. Co.*, 2 Head (Tenn.) 171, it was held that the damages should be distributed according to the respective values of the different estates.

<sup>28</sup> *Bentonville R. Co. v. Baker*, 45 Ark. 252; *Burbridge v. New Albany &c. R. Co.*, 9 Ind. 546; *Pennsylvania &c. R. Co. v. Bently*, 88 Pa. St. 178; *Colcough v. Nashville &c. R. Co.*, 2 Head (Tenn.) 171; *Austin v. Rutland R. Co.*, 45 Vt. 215; *Plfegar, In re*, L. R. 6 Eq. 426. See as to lessor being entitled to the compensation where a renewal lease was executed while the proceedings were pending. *St. Louis v. Nelson*, 108 Mo. App. 210, 83 S. W. 271. But compare *Storms v. Manhattan R. Co.*, 178 N. Y. 493, 71 N. E. 3, 66 L. R. A. 625. The remainder-men are entitled to recover for their contingent interest the value of such interest at the time of taking, with interest.

*Charleston &c. R. Co. v. Reynolds*, 69 S. Car. 481, 48 S. E. 476. See generally as to life tenant and remainder-man, *Pittsburgh &c. R. Co. v. Bentley*, 88 Pa. St. 178; *Cureton v. South Bound R. Co.*, 59 S. Car. 371, 37 S. E. 914; *Northwestern R. Co. v. Colclough*, 89 S. Car. 555, 72 S. E. 494.

<sup>29</sup> *Ft. Smith Suburban R. Co. v. Maledon*, 78 Ark. 366, 95 S. W. 472; *North Coast R. Co. v. Gentry*, 58 Wash. 82, 107 Pac. 1060. See also *State v. Superior Court*, 80 Wash. 417, 141 Pac. 906. But see where lease is made after the taking, *Chicago v. Messler*, 38 Fed. 302; *Illinois Cent. R. Co. v. Ferrell*, 108 Ill. App. 659; *Child v. New York El. R. Co.*, 89 App. Div. 598, 85 N. Y. S. 604.

<sup>30</sup> *Rooney v. Sacramento Valley R. Co.*, 6 Cal. 638; *Chicago &c. R. Co. v. Dresel*, 110 Ill. 89; *Baltimore &c. R. Co. v. Thompson*, 10 Md. 76; *Lafferty v. Schuylkill &c. R. Co.*, 124 Pa. St. 297, 16 Atl. 869, 3 L. R. A. 124 and note, 10 Am. St. 587.

<sup>31</sup> If the mortgagee is not given an opportunity to assert his rights, the better opinion is that he may proceed to foreclose against the land as if it had never been condemned, in case the remainder of



maintain a bill in equity for that purpose.<sup>32</sup> Where land that had been duly condemned and paid for by a railroad company which had never taken possession of it was afterward condemned by a second company, it was held that the first damages should be paid to the first company and not to the original owner.<sup>33</sup> The court may compel rival claimants of the award to establish their respective rights by an appropriate action.<sup>34</sup> Where different interests are affected, as is usual in case of lessor and lessee, life tenant and remainder-man and the like, the method of determin-

the land proves insufficient to satisfy the mortgage debt. *Adams v. St. Johnsbury &c. R. Co.*, 57 Vt. 240; *Dodge v. Omaha &c. R. Co.*, 20 Nebr. 276, 29 N. W. 936; *Kennedy v. Milwaukee &c. R. Co.*, 22 Wis. 581; *North Hudson R. Co. v. Rooram*, 28 N. J. Eq. 450; *Severin v. Cole*, 38 Iowa 463. See also to the effect that the compensation should go to the mortgagee, *South Park Comrs. v. Todd*, 112 Ill. 379; *Sherwood v. Lafayette*, 109 Ind. 411, 10 N. E. 89, 58 Am. Rep. 414; *Wilson v. European &c. R. Co.*, 67 Maine 358; *Wooster v. Sugar River &c. Co.*, 57 Wis. 311, 15 N. W. 401; *Omaha Bridge & Terminal R. Co. v. Reed*, 69 Nebr. 514, 96 N. W. 276. But in a few jurisdictions it is held that it should be paid to the mortgagor, at least in the first instance. *Thompson v. Chicago &c. R. Co.*, 110 Mo. 147, 19 S. W. 77; *Chicago &c. R. Co. v. Baker*, 102 Mo. 553, 15 S. W. 64; *Read v. Cambridge*, 126 Mass. 427; *Bates v. Boston Elevated R. Co.*, 187 Mass. 328, 72 N. E. 1017, and not to a mortgagee out of possession. *Schumacker v. Toberman*, 56 Cal. 508; *Rand v. Ft. Scott &c. R. Co.*, 50 Kans. 114, 31 Pac. 683; *Whiting v. New Haven*, 45 Conn. 303.

The mortgage lien may be transferred to the award in New York. *In Re Sea Beach R. Co.*, 121 App. Div. 907, 106 N. Y. S. 1144, affirmed in 196 N. Y. 533, 89 N. E. 1112. Liens against property of which only a part is condemned may be shifted, however, to the portion not condemned. *Oregon Short Line R. Co. v. Hallock*, 41 Utah 378, 126 Pac. 394.

<sup>32</sup> *Platt v. Bright*, 29 N. J. Eq. 128; *Wood v. Westborough*, 140 Mass. 403, 5 N. E. 613. See also *Bates v. Boston &c. R. Co.*, 187 Mass. 328, 72 N. E. 1017; *Stamnes v. Milwaukee &c. R. Co.*, 131 Wis. 85, 109 N. W. 100, 925, 111 N. W. 62.

<sup>33</sup> *Dubuque &c. R. Co. v. Diehl*, 64 Iowa 635, 21 N. W. 117.

<sup>34</sup> *Gerrard v. Omaha &c. R. Co.*, 14 Nebr. 270, 15 N. W. 231; *Metro-politan Board of Works v. Sant*, 38 L. J. Ch. 7. It has been held that where the mortgagee was not a party, the corporation might pay the damages into court and apply to have the rights of the parties adjusted so that it should not have to pay twice. *Wooster v. Sugar River V. R. Co.*, 57 Wis. 311, 15 N. W. 401.

ing the values of the different interests, or the compensation, is not the same in all jurisdictions, but it is said that "whatever the method of ascertaining the values of these distinct interests, it is evident that the sum of these values must be the full value of the property taken."<sup>35</sup>

§ 1278 (1003a). **Measure of damages to lessee.**—It may be said generally that the measure of damages to a leasehold interest in land is its fair market value at the time of the appropriation and not its value to the lessee for a particular purpose.<sup>36</sup> But as a lease may have no market value this is not always regarded as a satisfactory test.<sup>37</sup> A Canadian court holds that a

<sup>35</sup> *Gluck v. Baltimore*, 81 Md. 315, 32 Atl. 515, 48 Am. St. 515. See also *New York & C. R. Co., In re*, 137 N. Y. 95, 32 N. E. 1054; *Stamnes v. Milwaukee & C. R. Co.*, 131 Wis. 85, 109 N. W. 100, 925, 111 N. W. 62. In the first case cited the question as to whether there is any apportionment of rent is considered and the relative rights of landlord and tenant where property is condemned are considered with a review of authorities pro and con, in *Corrigan v. Chicago*, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212 and note. As to compensation as between heir and administrator or personal representative, see *Peoria & C. R. Co. v. Rice*, 75 Ill. 329; *Neal v. Knox & C. R. Co.*, 61 Maine 298; *Boynton v. Peterborough & C. R. Co.*, 4 Cush. (Mass.) 467; *Oliver v. Pittsburgh & C. R. Co.*, 131 Pa. St. 408, 19 Atl. 47, 17 Am. St. 814, all holding that the heir is entitled if the owner dies before the land is taken; and the second and third holding also that if the land was taken during the owner's life the compensation

should be paid to the administrator. To the same effect is *Harshbarger v. Midland R. Co.*, 131 Ind. 177, 27 N. E. 352, 30 N. E. 1083. Compare *Brown v. Arkansas Cent. R. Co.*, 72 Ark. 456, 81 S. W. 613. See as to rights of remainder-man *Bridges v. Southern R. Co.*, 86 S. Car. 267, 68 S. E. 551, Ann. Cas. 1912A, 1056.

<sup>36</sup> *Kishlar v. Southern Pac. R. Co.*, 134 Cal. 636, 66 Pac. 848. See also *Bales v. Wichita Midland & C. R. Co.*, 92 Kans. 771, 141 Pac. 1009.

<sup>37</sup> It is said that the lessee is entitled to recover for the loss resulting from the deprivation of his right to remain in undisturbed possession to the end of his term and that while his recovery is restricted to the value of the unexpired term, the value of machinery or cost of removing or replacing it or the like, may be considered in some cases as tending to prove the value of the leasehold interest. *James McMillin Printing Co. v. Pittsburgh & C. R. Co.*, 216 Pa. 504, 65 Atl. 1091; *Getz v. Philadelphia & C. R. Co.*, 105 Pa. St. 547, and 113

tenant of buildings erected on land sought to be condemned for railroad purposes should be allowed compensation for the value of his possession under the lease, as well as for the value of the improvements made by him, and this was held true, although the term expressed in the lease had expired, where the lease provided for the appraisal of the improvements made by the tenant and the payment therefor by the lessor, or the renewal of the lease on the same conditions as the original lease, and the lessor had no immediate intention of taking possession of the premises and paying for the improvements, notwithstanding the fact that no appraisal had been made.<sup>38</sup>

**§ 1279 (1003b). Apportionment of compensation.**—As will be seen from an examination of the authorities referred to in the last two preceding sections, there is some conflict upon the question as to how compensation should be paid or apportioned, in some instances, as between parties having separate interests. As a general rule, where there are owners of separate interests each should receive compensation according to the damage to his own interests, or, in other words, the compensation should be apportioned according to their respective interests.<sup>39</sup> In a comparatively late case in which the commissioners were unable to make such apportionment it was held that they could award the compensation in gross and leave the court to make the apportionment.<sup>40</sup> Where the property is leased the compensation

Pa. St. 214, 6 Atl. 356; Kersey v. Schuylkill &c. R. Co., 133 Pa. St. 234, 19 Atl. 553, 7 L. R. A. 409, 19 Am. St. 632. See also Ehret v. Railroad Co., 151 Pa. St. 158, 24 Atl. 1068; Shipley v. Pittsburg &c. R. Co., 216 Pa. 512, 65 Atl. 1094. And compare Bales v. Wichita Midland &c. R. Co., 92 Kans. 771, 141 Pac. 1009. A covenant for renewal may increase the value of the term and decrease that of the reversion. North Penna. R. Co. v. Davis, 26 Pa. St. 238. See also Storms v. Manhattan R. Co., 178

N. Y. 493, 71 N. E. 3, 66 L. R. A. 625.

<sup>38</sup> McGoldrich v. King, 8 Can. Exch. 169.

<sup>39</sup> Law v. Chicago Sanitary Dist., 197 Ill. 523, 64 N. E. 536; Miller v. Asheville, 112 N. Car. 759, 16 S. E. 762; Baker v. New York, 31 App. Div. 112, 52 N. Y. S. 533; Rimback v. Essex Co. Park Comrs., 62 N. J. L. 494, 41 Atl. 699, and authorities cited in subsequent notes to this section.

<sup>40</sup> Cincinnati &c. R. Co. v. Bay City &c. R. Co., 106 Mich. 473, 64

should usually be apportioned between the lessor and lessee according to their respective interests,<sup>41</sup> but it has been held that a lessee who takes his lease while the proceedings are pending is not entitled to have compensation awarded him.<sup>42</sup> So, where a lease for years provided that it should not affect the right of the lessor to demand and recover any damage resulting from the construction of railroads to the same extent as if he were in possession, it was held that the lessee could not recover any damages for injury to his term resulting from the construction of a railroad.<sup>43</sup> It has likewise been held that the renewal of a lease, or a holding over, after the commencement of condemnation proceedings does not give the lessee any new right to compensation,<sup>44</sup> at least unless the original lease contained a covenant for renewal; but it has been held otherwise where there was a covenant for renewal and the new lease is considered as a continuation of the old.<sup>45</sup> If the estates of a life tenant and remainderman are both damaged so as to entitle them to compensation,

N. W. 471. This, however, was under a statute so providing.

<sup>41</sup> *Bentonville R. Co. v. Baker*, 45 Ark. 252; *Booker v. Venice & C. R. Co.*, 101 Ill. 333; *Schreiber v. Chicago & C. R. Co.*, 115 Ill. 340, 3 N. E. 427; *Douglas v. Indianapolis & C. Traction Co.*, 37 Ind. App. 332, 76 N. E. 892; *Pitts v. Baltimore*, 73 Md. 326, 21 Atl. 52; *Board v. Johnson*, 66 Miss. 248, 6 So. 199; *Biddle v. Hussman*, 23 Mo. 579; *Livingston v. Sulzer*, 19 Hun (N. Y.) 375. But see *Little Rock & C. R. Co. v. Allister*, 62 Ark. 1, 34 S. W. 82.

<sup>42</sup> *Davis v. Titusville & C. R. Co.*, 114 Pa. St. 308, 6 Atl. 736; *Chicago v. Messler*, 38 Fed. 302. But see *Justice v. Philadelphia*, 169 Pa. St. 503, 52 Atl. 592. And there are other exceptional cases in which a lessee may not be entitled to compensation. See *Becker v. Chicago & C. R. Co.*, 126 Ill. 436, 18

N. E. 564; *Matter of Morgan & C. R. Co.*, 32 La. Ann. 371. Compare also *Little Rock & C. R. Co. v. Allister*, 62 Ark. 1, 34 S. W. 82.

<sup>43</sup> *Burbridge v. New Albany & C. R. Co.*, 9 Ind. 546. See also *Illinois Cent. R. Co. v. Ferrell*, 108 Ill. App. 659, where the injury from overflows was constantly recurring and existed when the land was leased.

<sup>44</sup> *St. Louis v. Nelson*, 108 Mo. App. 210, 83 S. W. 271; *Schreiber v. Chicago & C. R. Co.*, 115 Ill. 340, 3 N. E. 427; *Witmark v. New York El. R. Co.*, 149 N. Y. 393, 44 N. E. 78.

<sup>45</sup> *Kearney v. Metropolitan El. R. Co.*, 129 N. Y. 76, 29 N. E. 70; *Storms v. Manhattan R. Co.*, 178 N. Y. 493, 71 N. E. 3, 66 L. R. A. 625; *North Pennsylvania R. Co. v. Davis*, 26 Pa. St. 238.

each is entitled to compensation according to the damage to his interest, and it is apportioned accordingly.<sup>46</sup> As between mortgagor and mortgagee, as already intimated, the mortgagee is, in most jurisdictions, entitled to be compensated for the injury to his interest and first paid, although the residue, if any, may then go to the mortgagor;<sup>47</sup> but in some jurisdictions it is held that the mortgagor is entitled to be paid the entire compensation, leaving the mortgagee to his remedy against the mortgagor,<sup>48</sup> at least where the mortgagor is in possession.<sup>49</sup>

§ 1280 (1003c). **Occupying claimants on public lands.**—It is the rule that one occupying government land as a homestead under a valid entry and having a legal vested interest therein can not be deprived of any portion of this interest except by due

<sup>46</sup> *Indiana &c. R. Co. v. Conness*, 184 Ill. 178, 56 N. E. 402; *Horney v. Coldbrook*, 65 Ill. App. 477; *Burbridge v. New Albany &c. R. Co.*, 9 Ind. 546; *Kansas City &c. R. Co. v. Weaver*, 86 Mo. 473; *Cogan v. McCabe*, 23 Misc. 739, 52 N. Y. S. 48; *Pennsylvania R. Co. v. Bentley*, 88 Pa. St. 178; *Cureton v. South Bound R. Co.*, 59 S. Car. 371, 37 S. E. 914.

<sup>47</sup> *Chicago v. Tebbetts*, 104 U. S. 120, 20 L. ed. 655; *South Park Comrs. v. Todd*, 112 Ill. 379; *Calumet River R. Co. v. Brown*, 136 Ill. 322, 26 N. E. 501, 12 L. R. A. 84; *Sherwood v. Lafayette*, 109 Ind. 411, 10 N. E. 89, 58 Am. St. 414; *Moritz v. St. Paul*, 52 Minn. 409, 54 N. W. 370; *Boutelle v. Minneapolis*, 59 Minn. 493, 61 N. W. 554; *Lumbermen's &c. Co. v. St. Paul*, 77 Minn. 410, 80 N. W. 357; *Thompson v. Chicago &c. R. Co.*, 110 Mo. 147, 19 S. W. 77; *Platt v. Bright*, 29 N. J. Eq. 128; *Gray v. Case*, 51 N. J. Eq. 426, 26 Atl. 805;

*Rochester, In re*, 136 N. Y. 83, 32 N. E. 702, 19 L. R. A. 161; *Magee v. Brooklyn*, 144 N. Y. 265, 39 N. E. 87; *State Line R. Co. v. Playford (Pa.)*, 14 Atl. 355; *Martin v. London &c. R. Co.*, 13 L. T. R. N. S. 355. As to his superior rights to creditors of the mortgagor, see *Sawyer v. Landers*, 56 Iowa 422, 9 N. W. 341; *Wood v. Westborough*, 140 Mass. 403, 5 N. E. 613; *Keller v. Bading*, 169 Ill. 152, 48 N. E. 436, 61 Am. St. 159.

<sup>48</sup> See *Whiting v. New Haven*, 45 Conn. 303; *Breed v. Eastern R. Co.* 5 Gray (Mass.) 470 and note; *Read v. Cambridge*, 126 Mass. 427; *Chicago &c. R. Co. v. Baker*, 102 Mo. 553, 15 S. W. 64. See also *Aggs v. Shackelford County*, 85 Tex. 145, 19 S. W. 1085 (where mortgage debt had not matured).

<sup>49</sup> *Rand v. Ft. Scott &c. R. Co.*, 50 Kans. 114, 31 Pac. 683; *Parish v. Gilmanton*, 11 N. H. 293. See also *Schumacker v. Toberman*, 56 Cal. 508.

process of law and the payment of reasonable compensation.<sup>50</sup> The patent issued to such a settler is held to relate back to the date of the settlement and to cut off all intervening claimants.<sup>51</sup> On this general subject the supreme court of Kansas uses this language: "A settler on the public lands of the United States, who makes a valid homestead entry, and continues to reside on and improve the land entered in compliance with the land laws, has the exclusive right to its possession and use, and to the improvements made thereon; and he also acquires equities in the land itself, which increase from the time the entry is made until the complete title is earned. Such a settler may sell or transfer a portion of his homestead for a right of way for a railroad, or his interest therein may be condemned and appropriated for such purpose upon adversary proceedings, and by paying full compensation to the settler therefor. A homesteader who has entered, and is proceeding lawfully to perfect his title to the land entered, suffers an injury by the building of a railroad over his homestead which differs only in degree from that sustained from the same cause by one who has the complete title."<sup>52</sup>

§ 1281 (1004). **Effect of assessment of damages.**—The general rule is that the assessment of damages in appropriation proceedings is presumed to include all injuries resulting from the particular appropriation. The corporation acquires the right to construct its road in a suitable and proper manner for its own convenience and the accommodation of the public. And no action can be maintained by the owner either then or at any future time for damages resulting from the proper construction and maintenance of the road across his land.<sup>53</sup> The assessment

<sup>50</sup> *Oklahoma City v. McMasters*, 12 Okla. 570, 73 Pac. 1012; *Burlington &c. R. Co. v. Johnson*, 38 Kans. 142, 16 Pac. 125.

<sup>51</sup> *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210, 18 L. ed. 339. See also *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. ed. 761.

<sup>52</sup> *Burlington &c. R. Co. v. Johnson*, 38 Kans. 142, 16 Pac. 125.

<sup>53</sup> *Porter v. Midland R. Co.*, 125 Ind. 476, 25 N. E. 556; *White v. Chicago &c. R. Co.*, 122 Ind. 317, 23 N. E. 782, 7 L. R. A. 257; *Indianapolis &c. R. Co. v. Branson*, 172 Ind. 383, 86 N. E. 834, 88 N. E. 594 (citing text); *Cleveland &c. R. Co. v. Hadley*, 179 Ind. 429, 101 N. E. 473; *Cleveland &c. R. Co. v. Griswold*, 51 Ind. App. 497, 97

is often said "to be made once for all." The future necessities as well as the present needs of the company are conclusively presumed to have been taken into consideration, and the award of the appraisers is a bar to an action for damages for any use of the right of way which the future needs of the corporation may require.<sup>54</sup> The fact that the injuries were unforeseen,<sup>55</sup> or that,

N. E. 1030; *Elizabethtown &c. R. Co. v. Combs*, 10 Bush. (Ky.) 382, 19 Am. Rep. 67; *Chesapeake &c. Canal Co. v. Grove*, 11 G. & J. (Md.) 398; *Fowle v. New Haven &c. R. Co.*, 112 Mass. 334, 17 Am. Rep. 106; *Bailey v. Woburn*, 126 Mass. 416; *McCormick v. Kansas City &c. R. Co.*, 57 Mo. 433; *Dearborn v. Boston &c. R. Co.*, 24 N. H. 179; *Perley v. Boston &c. R. Co.*, 57 N. H. 212; *Van Schoick v. Delaware &c. Canal Co.*, 20 N. J. L. 249; *Furniss v. Hudson River R. Co.*, 5 Sandf. (N. Y.) 551; *Tucker v. Erie &c. R. Co.*, 27 Pa. St. 281; *Pittsburgh &c. R. Co. v. Gilleland*, 56 Pa. St. 445, 94 Am. Dec. 97. See also *Bunting v. Oak Creek Drainage Dist.*, 99 Nebr. 843, 157 N. W. 1028, L. R. A. 1918B, 1004; *St. Louis &c. Ry. Co. v. Barnes* (Tex. Civ. App.), 162 S. W. 373; *Dose v. Seattle*, 78 Wash. 571, 139 Pac. 594.

<sup>54</sup> *White v. Chicago &c. R. Co.*, 122 Ind. 317, 23 N. E. 782, 7 L. R. A. 257; *Cleveland &c. R. Co. v. Hadley*, 179 Ind. 429, 441, 101 N. E. 473; *Chicago &c. R. Co. v. Smith*, 111 Ill. 363. See also *Smith v. Hall*, 103 Iowa 95, 72 N. W. 427, 428; *Yazoo &c. R. Co. v. Davis*, 73 Miss. 678, 19 So. 487, 32 L. R. A. 262, 55 Am. St. 562; *Atchison &c. R. Co. v. Forney*, 35 Nebr. 607, 53 N. W. 585, 37 Am. St. 450. So it has been held that where a rail-

road company fails to comply with the statute as to payment of compensation and an abutting owner sues for the damages, all damages should be recovered in one action. *Keyser v. Lake Shore &c. R. Co.*, 142 Mich. 143, 105 N. W. 143; *Indiana &c. R. Co. v. Allen*, 113 Ind. 308, 15 N. E. 451, 3 Am. St. 650. Where a change of location is made under authority of the legislature, the land-owner may recover damages for the alteration, if any actual damage or injury has been sustained thereby to the extent of such additional injury and no more. *Baltimore &c. R. Co. v. Compton*, 2 Gill (Md.) 20. A land-owner who has accepted the damages awarded to him upon condemnation and confirmed on appeal, is estopped to dispute the company's right to occupy the lands for any use authorized by the company's charter. *Dodge v. Burns*, 6 Wis. 514.

<sup>55</sup> *Aldrich v. Cheshire &c. R. Co.*, 21 N. H. 359, 53 Am. Dec. 212. In this case, a spring which had supplied the owner's buildings with water was drained by an excavation made in constructing the road, and he was denied any additional compensation, although in the assessment of damages, the probability of destroying the spring had not been considered.

owing to the lack of any definite plan for construction on the part of the railroad, it was impossible to know at the time the damages were assessed what damages would be done in making cuts and fills, and constructing bridges,<sup>56</sup> does not alter the rule. The jury are, as a rule, conclusively presumed to have assessed the damages for every injury that they could legally include in their assessment.<sup>57</sup> If an item of damages was erroneously

<sup>56</sup> Where the agents of the company represented to the commissioners making the appraisalment that the road would be constructed in a particular manner, thereby reducing the appraisalment below what it would otherwise have been, and the company constructed the road by a different plan which caused much greater damage to the land-owner, it was held that he could not maintain an independent action for constructing the railroad contrary to the representations upon which the award was based, but that, so long as the award was not set aside by appeal or by proceedings to review, it was binding to all present or future damages growing out of the construction of the road in any careful and proper manner. *Butman v. Vermont Central R. Co.*, 27 Vt. 500.

<sup>57</sup> *Caïro &c. R. Co. v. Turner*, 31 Ark. 494, 25 Am. Rep. 564; *Lafayette &c. R. Co. v. Smith*, 6 Ind. 249; *Lafayette &c. R. Co. v. New Albany &c. R. Co.*, 13 Ind. 90, 74 Am. Dec. 246; *White v. Chicago &c. R. Co.*, 122 Ind. 317, 23 N. E. 782, 7 L. R. A. 257; *Porter v. Midland R. Co.*, 125 Ind. 476; *Daniels v. Chicago &c. R. Co.*, 35 Iowa 129, 14 Am. Rep. 490; *Stodhill v. Chicago &c. R. Co.*, 43 Iowa 26, 22 Am. Rep. 211; *Mason v. Kennebec*

*&c. R. Co.*, 31 Maine 215; *Boothby v. Androscoggin &c. R. Co.*, 51 Maine 318; *Chesapeake &c. Canal Co. v. Grove*, 11 G. & J. (Md.) 398; *Baltimore &c. R. Co. v. Magruder*, 34 Md. 79, 6 Am. Rep. 310; *Mellen v. Western R. Co.*, 4 Gray (Mass.) 301; *Stevens v. Proprietors of Middlesex Canal*, 12 Mass. 466; *Brown v. Beatty*, 34 Miss. 227, 69 Am. Dec. 389; *Clark v. Hannibal &c. R. Co.*, 36 Mo. 202; *Lindell v. Hannibal &c. R. Co.*, 36 Mo. 543; *Aldrich v. Cheshire R. Co.*, 21 N. H. 359, 53 Am. Dec. 212; *Dearborn v. Boston &c. R. Co.*, 24 N. H. 179; *Perley v. Boston &c. R. Co.*, 57 N. H. 212; *Furniss v. Hudson River R. Co.*, 5 Sandf. (N. Y.) 551; *Selden v. Delaware &c. Canal Co.*, 29 N. Y. 634; *McIntire v. Western &c. R. Co.*, 67 N. Car. 278; *Philadelphia &c. R. Co. v. Williams*, 54 Pa. St. 103; *Cumberland Valley R. Co. v. McLanahan*, 59 Pa. St. 23; *Fehr v. Schuylkill Nav. Co.*, 69 Pa. St. 161; *Colcough v. Nashville &c. R. Co.*, 2 Head. (Tenn.) 171; *Tennessee &c. R. Co. v. Adams*, 3 Head. (Tenn.) 596; *Vermont Cent. R. Co. v. Baxter*, 22 Vt. 365; *Sabin v. Vermont Cent. R. Co.*, 25 Vt. 363; *Pettibone v. La Crosse &c. R. Co.*, 14 Wis. 443; *Sherman v. Milwaukee &c. R. Co.*, 40 Wis. 645; *Little v. Dublin &c. R. Co.*, 7 Ir.



omitted by the commissioners or jury in making the assessment of damages, or if they proceeded upon erroneous principles, the remedy is by appeal or by proceedings to review, and not by an independent suit.<sup>58</sup> But where the owner accepts and retains the damages awarded it has been held that he can not afterwards claim greater damages either in a direct appeal or in a collateral action.<sup>59</sup>

**§ 1282 (1005). Award of compensation does not cover negligent acts.**—Compensation is awarded, no matter what may be the nature of the condemnation proceedings, for the property taken and not for injuries resulting from negligence in the construction or operation of the railroad. While it is the general rule that damages are awarded once for all, they are, nevertheless, not given to compensate a party for injuries caused him by the negligence of the railroad company in the construction or operation of its road. In awarding damages, the jury, commissioners, viewers, appraisers, or whatever tribunal makes the award, proceeds, in legal contemplation, upon the theory that in constructing and operating its road the railroad company will use ordinary and reasonable care to prevent injury to land-owners.<sup>60</sup> In some of the cases it is held that injuries caused

C. L. 82. See also *Lynch v. St. Louis &c. R. Co.*, 180 Mo. App. 169, 168 S. W. 224.

<sup>58</sup> *Butman v. Vermont Cent. R. Co.*, 27 Vt. 500; *McArthur v. McEachin*, 64 N. Car. 454; *Morris Canal &c. Co. v. Seward*, 23 N. J. L. 219; *People v. Wasson*, 64 N. Y. 167; *Spaulding v. Arlington*, 126 Mass. 492. So, in case the owner presented his claim for damages to the commissioners, and it was disallowed by them under a misapprehension of their authorities and duties, the owner's sole remedy is by a proceeding to review the award. *Van Schoick v. Delaware &c. R. Co.*, 20 N. J. L. 249.

<sup>59</sup> *Stauffer v. Cincinnati &c. R. Co.*, 33 Ind. App. 356, 70 N. E. 543. See also post, § 1361; and *Clay County v. Howard*, 95 Nebr. 389, 145 N. W. 982; *Stoope v. Kittingan Tel. Co.*, 242 Pa. 556, 89 Atl. 686.

<sup>60</sup> *Jones v. Chicago &c. R. Co.*, 68 Ill. 380; *White v. Chicago &c. R. Co.*, 122 Ind. 317, 329, 23 N. E. 782, 7 L. R. A. 257; *Hunt v. Iowa &c. R. Co.*, 86 Iowa 15, 52 N. W. 668, 41 Am. St. 473; *Sinia v. Louisville &c. R. Co.*, 71 Miss. 547, 14 So. 87; *Fremont &c. R. Co. v. Whalen*, 11 Nebr. 585, 10 N. W. 491; *Buting v. Oak Creek Drainage Dist.*, 99 Nebr. 843, 157 N. W. 1028,

by negligence are not covered by the assessment even though the negligent acts were done before the damages were assessed.<sup>61</sup> The rule applies to negligent interference with water courses, as

Ann. Cas. 1918B, 1004; *March v. Portsmouth &c. R. Co.*, 19 N. H. 372; *Wheeler v. Rochester &c. R. Co.*, 12 Barb. (N. Y.) 227; *Setzler v. Pennsylvania &c. R. Co.*, 112 Pa. St. 56, 4 Atl. 370; *Nason v. Woonsocket &c. R. Co.*, 4 R. I. 377; *Spencer v. Hartford &c. R. Co.*, 10 R. I. 14; *Neilson v. Chicago &c. R. Co.*, 58 Wis. 516, 17 N. W. 310. In *Kansas City &c. R. Co. v. Lackey*, 72 Miss. 881, 16 So. 909, 48 Am. St. 589, the rule was thus stated: "In the condemnation proceedings the owner received compensation from the railroad company only for such damages as he would sustain by the proper construction of its line. Neither the owner nor the commissioners who condemned the right of way, and awarded compensation, would have been justified, the owner in asking, or the commissioners in imposing, any sum of money for damages to be due by an improper construction of the railroad thereafter. The presumption was that the railroad would properly construct its road, and hence no damages could properly have been awarded for injuries that could never occur if appellant properly constructed its road." See *Fleming v. Chicago &c. R. Co.*, 34 Iowa 353; *Arkansas Cent. R. Co. v. Smith*, 71 Ark. 189, 71 S. W. 947; *Cleveland &c. R. Co. v. Doan*, 47 Ind. App. 322, 94 N. E. 598; *King v. Iowa &c. R. Co.*, 34 Iowa 458; *Miller v. Keokuk &c. R. Co.*, 63 Iowa 680, 685, 16 N. W. 567; *Key-*

*ser v. Lake Shore &c. Ry. Co.*, 142 Mich. 143, 105 N. W. 143; *Mullen v. Lake Drummond &c. Co.*, 130 N. Car. 496, 41 S. E. 1027, 61 L. R. A. 833 and note; *Norfolk &c. R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517.

<sup>61</sup> *Selma &c. R. Co. v. Keith*, 53 Ga. 178; *Missouri &c. R. Co. v. Ward*, 10 Kans. 352; *Blodgett v. Utica &c. R. Co.*, 64 Barb. (N. Y.) 580; *Oregon &c. R. Co. v. Barlow*, 3 Ore. 311; *Mathews v. St. Paul &c. R. Co.*, 18 Minn. 434; *McClinton v. Pittsburg &c. R. Co.*, 66 Pa. St. 404. See *Pierce v. Worcester &c. R. Co.*, 105 Mass. 199; *Clark v. Vermont &c. R. Co.*, 28 Vt. 103. It is held that where the assessment is made after the road is constructed, the jury in assessing damages may take into account the manner in which it is built. *Hayes v. Ottawa &c. R. Co.*, 54 Ill. 373; *Hooker v. New Haven &c. R. Co.*, 15 Conn. 312; *Terre Haute &c. R. Co. v. McKinley*, 33 Ind. 274; *Fleming v. Chicago &c. R. Co.*, 34 Iowa 353; *Gear v. Chicago, C. & D. R. Co.*, 43 Iowa 83; *Mason v. Kennebec &c. R. Co.*, 31 Maine 215; *Whitehouse v. Androscoggin R. Co.*, 52 Maine 208; *Baltimore &c. R. Co. v. Reaney*, 42 Md. 117; *Proprietors of Locks and Canals v. Nashua &c. R. Co.*, 10 Cush. (Mass.) 385; *Hazen v. Boston &c. R. Co.*, 2 Gray (Mass.) 574; *Rau v. Minnesota Valley R. Co.*, 13 Minn. 442; *McCormick v. Kansas City &c. R. Co.*, 57 Mo. 433; *Dear-*

where a stream is wrongfully diverted,<sup>62</sup> or otherwise interfered with by the negligent construction of a bridge.<sup>63</sup> The rule has been extended to interference with lateral support. Thus it has also been held that where excavations are made by which the adjoining soil is unnecessarily deprived of support and caused to give away and slide into the cut, the company is liable.<sup>64</sup> So in a case where property was damaged beyond the mere incidental inconvenience, which unavoidably follows the construction of tunnels and the operation of the railroad trains therein, it was held that property owners affected were entitled to recover the damages without proof of negligence of the railroad, though the construction of the tunnel and the operation of the trains therein

born v. Boston &c. R. Co., 24 N. H. 179; Eaton v. Boston &c. R. Co., 51 N. H. 504, 12 Am. Rep. 147; Perley v. Boston &c. R. Co., 57 N. H. 212; Brown v. Cayuga &c. R. Co., 12 N. Y. 486; Bellinger v. New York Central R. Co., 23 N. Y. 42; Oregon &c. R. Co. v. Barlow, 3 Ore. 311; Watson v. Pittsburg &c. R. Co., 37 Pa. St. 469; Pittsburg &c. R. Co. v. Gilleland, 56 Pa. St. 445, 94 Am. Dec. 97; Fehr v. Schuylkill Nav. Co., 69 Pa. St. 161; Colcough v. Nashville &c. R. Co., 2 Head (Tenn.) 171; Vermont Central R. Co. v. Baxter, 22 Vt. 365; Hatch v. Vermont Cent. R. Co., 25 Vt. 49, 28 Vt. 142; Clark v. Vermont &c. R. Co., 28 Vt. 103; Waterman v. Connecticut &c. R. Co., 30 Vt. 610, 73 Am. Dec. 326; Southside R. Co. v. Daniel, 20 Grat. (Va.) 344; Lyon v. Green Bay &c. R. Co., 42 Wis. 538; Lawrence v. Great Northern R. Co., 16 Q. B. 643; Turner v. Sheffield &c. R. Co., 10 M. & W. 425; Brand v. Hammersmith &c. R. Co., L. R. 2 Q. B. 223, L. R. 4 H. L. 171.

<sup>62</sup> Stodghill v. Chicago &c. R. Co., 43 Iowa 26, 22 Am. Rep. 211; Baltimore R. Co. v. Magruder, 34 Md. 79, 6 Am. Rep. 310.

<sup>63</sup> Selma &c. R. Co. v. Keith, 53 Ga. 178; Spencer v. Hartford &c. R. Co., 10 R. I. 14; Pittsburgh &c. R. Co. v. Gilleland, 56 Pa. St. 445, 94 Am. Dec. 97. See also Atchison &c. R. Co. v. Eldridge, 41 Okla. 463, 139 Pac. 254.

<sup>64</sup> Dyer v. St. Paul, 27 Minn. 457; Quincy v. Jones, 76 Ill. 231, 20 Am. Rep. 243; Metropolitan Board of Works v. Metropolitan R. Co., 37 L. J. C. P. 281, 38 L. J. C. P. 172. See also Mosier v. Oregon &c. R. Co., 39 Ore. 256, 64 Pac. 453, 87 Am. St. 652; Pettit v. Jamestown &c. R. Co., 222 Pa. St. 490, 71 Atl. 1048, 21 L. R. A. (N. S.) 318. The general subject as to whether such damages are included in the award in eminent domain proceedings as for a taking has already been considered. See, however, note to Manning v. New Jersey &c. R. Co. 80 N. J. L. 349, 78 Atl. 200, 32 L. R. A. (N. S.) 155.

were under the direct authority of the legislature of the state and city wherein the tunnels were constructed.<sup>65</sup>

**§ 1283 (1006). Interest—Allowance of.**—The general rule is that interest should be allowed to the land-owner from the time of the taking in all cases where there is any delay in making payment.<sup>66</sup> Thus, where, by the location of its road a railroad company acquires the right of immediate entry, interest must usually be allowed from the date of the location.<sup>67</sup> And the fact

<sup>65</sup> *Baltimore Belt R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 654. See also *Davenport &c. R. Co. v. Sinnet*, 111 Ill. App. 75.

<sup>66</sup> In *Williams v. New Orleans &c. R. Co.*, 60 Miss. 689, it appeared that the railroad company had had the damages duly assessed some years before, but had taken and retained possession of a part of the land condemned without paying or tendering the assessed damages. The court held that "until there has been such payment or tender the one party has acquired nothing and the other lost nothing," and that, therefore, the land-owner was entitled to compensation for the value of the land taken as it was at the date of the trial. But it allowed him his election whether he would take that value or the sum awarded upon the former attempt at condemnation with interest from the date of the award. In support of the text see *Concord R. Co. v. Greely*, 23 N. H. 237; *Missouri River &c. R. Co. v. Owen*, 8 Kans. 409; *Bangor &c. R. Co. v. McComb*, 60 Maine 290; *Presbrey v. Old Colony R. Co.*, 103 Mass. 1; *Reed v. Hanover Branch R. Co.*, 105 Mass. 303; *Old Colony R. Co. v. Miller*, 125 Mass. 1, 28 Am. Rep.

194; *Knauff v. St. Paul &c. R. Co.*, 22 Minn. 173; *Webster v. Kansas City &c. R. Co.*, 116 Mo. 114, 22 S. W. 474; *Miller v. St. Louis &c. R. Co.*, 162 Mo. 424, 63 S. W. 85; *Shattuck v. Wilton R. Co.*, 23 N. H. 269; *Metler v. Easton &c. R. Co.*, 37 N. J. L. 222; *Kerr v. New York El. R. Co.*, 96 N. Y. S. 1021; *Cincinnati v. Whetstone*, 47 Ohio St. 196, 24 N. E. 409; *Delaware &c. R. Co. v. Burson*, 61 Pa. St. 369; *Wayne v. Penna. R. Co.*, 231 Pa. 512, 80 Atl. 1097; *Sprague v. Sea View R. Co. (R. I.)*, 72 Atl. 818; *Panhandle &c. R. Co. v. Kirby (Tex. Civ. App.)*, 108 S. W. 498; *West v. Milwaukee &c. R. Co.*, 56 Wis. 318, 14 N. W. 292. That interest can not be allowed in the absence of testimony as to when the railroad took possession, see *Guinn v. Iowa &c. R. Co.*, 131 Iowa 680, 109 N. W. 209. Compare also *Stephens v. Cambria &c. R. Co.*, 242 Pa. St. 606, 89 Atl. 672 (interest not an element of compensation).

<sup>67</sup> *Old Colony R. Co. v. Miller*, 125 Mass. 1, 28 Am. Rep. 194. But compare *Raleigh &c. R. Co. v. Mecklenburg Mfg. Co.*, 166 N. Car. 168, 82 S. E. 5.

that a petition for damages, seasonably filed, is not brought to a hearing until several years thereafter does not defeat this right.<sup>68</sup> And where the taking is not complete until the damages are paid, if the railroad company secures possession of the land pending an appeal, by paying into court the amount of the original assessment, it will be liable for interest from that date on the amount of damages as finally determined, in case the assessment is increased.<sup>69</sup> Where the jury were instructed that interest from the time the property was taken constituted a part of the plaintiff's damages, it will be presumed that the interest to the date of the verdict is included therein, and judgment should be rendered simply for the amount of the verdict,<sup>70</sup> but, it is proper to have assessment on appeal made as of the date of the original

<sup>68</sup> *Hartshorn v. Burlington &c. R. Co.*, 52 Iowa 613, 3 N. W. 648; *Drury v. Midland R. Co.*, 127 Mass. 571. The fact that the owner was left in possession for some time after the right of possession accrued to the railroad company does not affect his right to interest. *Old Colony R. Co. v. Miller*, 125 Mass. 1, 28 Am. Rep. 194; *Philadelphia v. Dyer*, 41 Pa. St. 463; *Warren v. First Div. of St. Paul &c. R. Co.*, 21 Minn. 424. But in some cases this has been deducted from the interest. See *Minneapolis v. Wilkin*, 30 Minn. 145, 15 N. W. 668; *South Park Comrs. v. Dunlevy*, 91 Ill. 49; *Fink v. Newark*, 40 N. J. L. 11; *New York &c. Bridge, Matter of*, 137 N. Y. 95, 32 N. E. 1054; *Seefield v. Chicago &c. R. Co.*, 67 Wis. 96, 29 N. W. 904. Delay of the owner in instituting proceedings to have compensation assessed has been held not to relieve the company from paying interest from the time of taking possession. *Delaware &c. R. Co. v. Burson*, 61 Pa. St. 369.

<sup>69</sup> *Warren v. St. Paul &c. R. Co.*, 21 Minn. 424; *Atlantic &c. R. Co. v. Koblentz*, 21 Ohio St. 334; *Rhys v. Dare Valley R. Co.*, L. R. 19 Eq. 93. See also *Reed v. Chicago &c. R. Co.*, 25 Fed. 886; *Selma &c. R. Co. v. Gammage*, 63 Ga. 604; *Whitman v. Boston &c. R. Co.*, 7 Allen (Mass.) 313; and compare *Shattuck v. Wilton R. Co.*, 23 N. H. 269; *St. Louis &c. R. Co. v. Fowler*, 113 Mo. 458, 20 S. W. 1069 (interest held payable only on the amount of increase). On the other hand where the company appeals and the award is decreased it has been held that the company is entitled to interest on the decrease where it had paid the whole amount of the original award into court. *Watson v. Milwaukee &c. R. Co.*, 57 Wis. 332, 15 N. W. 468. *Reisner v. Atchison &c. Co.*, 27 Kans. 382; *Scott v. St. Paul &c. R. Co.*, 21 Minn. 322.

<sup>70</sup> *Diedrich v. Northwestern Union R. Co.*, 47 Wis. 662, 3 N. W. 749.

award, and the court should, in such case, add interest to the amount of the verdict in rendering judgment.<sup>71</sup>

**§ 1284 (1007). Presumption of payment of compensation—Statute of limitations.**—Upon much the same principle as that on which the doctrine of estoppel rests, it is held that if a claim for compensation is not presented within the time designated by the statute of limitations, presumption is that the damages were paid.<sup>72</sup> The decisions affirm that the legislature may prescribe the time within which claims shall be presented.<sup>73</sup> A statute limiting the time within which proceedings may be prosecuted

<sup>71</sup> Warren v. First Div. of St. Paul &c. R. Co., 21 Minn. 424; Whitacre v. St. Paul &c. R. Co., 24 Minn. 311. In St. Louis &c. Ry. Co. v. Oliver, 17 Okla. 589, 87 Pac. 423, the text is cited with approval and it is held that where the landowner appeals from the award, and the case is tried to a jury in the district court, it is proper for the court not to permit the jury to be informed of the amount of the award made by the commissioners, and as the allowance of interest is dependent upon the question as to whether the amount of damages awarded by the jury is greater or less than the award of the commissioners, the court may, where there is no question as to the date from which interest should be allowed, reserve the question of interest for determination by the court and direct the jury not to include interest in their verdict. See also Reed v. Chicago &c. R. Co., 25 Fed. 886. In Kansas interest is allowed between time of appropriation and rendition of judgment. Calkins v. Salina &c. R. Co., 102 Kans. 835, 172 Pac. 20.

<sup>72</sup> Brookville &c. Co. v. Butler, 91 Ind. 134, 46 Am. Rep. 580; Nelson v. Fleming, 56 Ind. 310; Mark v. State, 97 N. Y. 572; Terry v. New York &c. R. Co., 22 Barb. (N. Y.) 574. See also Carter v. Ridge Turnpike Co., 208 Pa. St. 565, 57 Atl. 988; De Geofrey v. Merchants' &c. Co., 179 Mo. 698, 79 S. W. 386, 64 L. R. A. 959, 101 Am. St. 524; Tietz v. International &c. R. Co., 35 Tex. Civ. App. 136, 80 S. W. 124. But see Wheeling &c. R. Co. v. Warrell, 122 Pa. St. 613, 16 Atl. 20; Chicago &c. R. Co. v. Galt, 133 Ill. 657, 23 N. E. 425, 44 Am. & Eng. R. Cas. 43; McCormick v. Evans, 33 Ill. 327; Elliott's Roads and Streets (3rd ed.), § 304, authorities cited.

<sup>73</sup> Stewart v. State, 105 N. Y. 254, 11 N. E. 652; Benedict v. State, 120 N. Y. 228, 24 N. E. 314; Rexford v. Knight, 11 N. Y. 308; Mark v. State, 97 N. Y. 572. See also Sweet v. Boston, 186 Mass. 79, 71 N. E. 113. In jurisdictions where special and local laws are forbidden it may be doubted whether a statute applicably solely to a special class of cases would be valid.

for the recovery of compensation, must give a reasonable time to the land-owner in which to institute his proceedings, otherwise there would be an impairment of his constitutional rights.<sup>74</sup> The legislature is the judge of what is a reasonable time, and courts can not review the legislative judgment unless the time prescribed is so clearly insufficient as to be a practical denial of the right to enforce proceedings for the recovery of compensation.<sup>75</sup> The right of an owner whose property is seized in proceedings in invitum to compensation is regarded with favor, and a statute limiting the time for prosecuting a claim will not be applied unless it clearly covers the case. Thus a statute limiting the time for commencing actions for trespass will not be applied to proceedings under a statute providing for appropriation proceedings.<sup>76</sup> The statute of limitations begins to run at the time the right of action accrues, but it is not possible to lay down any definite rule for determining when the cause of action is complete inasmuch as the question depends very largely upon the statute

<sup>74</sup> See *Philadelphia v. Wright*, 100 Pa. St. 235.

<sup>75</sup> See *Lincoln v. Colusa County*, 28 Cal. 662; *Pereles v. Watertown*, 8 Biss. (U. S.) 79; *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365; *Koshkonong v. Burton*, 104 U. S. 668, 26 L. ed. 886; *Potter v. Ames*, 43 Cal. 75; *Auld v. Butcher*, 2 Kans. 135; *Berry v. Ransdall*, 4 Metc. (Ky.) 292; *Revere v. Boston*, 14 Gray (Mass.) 218; *State &c. v. Messenger*, 27 Minn. 119, 6 N. W. 457; *Welsh v. Chicago &c. R. Co.*, 19 Mo. App. 127; *Carolina &c. R. Co. v. McCaskill*, 94 N. Car. 746; *Trustees of Cincinnati R. Co. v. Haas*, 42 Ohio St. 239; *King v. Belcher*, 30 S. Car. 381, 9 S. E. 359; *Callison v. Hedrick*, 15 Grat. (Va.) 244.

<sup>76</sup> *Shortle v. Louisville &c. Co.*, 130 Ind. 505, 30 N. E. 639, distin-

guishing *Midland &c. R. Co. v. Smith*, 125 Ind. 509, 25 N. E. 153; *Strickler v. Midland &c. R. Co.*, 125 Ind. 412, 25 N. E. 455, and denying the doctrine of *Foster v. Cumberland &c. R. Co.*, 23 Pa. St. 371; *Union Canal Co. v. Woodside*, 11 Pa. St. 176. In the first case cited it was said that the doctrine of the Pennsylvania cases cited was modified in *Delaware &c. R. Co. v. Burson*, 61 Pa. St. 369. See *Lawrence R. Co. v. Cobb*, 35 Ohio St. 94; *Cohen v. Cleveland*, 43 Ohio St. 190; *Houston &c. R. Co. v. Chaffin*, 60 Tex. 553; *Donnelly v. Brooklyn*, 121 N. Y. 9, 24 N. E. 17. Adverse possession may be relied on. *Sherlock v. Louisville &c. R. Co.*, 115 Ind. 22, 17 N. E. 171; *Railroad Co. v. O'Harra*, 48 Ohio St. 343, 28 N. E. 175.

governing the particular case.<sup>77</sup> It may be safely said that where the case is not controlled by particular statutory provisions, the statute of limitations begins to run from the time the owner's dominion over the property ceases.<sup>78</sup>

**§ 1285 (1008). Waiver—Estoppel.**—A land-owner may waive his right to compensation, and by conduct may estop himself from successfully claiming compensation or damages. It has been held that where an abutting owner invites a railroad company to construct its track in a street he is estopped to claim damages.<sup>79</sup> There is reason for affirming that the doctrine of some of the cases referred to in the note is to be carefully applied for, it would, as we believe, lead to injustice to hold that an owner of private property is estopped by the mere fact that he favors the location of a railroad on his land, since it may be justly presumed that he does not mean by his conduct to deprive himself of the right to the compensation to which the law entitles him.<sup>80</sup> There can, however, be no doubt that the doctrine of

<sup>77</sup> *Davis v. New Bedford*, 133 Mass. 49; *Brower v. Philadelphia*, 142 Pa. St. 350, 21 Atl. 828; *Volkmar St., In re*, 124 Pa. St. 320, 16 Atl. 867; *Baltimore &c. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. ed. 739.

<sup>78</sup> See generally *Moore v. Boston*, 8 Cush. (Mass.) 274; *Rider v. Stryker*, 63 N. Y. 136; *Hazen v. Boston &c. R. Co.*, 2 Gray (Mass.) 574; *Davidson v. Boston &c. R. Co.*, 3 Cush. (Mass.) 91; *Barker v. Taunton*, 119 Mass. 392. See also generally as to limitation of action to recover compensation, post § 1353.

<sup>79</sup> *Illinois &c. R. Co. v. Allen*, 39 Ill. 205; *Toledo &c. Co. v. Hunter*, 50 Ill. 325; *Penn Mutual Ins. Co. v. Heiss*, 141 Ill. 35, 33 Am. St. 273; *Burkham v. Ohio &c. R. Co.*, 122 Ind. 344, 23 N. E. 799; *Wolfe v.*

*Covington &c. R. Co.*, 15 B. Mon. (Ky.) 404; *Scarritt v. Kansas City &c. R. Co.*, 127 Mo. 298, 29 S. W. 1024; *Miller v. Auburn &c. R. Co.*, 6 Hill (N. Y.) 61; *Murdock v. Prospect &c. R. Co.*, 10 Hun (N. Y.) 598; *Shaw v. Manhattan Ave. R. Co.*, 35 Misc. 47, 71 N. Y. S. 22. Agreement that no damages shall be paid or acceptance of a certain amount in payment estops from further claim. *Stoops v. Kittanning Tel. Co.*, 242 Pa. St. 556, 89 Atl. 686. Compare also *Eastern Oreg. Land Co. v. Des Clinton R. Co.*, 213 Fed. 897. Mere consent to enter has been held to waive only prepayment. *Squiers v. Neenah*, 24 Wis. 588; *Smith v. Ferris*, 6 Hun (N. Y.) 553.

<sup>80</sup> *Humphreys v. Ft. Smith &c. Power Co.*, 71 Ark. 152, 71 S. W. 662; *Pennsylvania R. Co. v. Bond*,



waiver and estoppel does apply to cases of the appropriation of property under the right of eminent domain. Even constitutional rights may be waived, and a party may, by his conduct, be estopped from asserting them.<sup>81</sup> If there is an effective estoppel against the owner at or prior to the time the rights of the railway company are acquired it will bind all who thereafter acquire an interest or estate in the land.<sup>82</sup> Some of the courts hold that conduct may estop an owner from successfully claiming that there was a trespass, and yet not estop him from claiming compensation for the property taken.<sup>83</sup> The principle which author-

202 Ill. 95, 66 N. E. 941; *Evansville &c. R. Co. v. Charlton*, 6 Ind. App. 56, 33 N. E. 129; *Consumers' &c. Co. v. Huntsinger*, 12 Ind. App. 285, 39 N. E. 423, on rehearing, 42 N. E. 640; *Craig v. Lewis*, 110 Mass. 377; *Woodward v. Webb*, 65 Pa. St. 254; *Gilman v. Sheboygan &c. R. Co.*, 40 Wis. 653; post n. 86. Mere silent acquiescence is held not to be a waiver in *Kime v. Cass County*, 71 Nebr. 677, 99 N. W. 546, 101 N. W. 2. But while mere silence may not operate as an estoppel affirmative acts may so operate. Authorities preceding note. See *Platt v. Pennsylvania Co.*, 43 Ohio St. 228; *Niagara &c. R. Co.*, In re, 121 N. Y. 319, 24 N. E. 452; *Moore v. Sanford*, 151 Mass. 285, 24 N. E. 323, 7 L. R. A. 151 and note. Mistake of fact or fraud may prevent a waiver being held to exist. See also *Burns v. Chicago &c. R. Co.*, 102 Iowa 7, 70 N. W. 728; *Martin v. St. Louis*, 139 Mo. 246, 41 S. W. 231.

<sup>81</sup> *Great Falls Mfg. Co. v. Attorney-General*, 124 U. S. 581, 8 Sup. Ct. 631, 31 L. ed. 527; *Pryzbylowycz v. Missouri &c. Railroad*, 17 Fed. 492; *Vickery v.*

*Board*, 134 Ind. 554, 32 N. E. 880; *Tharp v. Witham*, 65 Iowa 566, 22 N. W. 677; *Pitkin v. Springfield*, 112 Mass. 509; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Detmold v. Drake*, 46 N. Y. 318; *Brooklyn v. Copeland*, 106 N. Y. 496, 13 N. E. 451. See generally *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187; *Perryman v. Greenville*, 51 Ala. 507; *Burlington &c. R. Co. v. Stewart*, 39 Iowa 267; *Ferguson v. Landram*, 1 Bush. 548, 5 Bush. (Ky.) 230, 96 Am. Dec. 350; *People v. Murray*, 5 Hill (N. Y.) 468; *Lee v. Tillotson*, 24 Wend. (N. Y.) 337, 35 Am. Dec. 624; *Van Hook v. Whitlock*, 26 Wend. (N. Y.) 43, 37 Am. Dec. 246; *State v. Mitchell*, 31 Ohio St. 592; *Goodale v. Sowell*, 62 S. Car. 516, 40 S. E. 970; *Elliott Roads and Streets* (3rd ed.), § 735.

<sup>82</sup> *Moore v. Roberts*, 64 Wis. 538, 25 N. W. 564; *Gurnsey v. Edwards*, 26 N. H. 224. See *Battles v. Brain-tree*, 14 Vt. 348; *Merchants' &c. Co. v. Chicago &c.*, 79 Iowa 613, 44 N. W. 900.

<sup>83</sup> *Pennsylvania R. Co. v. Platt*, 47 Ohio St. 366, 25 N. E. 1028; *Erie R. Co. v. Delaware &c. R. Co.*,

izes this distinction is the same as that which allows a claim for damages to be prosecuted in many instances, but denies a right to maintain ejectment or injunction.<sup>84</sup> It has also been held that a land-owner who accepts and retains the damages assessed in condemnation proceedings thereby estops himself from claiming greater damages, either in a direct appeal or in a collateral action.<sup>85</sup> But it is held that an appropriation of land by a railroad company for its own use, without consent of the owner and without an assessment of damages, makes the company liable for damages even though the owner acquiesced in the taking.<sup>86</sup>

21 N. J. Eq. 283. See *Bloomfield &c. R. Co. v. Grace*, 112 Ind. 128, 13 N. E. 680; *Missouri &c. R. Co. v. Calkins* (Tex. Civ. App.), 79 S. W. 852.

<sup>84</sup> *Roberts v. Northern Pacific R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. ed. 873; *Cairo &c. R. Co. v. Turner*, 31 Ark. 494, 25 Am. Rep. 564; *Chicago &c. Co. v. Goodwin*, 111 Ill. 273, 53 Am. Rep. 622; *Indiana &c. Co. v. Allen*, 113 Ind. 581, 15 N. E. 446; *Lexington &c. R. Co. v. Ormsby*, 7 Dana (Ky.) 276; *Harlow v. Marquette &c. R. Co.*, 41 Mich. 336, 2 N. W. 48; *Harrington v. St. Paul &c. R. Co.*, 17 Minn. 215; *Smart v. Portsmouth &c. R. Co.*, 20 N. H. 233; *Pettibone v. La Crosse &c. R. Co.*, 14 Wis. 443.

See also *Jacobs v. Kansas City &c. Ry. Co.*, 134 La. 389, 64 So. 150; *Second St. Imp. Co. v. Kansas City &c. Ry. Co.*, 255 Mo. 519, 164 S. W. 515; *Ennis-Brown Co. v. Central Pac. Ry. Co.*, 228 Fed. 46, 51 (citing text).

<sup>85</sup> *Stauffer v. Cincinnati &c. R. Co.*, 30 Ind. App. 356, 70 N. E. 543. See also *Allen v. Colorado Cent. R. Co.*, 22 Colo. 238, 43 Pac. 1015; *Clay County v. Howard*, 95 Nebr. 389, 145 N. W. 982; *Ft. Worth Ice Co. v. Chicago &c. R. Co.*, 11 Tex. Civ. App. 600, 33 S. W. 159.

<sup>86</sup> *Cleveland &c. R. Co. v. Simpson*, 182 Ind. 693, 104 N. E. 301, 108 N. E. 9, ante n. § 80. See also *Chicago &c. R. Co. v. Hoffman* (Ind. App.), 119 N. E. 169.

## CHAPTER XL.

### PROCEDURE IN APPROPRIATION CASES

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§ 1290 (1009). **Procedure—Introductory.**—The procedure in cases of seizure of private property under the right of eminent domain is so largely controlled and regulated by statutes that we can not go far into details. There are, however, general principles of a fundamental nature which apply to such proceedings almost universally, and of those principles we shall treat at some length. In many respects the statutes of the different states proceed upon much the same general lines, but there is, nevertheless, a wide diversity in matters of detail. All that can be properly and successfully done in a general treatise is to state and illustrate general principles, for it would be impossible, in a work of such a character, to treat matters dependent upon legislative enactments, and this we shall not undertake to do, except incidentally and for the purpose of showing the practical application of general principles.

§ 1291 (1010). **Nature of the proceeding.**—In order that there may be due process of law, it is essential that the subject of compensation be regulated by a legislative enactment,<sup>1</sup> but it is

<sup>1</sup> See *Anniston &c. R. Co. v. Jacksonville &c. R. Co.*, 82 Ala. 297, 2 So. 710; *Adirondack R. Co. v. New York*, 176 U. S. 335, 20 Sup. Ct. 460, 44 L. ed. 492, affirming 160 N. Y. 225; *Martin, Ex parte*, 13 Ark. 198, 58 Am. Dec. 321; *South-*

*western R. Co. v. Southern &c. Tel. Co.*, 46 Ga. 43, 12 Am. Rep. 585; *Garbutt Lumber Co. v. Georgia R. &c. Co.*, 111 Ga. 714, 36 S. E. 942; *Henderson &c. R. Co. v. Dickerson*, 17 B. Mon. (Ky.) 173, 66 Am. Dec. 148; *Calder*

not necessary that all the details of procedure be prescribed in the statute, since the statute, when enacted, takes its place as part of a uniform system of law, and may be aided and interpreted by other statutes and the general principles of jurisprudence.<sup>2</sup> The proceeding must be, in its nature judicial, but it is not a proceeding in ordinary course of the common law entitling the parties to a jury trial.<sup>3</sup> As to whether it is a "civil action" or "special proceeding," within the meaning of that term, as used in the codes of the different states, is a question upon which there is some diversity of opinion, but the weight of authority is that it is, in many respects, a special proceeding and

v. Police Jury, 44 La. Ann. 173, 10 So. 726; American Tel. &c. Co. v. Smith, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200; Connecticut River R. Co. v. Franklin Co. Comrs., 127 Mass. 50, 34 Am. Rep. 338; People v. Detroit &c. R. Co., 79 Mich. 471, 44 N. W. 934, 7 L. R. A. 717; State v. Chicago &c. R. Co., 36 Minn. 402, 31 N. W. 365; Mt. Washington R. Co., In re, 35 N. H. 134; Southern Kans. R. Co. v. Oklahoma City, 12 Okla. 82, 69 Pac. 1050; East End St. R. Co. v. Doyle, 88 Tenn. 747, 13 S. W. 936, 9 L. R. A. 100, 17 Am. St. 933. In *Secombe v. Railroad Co.*, 23 Wall. (U. S.) 108, 23 L. ed. 67, the court, in speaking of the legislative power to prescribe the course of proceeding, said: "There is no limitation upon the power of the legislature in this respect, if the purpose be a public one and just compensation be paid or tendered to the owner for the property taken." It seems to us that the rule is not quite accurately stated in the case cited, for, as we believe, provision must be made by law for notice and compensation. See upon the general sub-

ject, *Secomb v. Milwaukee &c. R. Co.*, 49 How. Pr. (N. Y.) 75; *Weir v. St. Paul &c. R. Co.*, 18 Minn. 155; *Langford v. Ramsey Co. Commissioners*, 16 Minn. 375; *Musick v. Kansas City &c. R. Co.*, 114 Mo. 309, 21 S. W. 491; post, § 1304.

<sup>2</sup> And for this reason it has been held that the want of a special provision for compensation or the mode of ascertaining it is not fatal in a special statute where it is supplied by a provision of a general statute or law. *New York El. R. Co.*, In re, 70 N. Y. 327; *Jennings v. Le Roy*, 63 Cal. 397; *Ponlan v. Atlantic &c. R. Co.*, 123 Ga. 605, 51 S. E. 657; *Gregg v. Baltimore*, 56 Md. 256; *Rees' Appeal* (Pa. St.), 12 Atl. 427; *East Union Twp. v. Comrey*, 100 Pa. St. 362; *State v. Hogue*, 71 Wis. 384, 36 N. W. 860.

<sup>3</sup> Ante, § 1245. Expressions in some of the cases seem to affirm that the jury or commissioners are not invested with judicial functions. *Grand Rapids &c. Co. v. Chesebro*, 74 Mich. 466, 42 N. W. 66, 39 Am. & Eng. R. Cas. 159; *Toledo &c. R. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271, 5 Am. &

not a civil action.<sup>4</sup> Yet in so far as concerns the right of appeal from a trial court to an appellate tribunal we think the proceeding must be regarded as a civil action.<sup>5</sup> The settled rule is that

Eng. R. Cas. 378. Possibly this may be true where the tribunal is a temporary one, and final action is to be taken by a court, but, however this may be, we think it clear that there must be at some stage of the proceeding action by a judicial tribunal. *State v. Neville*, 110 Mo. 345, 19 S. W. 491. See also *Tracy v. Elizabethtown &c. R. Co.*, 78 Ky. 309; *Union Pac. R. Co. v. Leavenworth &c. R. Co.*, 29 Fed. 728. A trial of proceedings by a railroad company to condemn land is governed by the ordinary rules of law governing the trial of causes, though the tribunal having the jurisdiction of such proceedings is special. *Davidson v. Texas &c. R. Co.*, 29 Tex. Civ. App. 54, 67 S. W. 1093.

<sup>4</sup> *Colorado Fuel &c. Co. v. Four Mile R. Co.*, 29 Colo. 90, 66 Pac. 902; *Hartley v. Keokuk &c. R. Co.*, 85 Iowa 455, 52 N. W. 352; *Cory v. Chicago &c. R. Co.*, 100 Mo. 282, 13 S. W. 346; *New York &c. R. Co.*, In re, 63 How. Pr. (N. Y.) 123; *Erie R. Co. v. Steward*, 59 App. Div. 187, 69 N. Y. S. 57; *Cours v. Vermont &c. R. Co.*, 25 Vt. 476; *Gill v. Milwaukee &c. R. Co.*, 76 Wis. 293, 45 N. W. 23. See also *South Carolina &c. Ry. v. Ellen*, 95 S. Car. 68, 78 S. E. 963, Ann. Cas. 1915B, 1042, 1043.

<sup>5</sup> *Elliott's Appellate Procedure*, § 253, note 1. *Albany &c. R. Co. v. Lansing*, 16 Barb. (N. Y.) 68; *Pack v. Chesapeake &c. R. Co.*, 5 W. Va. 118; *Howard v. Proprietors*

of Locks and Canals, 12 Cush. (Mass.) 259; *Colorado Midland R. Co. v. Jones*, 29 Fed. 193. See also *King's Lake Drainage &c. Dist. v. Jameson*, 176 Mo. 557, 75 S. W. 679; *Littleton Bridge Co. v. Pike*, 72 Vt. 7, 47 Atl. 108. Where an appeal or writ of error was allowed in civil cases, the statute has been held to apply to condemnation proceedings. *Atlantic &c. R. Co. v. Sullivan*, 5 Ohio St. 276; *Scott v. Lasell*, 71 Iowa 180, 32 N. W. 322. The proceedings are governed by rules of practice prevailing in courts of law rather than by the rules of chancery. *Sanitary Dist. v. Munger*, 264 Ill. 256, 106 N. E. 185. See *Warren v. First Division &c. R. Co.*, 18 Minn. 384. And a statute allowing challenges in all civil cases was held to apply to eminent domain proceedings. *Convers v. Grand Rapids &c. R. Co.*, 18 Mich. 459. Proceedings under some statutes has been held to be special proceedings, to which acts governing civil cases do not apply. *Knoth v. Barclay*, 8 Colo. 300, 6 Pac. 924; *Sacramento &c. R. Co. v. Harlan*, 24 Cal. 334; *Dukes v. Working*, 93 Ind. 501. See also *Erie R. Co. v. Steward*, 59 App. Div. 187, 69 N. Y. S. 57; *Bowersox v. Seneca County Comrs.*, 20 Ohio St. 496; *Chappell v. Edmondson Ave. &c. R. Co.*, 83 Md. 512, 35 Atl. 19; *Western Am. Co. v. St. Ann. Co.*, 22 Wash. 158, 60 Pac. 158.

the provisions of the statute prescribing the mode of proceeding must be pursued.<sup>6</sup>

§ 1292 (1010a). **Civil action—Removal to federal court.**—As intimated in the last preceding section, while a condemnation proceeding is perhaps to be regarded as a special proceeding rather than a civil action, a condemnation proceeding may nevertheless be within the meaning of some statute or rule of law relative to civil actions. Thus, it now seems to be well settled that it is a "suit at law" within the meaning of the provision giving the courts of the United States jurisdiction in certain cases.<sup>7</sup> So, although instituted in a state court under a statute providing

<sup>6</sup> The decisions are very numerous and we cite only a few of the great number. *Charleston & Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69; *Colorado & C. R. Co. v. Allen*, 13 Colo. 229, 22 Pac. 605; *Colorado Fuel & C. Co. v. Four Mile R. Co.*, 29 Colo. 90, 66 Pac. 902; *Wilson v. Baltimore & C. R. Co.*, 5 Del. Ch. 524; *Elbert v. Scott*, 5 Boyce (Del.) 1, 90 Atl. 587; *Florida Central & C. R. Co. v. Bear*, 43 Fla. 319, 31 So. 287; *Mobley v. Breed*, 48 Ga. 44; *Chicago & C. R. Co. v. Galt*, 133 Ill. 657, 24 N. E. 674; *Dickey v. Chicago*, 152 Ill. 468, 38 N. E. 932; *Tracy v. Elizabethtown & C. R. Co.*, 80 Ky. 259, 14 Am. & Eng. R. Cas. 407; *Missouri & C. R. Co. v. Carter*, 85 Mo. 448; *New Jersey & C. Co. v. Morris & C. Co.*, 44 N. J. Eq. 398, 15 Atl. 227, 1 L. R. A. 133, and note; *Stannards & C. Association v. Brandes*, 35 N. Y. S. 1015; *Dargan v. Carolina & C. R. Co.*, 113 N. Car. 596, 18 S. E. 653; *Southern Kansas R. Co. v. Oklahoma City*, 12 Okla. 82, 69 Pac. 1050; *Johnston v. Delaware & C. R. Co.*, 245 Pa. St. 338, 91 Atl.

618. *Providence & C. R. Co.*, *Petition of*, 17 R. I. 324, 21 Atl. 965; *Lewis v. St. Paul & C. R. Co.*, 5 S. Dak. 148, 58 N. W. 580, 57 Am. & Eng. R. Cas. 612; *Illinois Cent. R. Co. v. East Sioux Falls Quarry Co.*, 33 S. Dak. 63, 144 N. W. 724; *Galveston & C. R. Co. v. Mud Creek & C. Co.*, 1 Tex. App. (Civil Cases) 169; *Alexandria & C. R. Co. v. Alexandria & C. R. Co.*, 75 Va. 780, 40 Am. R. 743 and note, 10 Am. & Eng. R. Cas. 23.

<sup>7</sup> *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 253, 254, 49 L. ed. 462; *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449. In the last case cited it is said that "it is difficult to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statutes, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right." See also chapter on Removal of Causes.

for appraisers or commissioners and not a common law jury, it is a civil suit within the meaning of the federal judiciary act and is removable to the federal court where the requisite diversity of citizenship exists and the jurisdictional amount is involved.<sup>8</sup> But after the removal the federal court proceeds under the sanction of, and according to, the state statute governing the condemnation proceedings.<sup>9</sup>

<sup>8</sup> *South Dakota &c. R. Co. v. Chicago &c. R. Co.*, 141 Fed. 578; *Colorado Midland R. Co. v. Jones*, 29 Fed. 193; *Mississippi &c. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *Searl v. School Dist.*, 124 U. S. 197, 8 Sup. Ct. 460, 31 L. ed. 415; *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. ed. 462. It is also held in the first case cited that a proceeding by a railroad company to condemn right of way against a number of defendants owning land in severalty presents a separable controversy with respect to each owner, and is removable by a defendant, who is a citizen of another state, where the requisite amount is involved to give the federal court jurisdiction; that an allegation in the petition for removal, that the amount in dispute exceeds \$2,000, exclusive of interest and costs, is sufficient to give the federal court jurisdiction, although there may be no proof given on the trial to sustain it; that the summons being served on September 16th requiring defendant to appear and plead within 20 days, exclusive of the day of service, a petition for removal filed on October 6th was in time; that the statute, while authorizing one railroad company to "cross, inter-

sect, join and unite its road with the railroad of any other company," did not authorize it to build its road longitudinally upon the right of way of another company, and in the absence of such statutory authority it can not condemn a right of way to do so; and that under the statute providing that, if the two companies are unable to agree as to the compensation to be made or the point or manner of crossing, the same may be determined by condemnation proceedings, an effort to make an agreement is a condition precedent to the right to maintain condemnation proceedings.

<sup>9</sup> *Broadmoor Land Co. v. Curr*, 142 Fed. 421. See also *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 256, 49 L. ed. 462; *East Tenn. &c. R. Co. v. Southern Tel. Co.*, 112 U. S. 310, 5 Sup. Ct. 169, 28 L. ed. 747; *Postal Tel. Cable Co. v. Southern R. Co.*, 122 Fed. 156. It is also held by a majority decision in the case first cited, that where the statute provided that any party to proceedings for the condemnation of land "before the appointment of commissioners . . . and before the expiration of the time for the defendant to appear and answer may demand a jury of free-



**§ 1293 (1011). Tribunals—Generally.**—As we have elsewhere shown private property can not be seized for a public use without the payment of compensation to the owner.<sup>10</sup> Compensation must, as we have said, be determined and fixed by a judicial tribunal, for the question of compensation, under our system, is a judicial question,<sup>11</sup> and neither legislative nor administrative. As there must be compensation, and as the question of compensation is a judicial one, provision must be made for a tribunal invested with power to determine the measure of compensation to which the land-owner is entitled. What the power of the tribunal shall be is, to a very great extent, a legislative question, but the tribunal must be, in its nature, judicial, and must have power to ascertain and determine the question of compensation. There is, as will hereafter appear, some conflict as to the power of a temporary tribunal, such as appraisers, commissioners or the like, but we think it entirely clear on principle, that before a final decision of the question of compensation there must be judicial action. We are, indeed, persuaded that on principle the temporary tribunal must be invested with quasi judicial powers at least, since the power to determine the measure of compensation can not be justly regarded as administrative, legislative or executive, but there are respectable authorities to the contrary.<sup>12</sup>

holders residing in the county in which the petition is filed to ascertain, determine and appraise the damages or compensation to be allowed," and a defendant land-owner removed the condemnation proceedings into a federal court and appeared therein, and answered on the date set by the court for hearing the cause, without at that time demanding a jury, it waived its right to such jury, and could not thereafter be heard to say that such date was not the time for it to appear and answer.

<sup>10</sup> Ante, § 1240.

<sup>11</sup> Ante, § 1245; Elliott's Roads and Streets (3d ed.), § 309, et seq. See also Boston El. R. Co. v.

Presho, 174 Mass. 99, 54 N. E. 348; Ames v. Lake Superior &c. R. Co., 21 Minn. 241; Goerke v. Manitou, 25 Colo. App. 482, 139 Pac. 1051; Monongahela Nav. Co. v. United States, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. ed. 463.

<sup>12</sup> See notes to Bass v. Fort Wayne, 121 Ind. 389, 23 N. E. 259. In Vinegar Bend Lumber Co. v. Oak Grove &c. R. Co., 89 Miss. 84, 43 So. 292, it is held that the only question the special eminent domain court can determine is the amount of compensation and not the right to compensation or to condemn. See also Georgia &c. R. Co. v. Ridlehuber, 38 S. Car. 308, 17 S. E. 24.

§ 1294 (1012). **Nature of the tribunal for the assessment of benefits and damages.**—In the absence of constitutional provisions prescribing the mode of creating tribunals for the assessment of benefits and damages, the legislature may establish such tribunals as it deems proper, but, as is evident from what has been said, it must provide for a judicial tribunal, that is, a tribunal having power to hear and decide; though, according to the weight of authority, not a court in the strict sense of the term. Unless the constitution so requires the legislature is not bound to submit the assessment of benefits to a jury of twelve men. The right of trial by jury, which the American constitutions generally declare shall remain inviolate, does not embrace proceedings in cases of the seizure of private property under the right of eminent domain.<sup>13</sup> There are cases holding that unless

<sup>13</sup> Anderson v. Caldwell, 91 Ind. 451, 46 Am. Rep. 613; Lipes v. Hand, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160; Butler v. Worcester, 112 Mass. 541, 556; Kramer v. Cleveland &c. R. Co., 5 Ohio St. 140, 145; McKinney v. Monongahela &c. Co., 14 Pa. St. 65, 53 Am. Dec. 517; Pennsylvania R. Co. v. First German Lutheran Congregation, 53 Pa. St. 445. See also Kansas City v. Vineyard, 128 Mo. 75, 30 S. W. 326; Bonaparte v. Camden &c. R. Co., 1 Baldwin (U. S.) 205; Missouri Pac. R. Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. ed. 463; Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. ed. 270; Postal Tel. Co. v. Southern R. Co., 122 Fed. 176; Montgomery &c. R. Co. v. Sayre, 72 Ala. 443; Cairo &c. R. Co. v. Trout, 32 Ark. 17; Kimball v. Board &c., 46 Cal. 19; Whiteman v. Wilmington &c. R. Co., 2 Harr. (Del.) 514, 33 Am. Dec. 411; Bailey v. Philadelphia &c. R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593; Johnson v. Joliet &c. R. Co., 23 Ill. 202;

Evansville &c. R. Co. v. Miller, 30 Ind. 209; Indianapolis &c. Gravel Road Co. v. Christian, 93 Ind. 360; Bradley, In re, 108 Iowa 476, 79 N. W. 280; Central Branch &c. R. Co. v. Atchison &c. R. Co., 28 Kans. 453; Henderson &c. R. Co. v. Dickerson, 17 B. Mon. (Ky.) 173, 66 Am. Dec. 148; People v. Michigan &c. R. Co., 3 Mich. 496; Ames v. Lake Superior &c. R. Co., 21 Minn. 241; New Orleans &c. R. Co. v. Drake, 60 Miss. 621; Louisiana &c. R. Co. v. Pickett, 25 Mo. 535; Kansas City &c. R. Co. v. Kansas City &c. R. Co., 118 Mo. 599, 24 S. W. 478; Virginia &c. R. Co. v. Elliott, 5 Nev. 358; Mt. Washington Road Co., Petition of, 35 N. H. 134; Beekman v. Saratoga &c. R. Co., 3 Paige (N. Y.) 45, 22 Am. Dec. 679 and note; Raleigh &c. R. Co. v. Davis, 2 Dev. & B. (N. Car.) L. 451; McIntire v. Western N. Car. R. Co., 67 N. Car. 278; Kramer v. Cleveland &c. R. Co., 5 Ohio St. 140; Kendall v. Post, 8 Ore. 141; Pennsylvania R. Co. v. First German Lutheran Con-

the constitution especially provides otherwise the tribunal to assess damages upon condemnation may consist of any person or number of persons, at the option of the legislature.<sup>14</sup> But, we suppose that where the legislature is forbidden to enact special and local laws it can not designate particular persons to form a portion or all of such tribunal, to act in a particular case.<sup>15</sup> In states where the right to a jury trial in such proceedings is guaranteed by the constitution, if an assessment by commissioners is provided for, it must be reviewable by a jury on appeal.<sup>16</sup> In a case where the constitution provides for an assessment by a jury of twelve men, as prescribed by law, a statute providing for

gregation, 53 Pa. St. 445; *Anderson v. Turbeville*, 6 Caldw. (Tenn.) 150; *Buffalo Bayou &c. R. Co. v. Ferris*, 26 Tex. 588; *Houston &c. R. Co. v. Milburn*, 34 Tex. 224; *Gold v. Vermont Cent. R. Co.*, 19 Vt. 478. *Contra Southwestern R. Co. v. Southern &c. Co.*, 46 Ga. 43, 12 Am. Rep. 585; *Newcomb v. Smith*, 1 Chandler (Wis.) 71; *Salem Turnpike &c. v. Essex Co.*, 100 Mass. 282. See *Martin v. Tyler*, 4 N. Dak. 278, 60 N. W. 392, 25 L. R. A. 838; *Condemnation of Independence Av. &c.*, In re, 128 Mo. 272, 30 S. W. 763; *Kansas City v. Smart*, 128 Mo. 272, 30 S. W. 773; *People v. Board of Trustees*, 80 Hun 385, 30 N. Y. S. 325. See also *Louisville &c. R. Co. v. Lang*, 160 Ky. 702, 170 S. W. 2; *Postal Tel. &c. Co. v. Southern Ry. Co.*, 122 Fed. 156 (jury trial not required after transfer to Federal court useless required by state law).

<sup>14</sup> *Evansville &c. R. Co. v. Miller*, 30 Ind. 209; *Indianapolis &c. Gravel Road Co. v. Christian*, 93 Ind. 360; *Ames v. Lake Superior &c. R. Co.*, 21 Minn. 241; *New Or-*

*leans &c. R. Co. v. Drake*, 60 Miss. 621; *Virginia &c. R. Co. v. Elliott*, 5 Nev. 358; *Raleigh &c. R. Co. v. Davis*, 2 Dev. & B. (N. Car.) L. 451; *Kramer v. Cleveland &c. Co.*, 5 Ohio St. 140.

<sup>15</sup> *Langford v. County Commissioners*, 16 Minn. 375.

<sup>16</sup> *Aldridge v. Tuscumbia &c. R. Co.*, 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307; *Whitehead v. Arkansas Cent. R. Co.*, 28 Ark. 460; *Whiteman v. Wilmington &c. R. Co.*, 2 Harr. (Del.) 514, 33 Am. Dec. 411; *Atlanta v. Central R. Co.*, 53 Ga. 120; *Norristown &c. Turnp. Co. v. Burkett*, 26 Ind. 53; *Louisville &c. R. Co. v. Dryden*, 39 Ind. 393; *Tharp v. Witham*, 65 Iowa 566, 22 N. W. 677. See also *Wabash R. Co. v. Coon Run Drainage Dist.*, 194 Ill. 310, 62 N. E. 679. And this is held sufficient. *Shively v. Lankford*, 174 Mo. 535, 74 S. W. 835. But see where a jury of twelve men in a court of record was required by the constitution, *South Carolina &c. Ry. v. Ellen*, 95 S. Car. 68, 78 S. E. 963, Ann. Cas. 1915B, 1043.

a decision by a majority was held invalid.<sup>17</sup> Where a jury is provided for by a statute and there are no words limiting or defining the meaning of the term "jury," the statute is generally held to mean a common law jury of twelve men.<sup>18</sup> In Colorado where the statute authorized a party in condemnation proceedings to demand a jury to assess the damages it was held that when the hearing is in term time, the jury must be drawn from the regular panel in attendance, or from persons summoned for jury duty in term time, in the manner provided by statute.<sup>19</sup> But it is also held that where the constitution recognizes different kinds of juries in different tribunals, the legislature may prescribe whichever form is used in the tribunal in which the proceedings are conducted.<sup>20</sup> The right to a jury trial may be waived, even though the constitution provides that the damages shall be assessed by a jury,<sup>21</sup> and the failure to appeal from a preliminary award of appraisers has been held to amount to such a waiver.<sup>22</sup>

**§ 1295 (1013). Creation of the tribunal—Legislative power.—**  
Broad as is the legislative power over the subject of creating

<sup>17</sup> Jacksonville &c. R. Co. v. Adams, 33 Fla. 608, 15 So. 257, 24 L. R. A. 272; Chicago &c. R. Co. v. Hock, 118 Ill. 587, 9 N. E. 205. But where there is no such constitutional provision as that quoted in the text, provision may be made for a majority decision. Post § 1298. As to method of reaching a verdict, see Orange &c. R. Co. v. Craver, 32 Fla. 28, 13 So. 444, 57 Am. & Eng. R. Cas. 511.

<sup>18</sup> Chicago &c. R. Co. v. Sanford, 23 Mich. 418; Mitchell v. Illinois &c. R. Co., 68 Ill. 286; Whitehead v. Arkansas &c. R. Co., 28 Ark. 460; Clark v. Utica, 18 Barb. (N. Y.) 451; Smith v. Atlantic &c. R. Co., 25 Ohio St. 91. Questions coming before such a jury must be decided by the unanimous voice of the members. McLellan v. County Commissioners, 21 Maine 390.

<sup>19</sup> Colorado Fuel &c. Co. v. Four

Mile R. Co., 29 Colo. 90, 66 Pac. 902.

<sup>20</sup> McManus v. McDonough, 107 Ill. 95. In New York, where the constitution requires the damages to be appraised by a jury or not less than three commissioners, it was held competent for the legislature to provide for a tribunal termed a jury, consisting of less than twelve members, which should decide all questions coming before it, by a majority vote. Cruger v. Hudson River R. Co., 12 N. Y. 190.

<sup>21</sup> Chicago &c. R. Co. v. Hock, 118 Ill. 587, 9 N. E. 205; Chowan &c. R. Co. v. Parker, 105 N. Car. 246, 11 S. E. 328; Beynon v. Brandywine &c. Co., 39 Ind. 129.

<sup>22</sup> Tharp v. Witham, 65 Iowa 566. But compare South Carolina Western &c. Ry. v. Ellen, 95 S. Car. 68, 78 S. E. 963, Ann. Cas. 1915B, 1042.

tribunals for the assessments of benefits and damages the power is by no means unlimited. The legislature can not under guise of providing rules of procedure so fetter the tribunal that it can not exercise free and impartial judgment. It may be safely laid down as a general rule that the legislature can not make arbitrary rules that will restrain the tribunal from exercising judicial functions, although it may prescribe rules of procedure. The tribunal can not be subjected to legislative dictatorship and hence the legislature can not directly or indirectly declare what the land-owner's compensation shall be, but must submit that question to an impartial tribunal.<sup>23</sup> The principle we have stated prohibits the legislature from effectively declaring that the tribunal shall adopt assessment or estimate of an assessor or any officer.<sup>24</sup>

**§ 1296 (1013a). Right of land-owner to have question of right to take determined.**—It does not follow from the fact that a land-owner has a constitutional right to compensation for property taken for public uses, and a right to a hearing at some stage that he has a like constitutional right to be heard upon the question whether his private property shall be taken for such uses. It is said: "It is wholly a matter of statutory construction whether there shall be a hearing before land shall be taken for public uses under a statute allowing the taking, and what the hearing shall be, and who shall be parties to it or be heard."<sup>25</sup> The question of necessity for the taking is a legislative question.<sup>26</sup> Statutes usually provide, however, for such a hearing,

<sup>23</sup> *Rich v. Chicago*, 59 Ill. 286; *Powers Appeal*, 29 Mich. 504; *Ames v. Lake Superior &c. R. Co.*, 21 Minn. 241; *People v. Kniskern*, 54 N. Y. 52; *Buffalo, Matter of*, 139 N. Y. 422, 34 N. E. 1103; ante, § 1245. See *State v. Sewer Commissioners*, 39 N. J. L. 665; *Davis v. Howell*, 47 N. J. L. 280; *State v. Perth Amboy*, 52 N. J. L. 132, 18 Atl. 670.

<sup>24</sup> *County Court v. Griswold*, 50 Mo. 175. See generally *Pennsylvania R. Co. v. Baltimore &c. R.*

*Co.*, 60 Md. 263; *Commonwealth v. Pittsburgh &c. R. Co.*, 58 Pa. St. 26; *Kansas v. Baird*, 98 Mo. 215, 11 S. W. 243, 562; *Rhine v. McKinney*, 53 Tex. 354; *Bruggerman v. True*, 25 Minn. 123.

<sup>25</sup> *Chandler v. Railroad Commissioners*, 141 Mass. 208, 5 N. E. 509. See also *Bemis v. Guirl Drainage Co.*, 182 Ind. 36, 105 N. E. 496; *Rensselaer &c. R. Co. v. Davis*, 43 N. Y. 137; *People v. Smith*, 21 N. Y. 595.

<sup>26</sup> See ante, § 1188.

especially where it is sought to take for public purpose, property already devoted to a public use.<sup>27</sup>

§ 1297 (1013b). **Determination of right of interurban road to cross railroad tracks.**—As elsewhere shown, in some jurisdictions interurban railroads are incorporated under the general railroad law. In such a jurisdiction, where an interurban road was organized under the general railroad law it was regarded as a railroad company and subject to all statutory provisions affecting the right of such companies to make crossings over the tracks of the railroad companies.<sup>28</sup> Under an Indiana statute requiring the manner of the crossing to be determined by commissioners appointed by the circuit court, it was held that a report of the commissioners is sufficiently certain which directs that the crossing shall be a frog crossing constructed of the same weight and kind of rails as are in the tracks of the railroad, and to be of a pattern in general use, and requiring a derailing device so constructed that the electric cars could not be run over the railroad tracks except by connecting the tracks of the electric cars by a lever on the side from which the car was approaching.<sup>29</sup> The general subject of condemnation by interurban railroad companies is considered in the chapter devoted to the treatment of such companies.

§ 1298 (1014). **Tribunal—Jurisdiction—Decision of majority.**—It is essential to the validity of the decision of a tribunal that it should have jurisdiction of the general subject, for if there is no jurisdiction the proceedings are *coram non judice*. Where the tribunal is a temporary one of naked statutory powers there can be no doubt that jurisdiction of the subject must affirma-

<sup>27</sup> Ante, § 1213. See also *Boston &c. R. Co., In re*, 79 N. Y. 64 (railroad crossing); *Kansas City &c. R. Co. v. Kansas City &c. R. Co.*, 118 Mo. 599, 24 S. W. 478.

<sup>28</sup> *Malott v. Collinsville &c. Elec. R. Co.*, 108 Fed. 313.

<sup>29</sup> *Wabash &c. R. Co. v. Ft. Wayne &c. R. Co.*, 161 Ind. 295, 67

N. E. 674. See also generally *Cook &c. v. Evansville Terminal R. Co.*, 175 Ind. 3, 93 N. E. 279; *Indianapolis &c. R. Co. v. Indianapolis &c. Transit Co.*, 33 Ind. App. 337, 67 N. E. 1013; *Galveston &c. R. Co. v. Houston Elec. Co.*, 57 Tex. Civ. App. 170, 122 S. W. 287.

tively appear and the weight of authority is that this is true where the tribunal is one of inferior jurisdiction although it is a permanent judicial tribunal. Jurisdiction of the subject can not be conferred by the parties, but must be given by law. These elementary principles apply to tribunals in appropriation or condemnation cases and it is not deemed necessary to do much more than barely mention them.<sup>30</sup> In condemnation proceedings only such questions can be tried as the statute makes provision for trying.<sup>31</sup> Where the jurisdiction is vested in the courts it is held that a judge can not hear the case out of court.<sup>32</sup> The general rule is that proceedings under the right of eminent domain must be brought in the county in which the land is situated.<sup>33</sup> But if the land is in more than one county it is held, under most statutes, that the proceedings may be instituted in either county.<sup>34</sup> Where the law provides for a trial by jury and does

<sup>30</sup> See generally *Gray v. St. Louis &c. R. Co.*, 81 Mo. 125, 22 Am. & Eng. R. Cas. 106; *Denver &c. Co. v. Otis*, 7 Colo. 198, 2 Pac. 925; *Denver City &c. R. Co. v. Midaugh*, 12 Colo. 434, 21 Pac. 565, 13 Am. St. 234; *De Buol v. Freeport &c. R. Co.*, 111 Ill. 499; *Hughes v. Lake Erie &c. R. Co.*, 21 Ind. 175; *Kansas City &c. Co. v. Campbell*, 62 Mo. 585; *Chicago &c. R. Co. v. Young*, 96 Mo. 39, 8 S. W. 776; *Long Island &c. R. Co., In re*, 45 N. Y. 364; *People v. Tubbs*, 49 N. Y. 356; *Galveston &c. Co. v. Gulf &c. R. Co.*, 72 Tex. 454, 10 S. W. 537.

<sup>31</sup> *Oregon &c. R. Co. v. Baily*, 3 Ore. 164.

<sup>32</sup> *Broadway &c. R. Co., In re*, 73 Hun 7, 57 N. Y. S. 108; *Washington &c. R. Co. v. Coeur D'Alene &c. R. Co.*, 2 Idaho 991, 28 Pac. 394. See *Lewis v. St. Paul &c. R. Co.*, 5 S. Dak. 148, 58 N. W. 580, 57 Am. & Eng. R. Cas. 612; *Baltimore &c. R. Co. v. Louisiana &c.*

*R. Co.*, 39 La. Ann. 659, 2 So. 67.

<sup>33</sup> *California &c. R. Co. v. Southern &c. R. Co.*, 65 Cal. 409, 4 Pac. 388; *Pool v. Simmons*, 134 Cal. 621, 66 Pac. 872; *Missouri &c. R. Co. v. Carter*, 85 Mo. 448, 28 Am. & Eng. R. Cas. 249; *St. Louis &c. R. Co. v. Lewright*, 113 Mo. 660; *Buffalo, In re*, 139 N. Y. 422, 34 N. E. 1103; *Perry v. Pittsburgh &c. St. R. Co.*, 64 Pa. Superior Ct. 583. Condemnation proceedings should be matter of record. *Lewis v. St. Paul &c. R. Co.*, 5 S. Dak. 148, 58 N. W. 580, 57 Am. & Eng. R. Cas. 612.

<sup>34</sup> *Bates v. Ray*, 102 Mass. 458; *St. Louis &c. R. Co. v. Postal Tel. Co.*, 173 Ill. 508, 51 N. E. 382 (and the necessary right of way for the entire line condemned); *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. 705; *Postal Tel. Cable Co. v. Texas &c. R. Co. (Tex. Civ. App.)*, 46 S. W. 912; *Helena v. Rogan*, 26 Mont. 452, 68 Pac. 798, 69 Pac. 709. Compare *Mono Power*

not provide for a decision by a majority then we suppose the ordinary rule applies and the decision must be unanimous. The rule declared by some of the cases is that where there is a power granted to two or more all must unite except where provision is made to the contrary, but there is a diversity of opinion upon this question.<sup>35</sup> It has been held that where a general statute provides that a majority of persons designated to discharge certain duties may act the majority of commissioners appointed to assess benefits and damages may make an award.<sup>36</sup> The rule that where courts have concurrent jurisdiction the one which first obtains jurisdiction will retain it applies to condemnation proceedings,<sup>37</sup> but where the statute requires joint action by two tribunals both must act.<sup>38</sup>

**§ 1299 (1015). Appointment of appraisers or commissioners to assess benefits and damages.**—There is some diversity of

Co. v. Los Angeles, 33 Cal. App. 675, 166 Pac. 387; Toluca &c. R. Co. v. Haws, 194 Ill. 92, 62 N. E. 312.

<sup>35</sup> Galbraith v. Littleich, 73 Ill. 209; Beynon v. Brandywine &c. T. L. Co., 39 Ind. 129; Virginia R. Co. v. Lovejoy, 8 Nev. 100; Griscom v. Gilmore, 16 N. J. L. 105; Cruger v. Hudson River R. Co., 12 N. Y. 190; People v. Hynds, 30 N. Y. 470; Young v. Buckingham, 5 Ohio 485; Moore v. Green &c. R. Co., 3 Phila. (Pa.) 417. Under a proper construction of the Missouri statute directing the appointment of three commissioners to appraise land taken in invitum, the report of the commissioners is not rendered nugatory by the fact that only two of them acted and signed the report. Such a report is sufficient to authorize the court to render a judgment vesting the title of the land in the company. Quayle v. Missouri &c. R. Co., 63 Mo. 465; Louk v. Woods, 15 Ill. 256; Brook-

lyn, &c. R. Co., In re, 80 Hun 355, 30 N. Y. S. 131. Many cases, however, hold that all the commissioners must join in the deliberations although a majority may decide. New York, In re, 99 N. Y. 569, 2 N. E. 642, 34 Hun 441; State v. Findley, 67 Wis. 86, 30 N. W. 224; Smith v. Trenton &c. Co., 17 N. J. L. 5; Curry v. Jones, 4 Del. Ch. 559. See also Chicago &c. R. Co. v. Sanford, 23 Mich. 418 (holding that all must unite in the verdict).

<sup>36</sup> Serrell v. Oakland Probate Judge, 107 Mich. 234, 65 N. W. 107, distinguishing Kress v. Hammond, 92 Mich. 372, 52 N. W. 728. And there may be a waiver of the requirement of unanimity. Weber v. Detroit, 158 Mich. 149, 122 N. W. 570.

<sup>37</sup> Hughes v. Lake Erie &c. R. Co., 21 Ind. 175; Miller v. County Commissioners, 119 Mass. 485.

<sup>38</sup> St. Louis v. Gleason, 93 Mo. 33, 8 S. W. 348.



opinion as to the power of a court to appoint appraisers, commissioners or the like, to assess benefits and damages, some of the authorities inclining to the view that the power of appointment is an executive and not a judicial function,<sup>39</sup> and that appointments can not be made by the courts. In our opinion the power to appoint commissioners, appraisers or the like, to assess benefits and damages is judicial and may be exercised by the courts. The judicial power extends beyond the mere trial and decision of causes, and is broad enough to authorize the appointment of such ministers or officers as may be necessary to enable a court to effectively exercise its functions.<sup>40</sup> We doubt whether power to appoint agents or officers to perform duties not connected with the administration of the law by the courts, or to act in matters foreign to the purpose for which courts are organized can be conferred upon the judiciary, but we think that the assessment of benefits and damages being essentially a judicial matter and connected with the administration of the law by the courts, the courts may be empowered to appoint appraisers, commissioners or the like to assess benefits and damages. The power to appoint is not, however, exclusively judicial, for the authorities affirm the right of the legislature itself to appoint or to confer the power to appoint upon judicial, executive or administrative officers.<sup>41</sup> The power must be exercised by the board or tribunal upon which the power is conferred.<sup>42</sup> Broad

<sup>39</sup> *Taylor v. Commonwealth*, 3 J. J. Marsh (Ky.) 401; *State v. Barbour*, 53 Conn. 76, 22 Atl. 686, 55 Am. Rep. 65; *Achley's Case*, 4 Abb. Pr. (N. Y.) 35. In *Penniman v. St. Johnsbury*, 54 Vt. 306, it is held not to exist unless given by statute.

<sup>40</sup> *Striker v. Kelly*, 2 Denio: (N. Y.) 323; *Cooper*, In re, 22 N. Y. 67; *State v. Noble*, 118 Ind. 350, 360, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. 143. See also *Vail v. Morris &c. R. Co.*, 21 N. J. L. 189; *Gregory v. Cleveland &c. R. Co.*, 4 Ohio St. 675; *Colorado &c. R. Co. v. Jones*, 29 Fed. 193; *Terre Haute v. Evansville &c. R. Co.*, 149 Ind. 174,

46 N. E. 77, 37 L. R. A. 189; *Elliott Roads and Streets* (3d ed.), § 316.

<sup>41</sup> *State v. Commissioners*, 28 Kans. 431; *Morris v. Comptroller*, 54 N. J. L. 268, 23 Atl. 664; *Shoemaker v. United States*, 147 U. S. 282, 31 Sup. Ct. 361, 37 L. ed. 170; *Elliott Roads and Streets* (3d ed.), §§ 311, 317. In *Mississippi* it is held that the power is conferred on deputy clerks. *Western Union Tel. Co. v. Louisville &c. R. Co.*, 107 Miss. 626, 65 So. 650.

<sup>42</sup> *House v. Rochester*, 15 Barb. (N. Y.) 517; *Menges v. Albany*, 56 N. Y. 374.

as is the power which the adjudged cases accord to the legislature there is this important limitation upon it, namely, the tribunal must be an impartial one, and its action subject to judicial control at some stage of the proceedings.<sup>43</sup> Where there is provision for an appeal the appointment of commissioners may be authorized to be made by members of a public corporation.<sup>44</sup> While the rule declared by the authorities is that the legislature may appoint commissioners or appraisers itself or may vest the power of appointment in ministerial or executive officers, the action of appraisers and commissioners by whomsoever appointed, must be under judicial control, otherwise the fundamental principle that the award of compensation is a judicial function would be violated.<sup>45</sup>

**§ 1300 (1016). Duty to appoint appraisers or commissioners—Mandamus.**—It is broadly asserted in some of the cases that where a proper petition is presented, and proper notice is given, the appointment of commissioners or selection of a jury to assess the land-owner's damages is a matter of right, and if the judge or other officer, charged with the ministerial duty of ordering a jury or appointing commissioners, refuses to act, he may be com-

<sup>43</sup> *Hessler v. Drainage Com.*, 53 Ill. 105; *Bradley v. Frankfort*, 99 Ind. 417; *Paul v. Detroit*, 32 Mich. 108; *Nashua, Petition of*, 12 N. H. 425; *Mitchell v. Holderners*, 29 N. H. 523; *New Boston, Petition of*, 49 N. H. 328; *State v. Atkinson*, 27 N. J. L. 420; *Rhine v. McKinney*, 53 Tex. 354; *Lumsden v. Milwaukee*, 8 Wis. 485; *Powers v. Bears*, 12 Wis. 213, 78 Am. Dec. 733; *State v. Fond du Lac*, 42 Wis. 287. Compare also *Thomas v. Boise City*, 25 Idaho 522, 138 Pac. 1110. But see *Bridgeport v. Giddings*, 43 Conn. 304; *Johnston v. Rankin*, 70 N. Car. 550.

<sup>44</sup> *Bass v. Fort Wayne*, 121 Ind. 389, 23 N. E. 259; *McMicken v.*

*Cincinnati*, 4 Ohio St. 394; *State v. Crane*, 36 N. J. L. 394; *Minneapolis v. Wilkin*, 30 Minn. 140, 14 N. W. 581.

<sup>45</sup> *Vanhorne v. Dorrance*, 2 Dall. (U. S.) 304, 1 L. ed. 391; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420, 9 L. ed. 773; *San Francisco v. Scott*, 4 Cal. 114; *Cunningham v. Campbell*, 33 Ga. 625; *Pennsylvania R. Co. v. Baltimore R. Co.*, 60 Md. 263; *Langford v. County Commissioners*, 16 Minn. 375; *McMicken v. Cincinnati*, 4 Ohio St. 394; *Kramer v. Cleveland &c. R. Co.*, 5 Ohio St. 140; ante, § 1245; *Elliott's Roads and Streets* (3d ed.), § 309, et seq.

pelled, by mandamus, to do so.<sup>46</sup> It seems to us that there is difficulty in maintaining this doctrine where the power to appoint is conferred upon a court. If the proceedings are judicial and the duty is imposed upon a court, the refusal to make the appointment is, as we are inclined to believe, an error to be reviewed by certiorari, appeal or the like, and not upon an application for mandamus. Where, however, the duty is imposed upon administrative officers, their performance of that duty may be coerced by mandamus. But even as to ministerial officers the rule allowing a mandamus to compel the performance of a duty will not apply if the duty be purely a discretionary one.

**§ 1301 (1017). Qualifications of jurors—Appraisers or commissioners.**—The fundamental principle that no one can be a judge in his own case requires it to be held that the members of the tribunal appointed to assess benefits and damages should be disinterested. This principle governs although the statute may not provide that the members of the tribunal shall not be interested, since statutes are to be construed in connection with other statutes and the general principles of law.<sup>47</sup> Neither members of the condemning corporation nor its agent,<sup>48</sup> nor persons

<sup>46</sup> *Western U. R. Co. v. Dickson*, 30 Wis. 389; *Thirty-fourth Street R. Co., In re*, 102 N. Y. 343, 7 N. E. 172; *Illinois Cent. R. Co. v. Rucker*, 14 Ill. 353; *Chicago & C. R. Co. v. Wilson*, 17 Ill. 123. See *Southern & C. R. Co., In re*, 146 N. Y. 352, 40 N. E. 1000; *West Jersey & C. R. Co. v. Ocean City R. Co.*, 61 N. J. L. 506, 39 Atl. 1024.

<sup>47</sup> *Ante*, § 1299; *Douglass v. Byrnes*, 63 Fed. 16; *In re Rochester*, 208 N. Y. 188, 101 N. E. 875, 47 L. R. A. (N. S.) 151.

<sup>48</sup> *Powers v. Bears*, 12 Wis. 213, 78 Am. Dec. 733. An employe of the company is not competent to serve as a juror. *Central R. Co. v. Mitchell*, 63 Ga. 173. But see *Lower Kings River Reclamation*

*Dist. v. Phillips*, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335. Persons owning land in the neighborhood are not disqualified from acting as viewers where their land does not immediately adjoin the railroad. *Newbecker v. Susquehanna R. Co.*, 1 Pears. (Pa.) 57. See also *State v. North Plainfield*, 63 N. J. 61, 42 Atl. 805; *Foot v. Stiles*, 57 N. Y. 399; *Thompson v. Love*, 42 Ohio St. 61. But in general the owner of land sought to be condemned is disqualified. *Bradley v. Frankfort*, 99 Ind. 417; *Wilson v. Burr Oak*, 87 Mich. 240, 49 N. W. 572; *Krug's Lake Drainage Dist. v. Jamison*, 176 Mo. 557, 75 S. W. 679; *Re Rochester*, 268 N. Y. 188, 101 N. E.

appointed by it are competent to serve as appraisers, where the other party is not also represented.<sup>49</sup> In accordance with the general principle stated it is held that if the jury is selected exclusively from a few towns in the country whose inhabitants are deeply interested in the proposed improvement, a challenge to the array should be allowed.<sup>50</sup> One whose name is struck off the venire in choosing a struck jury is incompetent to fill a vacancy in such jury.<sup>51</sup> The fact that a commissioner to assess

875, 47 L. R. A. (N. S.) 151. *J. Douglass v. Byrnes*, 63 Fed. 16, there is a full discussion of the general question and it was held that a person who accepts a retainer as an attorney for one of the parties is disqualified. The court cited *Sacramento &c. Mining Co. v. Showers*, 6 Nev. 291; *Johnson v. Hobart*, 45 Fed. 542; *Palmer v. Utah &c. R. Co.*, 2 Idaho 290, 13 Pac. 429; *Burke v. McDonald*, 2 Idaho 1022, 29 Pac. 98; *Dond v. Guthrie*, 13 Ill. App. 653; *Bowler v. Washington*, 62 Maine 302; *Blake v. County Commissioners*, 114 Mass. 583; *Ensign v. Harney*, 15 Nebr. 330, 18 N. W. 73, 48 Am. Rep. 344 and note; *Patten's Petition*, 16 N. H. 283; *Peavy v. Wolfborough*, 37 N. H. 286; *Beacon v. Shreve*, 22 N. J. L. 176; *Phillipsburgh Bank v. Fulmer*, 31 N. J. L. 53; *Buffalo &c. Co.*, *In re*, 32 Hun (N. Y.) 289; *Pittsburgh &c. R. Co. v. Porter*, 32 Ohio St. 328; *McDaniels v. McDaniels*, 40 Vt. 363, 94 Am. Dec. 408. See also *Peirce v. Bangor*, 105 Maine 413, 74 Atl. 1039. But see *McDonnell v. Improvement Dist.*, 97 Ark. 334, 133 S. W. 1126; *Crowley v. Gallatin Co.*, 14 Mont. 292, 36 Pac. 313.

<sup>49</sup> *Rhine v. McKinney*, 53 Tex. 354. Citing and approving this de-

cision it was held in *Tucker v. Paris* (Tex. Civ. App.), 99 S. W. 1127, that a statute authorizing a city to condemn land by having the same appraised by a jury taken from twelve men selected by the city marshal, from which the mayor was entitled to strike three and the owner of the land three, the remainder to constitute the jury, and containing no provision for an appeal from their award, was unconstitutional as authorizing a deprivation of property without due process of law.

<sup>50</sup> *Haslam v. Galena &c. R. Co.*, 64 Ill. 353. The mere fact that the county of which the juror is a citizen is interested in the suit was held not to render him incompetent within the statutes of West Virginia. *Baltimore &c. R. Co. v. Pittsburgh &c. R. Co.*, 17 W. Va. 812. See also *Warner v. Gunnison*, 2 Colo. App. 430, 31 Pac. 238; *Minneapolis v. Wilkins*, 30 Minn. 140, 14 N. W. 581; *Illinois Cent. R. Co. v. Swalm*, 83 Miss. 631, 36 So. 147.

<sup>51</sup> *Detroit &c. R. Co.*, *In re*, 2 Doug. (Mich.) 367. And prior service in the same matter will usually disqualify. *Folinar v. Folinar*, 68 Ala. 120; *Hester v. Chambers*, 84 Mich. 562, 48 N. W. 152; *State v.*

damages upon the condemnation of land for a railroad right of way is a stockholder in another railroad which has already acquired its right of way does not make him incompetent.<sup>52</sup> A corporation can not object to the award because part of the commissioners were its own stockholders,<sup>53</sup> but, of course, the adverse party may successfully object in such a case. The general principle is well illustrated by the cases which hold that persons who are active in promoting the proposed movement, are disqualified.<sup>54</sup> Stockholders in a corporation which is a party to condemnation proceedings are, it is very clear, disqualified from acting as appraisers,<sup>55</sup> and this rule is generally enforced although the statute is silent on the subject of the interest of appraisers.<sup>56</sup>

District Ct., 87 Minn. 268, 91 N. W. 1111. Compare, however, *Fulton v. Cummings*, 132 Ind. 453, 30 N. E. 949; *Miller v. Kramer*, 154 Iowa 523, 134 N. W. 538.

<sup>52</sup> *People v. First Judge &c.*, 2 Hill (N. Y.) 398. See also *Re Brooklyn El. R. Co.*, 32 App. Div. 221, 52 N. Y. S. 997. But as hereinafter shown a stockholder in the condemning company would not be competent.

<sup>53</sup> *Strang v. Beloit &c. R. Co.*, 16 Wis. 635. In *Rock Island R. Co. v. Lynch*, 23 Ill. 645, it was held that the award of commissioners, one of whom was disqualified but whose disqualification was unknown, is void even though such commissioner voted with the minority.

<sup>54</sup> *Louisiana &c. R. Co. v. Moseley*, 115 La. 757, 40 So. 37, 5 Ann. Cas. 920. Such a disqualification, it has been held, can not be removed by agreement of parties. *Michigan &c. R. Co. v. Barnes*, 40 Mich. 383. In *Detroit &c. Co. v. Crane*, 50 Mich. 182, 15 N. W. 73, it was held that one who has sub-

scribed to a fund in aid of a railway is not disqualified to act as commissioner to assess damages against another projected road which is to be leased to the first named road.

<sup>55</sup> *Peninsular R. Co. v. Howard*, 20 Mich. 18; *Rock Island &c. R. Co. v. Lynch*, 23 Ill. 645; *Friend Appellant*, 53 Maine 387. The fact that one has subscribed for stock on which he has paid nothing and is in default does not disqualify him. *Chesapeake &c. Canal Co. v. Binney*, 4 Cranch C. C. 68. In *Georgia R. Co. v. Hart*, 60 Ga. 550, it was held that a stockholder's son was disqualified because of his near relationship to a person having an interest.

<sup>56</sup> See *Giesy v. Cincinnati &c. R. Co.*, 4 Ohio St. 308; *Donner v. Palmer*, 23 Cal. 40; *Inge v. Police Jury*, 14 La. Ann. 117; *Bryant v. Glidden*, 36 Maine 36; *People v. Michigan &c. R. Co.*, 3 Mich. 496; *Ames v. Lake Superior &c. R. Co.*, 21 Minn. 241; *Kansas City &c. R. Co. v. Campbell*, 62 Mo. 585; *Thompson v. Conway*, 53 N. H.

In many of the states it is provided that the commissioners or jurors to assess damages upon the condemnation of land shall be disinterested,<sup>57</sup> and under such statutes any material interest, however slight, must, as we suppose, disqualify. In some jurisdictions the damages are assessed by the commissioners, of whom one may be designated by the plaintiff and one by the defendant.<sup>58</sup> We think there is reason to doubt whether a party can be compelled to submit his rights to the decision of a tribunal thus constituted, but, of course, he may do so by consent, and acquiescence is regarded as a tacit agreement. In many states special commissioners to assess damages upon condemnation must be freeholders,<sup>59</sup> though such a requirement is not usually made as to jurors, whether summoned to assess the damages in the first instance, or on appeal from the commissioners, and

622; *Bernet v. Camden &c. R. Co.*, 14 N. J. L. 145; *Pennsylvania R. Co. v. First German Lutheran Congregation*, 53 Pa. St. 445; *Forbes v. Howard*, 4 R. I. 364; *Buffalo Bayou &c. R. Co. v. Ferris*, 26 Tex. 588; *Powers v. Bears*, 12 Wis. 214. One may have a claim against the company and yet not have such an interest as will prevent him from serving as a commissioner to assess damages. *Newbecker v. Susquehannah R. Co.*, 1 Pearson (Pa.) 57.

<sup>57</sup> There is considerable conflict in the decisions as to what relationship, if any, will disqualify, owing largely to differing statutes. For relationship disqualifying, see: *Beck v. Biggers*, 66 Ark. 292, 50 S. W. 514; *Bradley v. Frankfort*, 99 Ind. 417; *Taylor v. Worcester County*, 105 Mass. 225; *Lyon v. Haines*, 73 Maine 56. For relationship held not to disqualify see: *North Arkansas &c. R. Co. v. Cole*, 71 Ark. 38, 40 S. W. 312; *Louisiana Ry. Co. v. Movere*, 116

La. 997, 41 So. 236; *Chase v. Rutland*, 47 Vt. 393.

<sup>58</sup> For the construction of a statute providing that the court should appoint five commissioners from a list of twelve names, six of which were furnished by the company and six by the land-owner, see *Troy &c. R. Co. v. Cleveland*, 6 How. Pr. (N. Y.) 238.

<sup>59</sup> In Mississippi it was held that one holding lands under a title bond conditioned for the conveyance to him of a fee-simple upon the payment of the purchase-money, was a freeholder within such a statute. *New Orleans &c. R. Co. v. Hemphill*, 35 Miss. 17. It is sufficient if the commissioners become freeholders at any time before their appointment. *New York &c. R. Co. v. Townsend*, 36 Hun (N. Y.) 630. An heir of one who, by will directed his land to be sold, was held to be a freeholder. *People v. Scott*, 8 Hun (N. Y.) 566.

where such qualifications are prescribed, the commissioners or jurors must possess them, otherwise an objection to their competency, opportunity made, will prevail.<sup>60</sup>

**§ 1302. Waiver of objections to lack of qualification.**—Objections to the competency of commissioners or jurors may be waived by agreement,<sup>61</sup> or otherwise. It is generally held that taking part in an inquest by interested persons with knowledge of their interest is such a waiver.<sup>62</sup> To prevent a waiver the objection should be taken at the earliest opportunity.<sup>63</sup> But if there is excusable ignorance of the disqualification the general rule stated will not prevail.<sup>64</sup>

**§ 1303 (1018). Oath must be taken by jurors or commissioners.**—The commissioners or jurors should in all cases be sworn as required by the statute, and some of the cases hold that a failure on their part to take the prescribed oath will render all their proceedings invalid.<sup>65</sup> It seems to us that the failure to take the

<sup>60</sup> See *Adams v. San Angelo Waterworks Co.* (Tex. Civ. App.), 25 S. W. 165, 26 S. W. 1104.

<sup>61</sup> *People v. Taylor*, 34 Barb. (N. Y.) 481. See *New York &c. R. Co., Matter of*, 35 Hun (N. Y.) 575. But compare *Michigan Air Line R. Co. v. Barnes*, 40 Mich. 383.

<sup>62</sup> *Jameson v. Androscoggin R. Co.*, 52 Maine 412; *Walker v. Boston &c. R. Co.*, 3 Cush. (Mass.) 1; *Fitchburg &c. R. Co. v. Boston &c. R. Co.*, 3 Cush. (Mass.) 58; *Mansfield &c. R. Co. v. Clark*, 23 Mich. 519; *Smith v. School District*, 40 Mich. 143; *Crowell v. Londonderry*, 63 N. H. 42. See also *Bradley v. Frankfort*, 99 Ind. 417; *In re, New York &c. R. Co.*, 35 Hun (N. Y.) 575.

<sup>63</sup> *Astor v. New York*, 62 N. Y. 580; *Hilltown Road*, 18 Pa. St. 233; *Burnham v. Goffstown*, 50 N. H.

560; *Wells Co. Road, Matter of*, 7 Ohio St. 16; *Emanuel Hospital v. Metropolitan R. Co.*, 19 L. T. N. S. 692.

<sup>64</sup> *Giles v. Caines*, 3 Caines (N. Y.) 107; *In re Rochester*, 208 N. Y. 188, 101 N. E. 875, 47 L. R. A. (N. S.) 151; *Newberry v. Furnival*, 56 N. Y. 638; *Wolford v. Oakley*, 1 Sheldon (N. Y.), 261; *Elliott Appellate Procedure*, §§ 676, 691. Where the act which disqualifies, as for instance, the acceptance of a retainer, is unknown to the adverse party the failure to object is not a waiver.

<sup>65</sup> *Keenan v. Commissioners' Court*, 26 Ala. 568; *Frith v. Justices*, 30 Ga. 723; *Harper v. Lexington &c. R. Co.*, 2 Dana (Ky.) 227; *Bowler v. Perrin, Drain Commissioner*, 47 Mich. 154, 10 N. W. 180; *State v. Bayonne*, 35 N. J. L. 476;

oath ought not to be available in a collateral attack, but should be deemed a mere irregularity, not rendering the proceedings absolutely void.<sup>66</sup> The rule is very strictly enforced in some of the courts, and it is held that the record must show affirmatively that the jurors or commissioners were duly sworn.<sup>67</sup> But is generally held that a recital in the record that the commissioners were sworn according to law is sufficient to show that they took the proper oath,<sup>68</sup> and this certainly is the sensible doctrine. A mere irregularity in the form of the oath taken will not be cause for setting aside the proceedings where it is apparent that the proper matters were before the jury for consideration, and that the objecting party could have suffered no damages from the irregularity.<sup>69</sup> Proceeding to a hearing without objection and with

*People v. Conner*, 46 Barb. (N. Y.) 333; *Adams v. San Angelo Water-works Co.* (Tex. Civ. App.), 25 S.W. 165, 26 S. W. 1104; *Bohlman v. Green Bay &c. R. Co.*, 40 Wis. 157. See also *Thomas v. Boise City*, 25 Idaho 522, 138 Pac. 1110. Omission of the word "faithfully" from prescribed form of the oath held sufficient to invalidate the proceedings. *Gilroy, In re*, 85 Hun 424, 32 N. Y. S. 891. But see *Cambria St.*, *In re*, 75 Pa. St. 357.

<sup>66</sup> *Huling v. Kaw Valley R. &c. Co.*, 130 U. S. 559, 9 Sup. Ct. 603, 32 L. ed. 1045, citing *Commissioners v. Espen*, 12 Kans. 531; *Venard v. Cross*, 8 Kans. 248; *Cooper v. Reynolds*, 10 Wall. (U. S.) 308, 19 L. ed. 931; *Voorhees v. Jackson*, 10 Pet. (U. S.) 449, 9 L. ed. 490.

<sup>67</sup> *Virginia R. Co. v. Lovejoy*, 8 Nev. 100.

<sup>68</sup> *Lyon v. Green Bay &c. R. Co.*, 42 Wis. 538; *Hannibal &c. R. Co. v. Morton*, 27 Mo. 317; *New Orleans &c. R. Co. v. Hemphill*, 35 Miss. 17; *Road &c.*, *In re*, 90 Pa. St. 190; *Long v. Commissioner's*

*Court*, 18 Ala. 482. Where the sole record of the oath is contained in the record certified by the commissioners themselves, the oath which they took must be set forth that it may appear that the statute was complied with. *State v. Van Geison*, 15 N. J. L. 339; *In re Cambria Street*, 75 Pa. St. 357. The return of the sheriff that the jury were duly impanelled and sworn according to law, to discharge their duties, "will be construed to be a statement that the jury were properly sworn, and not a recital of the substance of the oath administered." *New Orleans &c. R. Co. v. Hemphill*, 35 Miss. 17.

<sup>69</sup> *Grafton &c. R. Co. v. Foreman*, 24 W. Va. 662. But see *Wilkinson v. Trenton*, 35 N. J. L. 485; *Gilroy, In re*, 85 Hun 424, 32 N. Y. S. 891. An oath before one not authorized to administer it is ineffectual and has been held to render the proceeding void where there was no appeal. *Thomas v. Boise City*, 25 Idaho 522, 138 Pac. 1110. But see *Woolsey v. Hamilton*, 32 Iowa 130.



knowledge of an omission to take the oath or of an irregularity in the manner of taking it,<sup>70</sup> or taking an appeal to a court in which the proceedings are tried de novo amounts to a waiver of such defects.<sup>71</sup>

**§ 1304 (1019). Notice—General doctrine.**—The authorities with very little conflict affirm that notice is essential in appropriation proceedings.<sup>72</sup> There is, however, a conflict upon the ques-

<sup>70</sup> *Rockford &c. R. Co. v. McKinley*, 64 Ill. 338. Parties who were before the court will be presumed to have notice of omissions and irregularities in the proceedings. *Raymond v. County Comrs.*, 63 Maine 110.

<sup>71</sup> *Patton v. Clark*, 9 Yerg. (Tenn.) 268.

<sup>72</sup> *Kennard v. Louisiana*, 92 U. S. 480, 23 L. ed. 478; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914; *United States v. Jones*, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. ed. 1015; *Wulzen v. Board of Supervisors*, 101 Cal. 15, 40 Am. St. 17 and note; *Brown v. Denver*, 7 Colo. 305, 3 Pac. 455; *Thomas v. Boise City*, 25 Idaho 522, 138 Pac. 1110; *Campbell v. Campbell*, 63 Ill. 462; *Garvin v. Daussman*, 114 Ind. 429, 16 N. E. 826, 5 Am. St. 637; *Kuntz v. Sumption*, 117 Ind. 1, 19 N. E. 474, 2 L. R. A. 655 and note; *Kansas City &c. R. Co. v. Fisher*, 53 Kans. 512, 36 Pac. 1004; *Leavitt v. Eastman*, 77 Maine 117; *Whiteford Township v. Probate Judge*, 53 Mich. 130, 18 N. W. 593; *St. Paul v. Nickl*, 42 Minn. 262, 44 N. W. 59; *Knoblauch v. Minneapolis*, 56 Minn. 321, 57 N. W. 928; *Williams v. Monroe*, 125 Mo. 574, 28 S. W. 853; *Kearney v. Ballantine*, 54 N. J. L. 194, 23 Atl. 821; *Greenwich &c. R. Co. v. Greenwich &c. R. Co.*, 75 App. Div.

220, 78 N. Y. S. 24; *Happy v. Mosher*, 48 N. Y. 313; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. 684 and note; *People v. Gilon*, 121 N. Y. 551, 24 N. E. 944; *Baltimore &c. R. Co. v. Pittsburgh &c. R. Co.*, 17 W. Va. 812; *Rowan v. State*, 30 Wis. 129, 11 Am. Rep. 559. See generally *Baltimore &c. R. Co. v. Pittsburgh &c. R. Co.*, 17 W. Va. 812; *Chesapeake &c. Canal Co. v. Union Bank*, 4 Cranch C. C. 75; *Burns v. Multnomah R. Co.*, 8 Sawyer (U. S.) 543; *Union Pac. R. Co. v. Leavenworth &c. R. Co.*, 29 Fed. 728; *Mulligan v. Smith*, 59 Cal. 206; *Chicago &c. R. Co. v. Smith*, 78 Ill. 96; *Tracy v. Elizabethtown &c. R. Co.*, 80 Ky. 259; *Atlantic R. Co. v. Cumberland County Comrs.*, 51 Maine 36; *State v. Reed*, 38 N. H. 59; *Gamble v. McCrady*, 75 N. Car. 509; *Carolina &c. R. Co. v. Penncarden &c. Co.*, 132 N. Car. 644, 44 S. E. 358; *Zimmerman v. Canfield*, 42 Ohio St. 463; *Reitenbaugh v. Chester Valley R. Co.*, 21 Pa. St. 100; *Road &c. In re*, 109 Pa. St. 118; *Thetford v. Kilburn*, 36 Vt. 179; *Lynch v. Rutland*, 66 Vt. 570, 29 Atl. 1015; *Walbridge v. Cabot*, 67 Vt. 114, 30 Atl. 805; *State v. Fond du Lac*, 42 Wis. 287.

tion whether the statute authorizing the proceedings must provide for notice. It is held by many of the courts that, although notice is indispensable, it is not essential to the validity of the statute that it should provide for notice to the property owner,<sup>73</sup> if notice is, in fact, given. Other cases hold a different doctrine affirming that a statute providing for the seizure of property is not valid unless it also provides for notice.<sup>74</sup> In our opinion a statute which authorizes the seizure of property, but does not prescribe what notice shall be given violates fundamental principles and should be regarded as void. It seems to us that a statute which authorizes the exercise of the extraordinary power of seizing private property should prescribe what the notice shall be inasmuch as such a statute should be complete in itself in so far as regards the fundamental elements of the procedure. It ought not to be left to courts to supply such an essential part of the procedure as notice, nor ought such a question to be left in such doubt that it can only be solved by construction. If notice is not provided for by the legislature the omission can only be supplied by judicial legislation, for a right to seize private property can only be given by express statutory enactment and if the courts supply what is omitted in such a statute they act as legislators. It can not be justly said that the omission can be supplied by the aid of the rules of the common law since the right to appropriate property depends entirely upon statute and not

<sup>73</sup> Paulsen v. Portland, 149 U. S. 30, 13 Sup. Ct. 750, 37 L. ed. 637; Wilson v. Baltimore &c. R. Co., 5 Del. Ch. 524; Peoria &c. Co. v. Warner, 61 Ill. 52; Tracy v. Elizabethtown &c. Co., 80 Ky. 259; State v. Jersey City, 24 N. J. L. 662; State v. Trenton, 36 N. J. L. 499; Sullivan v. Cline, 33 Ore. 270, 54 Pac. 156. These authorities generally proceed upon the theory that a provision for notice may be implied and that if it is given the failure to expressly provide for it in the statute will not render the proceedings void.

<sup>74</sup> Elliott Roads and Streets (3d ed.), § 222; Kuntz v. Sumption, 117 Ind. 1, 19 N. E. 474, 2 L. R. A. 655 and note; State v. Fond du Lac, 42 Wis. 287; Seifert v. Brooks, 34 Wis. 443. See Whiteford Township v. Probate Judge, 53 Mich. 130, 18 N. W. 593. Dissenting opinions of Cooley, C. J., Sherwood, J., and Campbell, J., in Whiteford Twp. v. Probate Judge, 53 Mich. 130; Quære in People v. Richards, 38 Mich. 214. Dissenting opinion of Bartley, J., in Kramer v. Cleveland &c. R. Co., 5 Ohio St. 140, 165; Savannah &c. R. Co. v.

upon the common law. If the right to seize property is entirely statutory then, as it seems to us, the notice must be provided for by the statute, since a notice not provided for by statute is not provided for by law, and notice not provided for by law is no notice at all.<sup>75</sup> While it is well established that notice is essential yet it is generally held that it is competent for the legislature to prescribe what the notice shall be.<sup>76</sup> The legislature may provide for constructive or personal notice,<sup>77</sup> and if the notice, no matter whether personal or constructive, be not palpably and unquestionably unreasonable it will be sufficient. Constructive

Mayor, 96 Ga. 680, 23 S. E. 847; Gatch v. Des Moines, 63 Iowa 718, 18 N. W. 310; State v. McGuire, 109 Minn. 88, 122 N. W. 1120; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Board of Education v. Aldredge, 13 Okla. 205, 73 Pac. 1104; Sterritt v. Young, 14 Wyo. 146, 82 Pac. 946.

<sup>75</sup> Harmon v. Birchard, 8 Blkf. (Ind.) 418; Terre Haute &c. R. Co. v. Baker, 122 Ind. 433, 441, 24 N. E. 83; Scudder v. Jones, 134 Ind. 547, 551, 32 N. E. 221; Norvell v. Porter, 62 Mo. 309; Osborne v. Schutt, 67 Mo. 712; Board of Education of Stillwater v. Aldredge, 13 Okla. 205, 73 Pac. 1104; Sterritt v. Young, 14 Wyo. 146, 82 Pac. 946, 4 L. R. A. (N. S.) 169. See also Shippen Bros. Lumber Co. v. Elliott, 134 Ga. 699, 68 S. E. 509. Some of the cases hold that provision for notice may be implied. Branson v. Gee, 25 Ore. 462, 36 Pac. 527, 24 L. R. A. 355; Ulman v. Baltimore, 72 Md. 587, 20 Atl. 141, 21 Atl. 709, 11 L. R. A. 224. See generally Paulsen v. Portland, 16 Ore. 450, 19 Pac. 450, 1 L. R. A. 673.

<sup>76</sup> McIntosh v. Pittsburgh, 112 Fed. 705; Mason v. Messenger, 17 Iowa 261; Walker v. Boston &c. R.

Co., 3 Cush. (Mass.) 1; Salem v. Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650; Nishnabotna Drainage Dist. v. Campbell, 154 Mo. 151, 55 S. W. 276; Middletown, Matter of, 82 N. Y. 196; Elliott Roads and Streets (3d ed.), § 223.

<sup>77</sup> Harvey v. Tyler, 2 Wall. (U. S.) 328, 17 L. ed. 871; Secombe v. Railroad Co., 23 Wall. (U. S.) 108, 23 L. ed. 67; Pennoyer v. Neff, 95 U. S. 714, 743, 24 L. ed. 575; Huling v. Kaw Valley R. &c. Co., 130 U. S. 559, 9 Sup. Ct. 603, 32 L. ed. 1045; Lent v. Tillson, 140 U. S. 316, 11 Sup. Ct. 825, 35 L. ed. 419; Wilson v. Hathaway, 42 Iowa 173; Missouri &c. Co. v. Shepard, 9 Kans. 647; Wilkin v. First Division of St. Paul &c. R. Co., 16 Minn. 271; Weir v. St. Paul &c. Co., 18 Minn. 155; New Orleans &c. Co. v. Hemphill, 35 Miss. 17; Polly v. Saratoga &c. Co., 9 Barb. (N. Y.) 449; Starbuck v. Murray, 5 Wend. (N. Y.) 148, 21 Am. Dec. 172; Owners v. Mayor, 15 Wend. (N. Y.) 374; United States &c. Co. v. United States &c. Co., 18 N. Y. 199; Cupp v. Commissioners, 19 Ohio St. 173. See also Dyer v. Baltimore, 140 Fed. 880.

notice satisfies the constitutional provision requiring due process of law.<sup>78</sup> The weight of authority is that the land-owner should have notice of the time when the application for the appointment of commissioners or appraisers or for the calling of a special jury to assess damages will be presented to the court,<sup>79</sup> in order that he may see that proper persons only are selected to make the appraisement, or may resist the application, if it is insufficient either in form or substance.<sup>80</sup>

**§ 1305 (1020). Notice—Requisites of.**—As notice is required in order to satisfy the provisions of the constitution requiring due process of law, it must be a reasonable notice. The subject

<sup>78</sup> *Huling v. Kaw Valley R. & Co.*, 130 U. S. 559, 9 Sup. Ct. 603, 32 L. ed. 1045; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. ed. 569; *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Mississippi & Boom Co. v. Patterson*, 98 U. S. 403, 406, 25 L. ed. 206; *Kuschke v. St. Paul*, 45 Minn. 225, 47 N. W. 786. See also *St. Paul & R. Co. v. Minneapolis*, 35 Minn. 141, 27 N. W. 500; *Winnebago & Co. v. Wisconsin Midland R. Co.*, 81 Wis. 389, 51 N. W. 576; *Wight v. Davidson*, 181 U. S. 371, 21 Sup. Ct. 616, 45 L. ed. 900.

<sup>79</sup> In some states, notice of the formation of a tribunal for the assessment of damages is not necessary, but notice of the hearing before such tribunal is sufficient. *Zack v. Pennsylvania R. Co.*, 25 Pa. St. 394; *Long Island R. Co. v. Bennett*, 10 Hun (N. Y.) 91; *Middletown, Matter of*, 82 N. Y. 196; *Hunter v. Matthews*, 1 Rob. (Va.) 468; *Weir v. St. Paul & R. Co.*, 18 Minn. 155; *Chesapeake &*

*Canal Co. v. Union Bank*, 4 Cranch (C. C.) 75. See also *Bemis v. Guirl Drainage Co.*, 182 Ind. 36, 105 N. E. 496.

<sup>80</sup> *Peoria & R. Co. v. Warner*, 61 Ill. 52; *Tracy v. Elizabethtown & R. Co.*, 80 Ky. 259; *Central Turnpike Corp.*, 7 Pick. (Mass.) 13; *Langford v. County Comrs.*, 16 Minn. 375; *Gamble v. McCrady*, 75 N. Car. 509; *Baltimore & R. Co. v. Pittsburgh & R. Co.*, 17 W. Va. 812; *State v. Fond du Lac*, 42 Wis. 287. See also *Abney v. Clark*, 87 Iowa 727, 55 N. W. 6; *Dixon v. Baltimore & R. Co.*, 1 Mackey (D. C.) 78; *Anderson v. St. Louis*, 47 Mo. 479; *Union Pac. R. Co. v. Leavenworth & R. Co.*, 29 Fed. 728. In *Sterritt v. Young*, 14 Wyo. 146, 82 Pac. 946, 4 L. R. A. (N. S.) 169, it is held that the statute must provide for notice of the time fixed for hearing on the question of damages as well as for appointment of appraisers. But in *St. Joseph v. Geiwitz*, 148 Mo. 210, 49 S. W. 1000 it is held that the land-owner must take cognizance himself of all proceedings after service of summons.

is, as we have said, so largely a legislative one that it is competent for the legislature to prescribe the form, and, within limits, the substance of the notice. There are cases holding that where the land-owner is a resident the notice must be personal, but the great weight of authority is that the legislature may provide for notice by publication or by posting only,<sup>81</sup> and need not even require it to be addressed to the owners by name; but may simply require it to describe the land, to indicate the nature of the proceeding, and to specify the time when, and the place where, the parties interested must appear to protect their rights.<sup>82</sup> A failure to comply with the requirements of the statute as to notice will, unless waived by appearance or otherwise, render all subsequent proceedings erroneous, and they may be arrested or set aside upon motion.<sup>83</sup> The notice must be definite as to the time and place where the proceeding will be had, and notice of a proceeding to be had in a certain village which covers two square

<sup>81</sup> *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71; *Baltimore &c. R. Co. v. North*, 103 Ind. 486, 3 N. E. 144; *Indianapolis &c. R. Co. v. State*, 105 Ind. 37, 4 N. E. 316; *Wilson v. Hathaway*, 42 Iowa 173; *Missouri River &c. R. Co. v. Shepard*, 9 Kans. 647; *Harper v. Lexington &c. R. Co.*, 2 Dana (Ky.) 227; *State v. Beeman*, 35 Maine 242; *Methodist P. Church v. Baltimore*, 6 Gill. (Md.) 391; *Hildreth v. Lowell*, 11 Gray (Mass.), 345; *People v. Richards*, 38 Mich. 214; *St. Paul &c. R. Co. v. Minneapolis*, 35 Minn. 141, 27 N. W. 500; *State v. Trenton*, 36 N. J. L. 499; *Polly v. Saratoga &c. R. Co.*, 9 Barb. (N. Y.) 449; *Application of Village of Middletown*, 82 N. Y. 196; *Cupp v. Commissioners*, 19 Ohio St. 173; *Zimmerman v. Canfield*, 42 Ohio St. 463; *Road &c.*, In re, 114 Pa. St. 627, 7 Atl. 765; *Baltimore &c. R. Co. v. Pittsburg &c. R. Co.*, 27 W.

Va. 812; ante, § 1304.

<sup>82</sup> *McIntyre v. Marine*, 93 Ind. 193; *Indianapolis &c. Road Co. v. State*, 105 Ind. 37, 4 N. E. 316; *McMicken v. Cincinnati*, 4 Ohio St. 394. Cases in preceding note. But see *Ellsworth v. Chicago &c. R. Co.*, 91 Iowa 386, 59 N. W. 78.

<sup>83</sup> *Commissioners v. Thompson*, 15 Ala. 134; *Morgan's Louisiana &c. R. Co. v. Bourdier*, 1 McGloin (La.) 232; *Morgan v. Chicago &c. R. Co.*, 36 Mich. 428; *Brazee v. Raymond*, 59 Mich. 548, 26 N. W. 699; *New Orleans &c. R. Co. v. Frederic*, 46 Miss. 1; *New York &c. R. Co.*, Matter of, 62 Barb. (N. Y.) 85; *Norton v. Wallkill Valley R. Co.*, 63 Barb. (N. Y.) 77; *Reitenbaugh v. Chester Valley R. Co.*, 21 Pa. St. 100; *Appeal of Central R. Co.*, 102 Pa. St. 38. See also *Lyle v. Chicago &c. R. Co.*, 55 Minn. 223, 56 N. W. 820.

miles without specifying any particular place in the village, is void for indefiniteness.<sup>84</sup> Where there is no notice at all the proceedings will be treated as a nullity even when attacked in a collateral proceeding.<sup>85</sup> Some of the cases go so far as to hold that the proceedings are void although there is notice, if the notice is defective, but it seems to us that some of the cases go too far. A provision that the notice shall recite the substance of the petition was held to be substantially complied with by a notice which informed the land-owner that the company would make application for the appointment of commissioners to view his property and assess the damages he would sustain by the establishment of a railroad across it upon a location which was particularly described, although it did not purport to recite the petition.<sup>86</sup> If the statute requires the notice to name the owner, the requirement must be complied with; otherwise the proceedings will be erroneous.<sup>87</sup>

**§ 1306 (1021). Notice—Political questions — Expediency. —** The rule that there must be notice in order to constitute due process of law does not extend to questions upon which the property owner is not entitled to a hearing. There are questions

<sup>84</sup> *Minneapolis &c. R. Co. v. Kanne*, 32 Minn. 174; *Johnson, In re*, 49 N. J. L. 381, 8 Atl. 113; *Wallkill Valley R. Co. v. Norton*, 12 Abb. Pr. (N. S.) 317; *Rensselaer &c. R. Co. v. Davis*, 43 N. Y. 137; *Broadway &c. R. Co., In re*, 69 Hun (N. Y.) 275, 23 N. Y. S. 609. See *Thompson v. Chicago &c. Co.*, 100 Mo. 147, 19 S. W. 77, as to the effect of failure to hear the application at the time specified in the notice.

<sup>85</sup> *Hull v. Chicago &c. R. Co.*, 21 Nebr. 371, 3 N. W. 162; *Lohman v. St. Paul &c.*, 18 Minn. 174; *Cruger v. Hudson River R. Co.*, 12 N. Y. 190; *Leavitt v. Eastman*, 77 Maine 117; *Barnes v. Fox*, 61 Iowa 18, 15 N. W. 581.

<sup>86</sup> *Quincy &c. R. Co. v. Taylor*,

43 Mo. 35.

<sup>87</sup> *Birge v. Chicago &c. R. Co.*, 65 Iowa 440, 21 N. W. 767; *Ellsworth v. Chicago &c. R. Co.*, 91 Iowa 386, 59 N. W. 78. If the notice name only a life tenant the remainderman is not bound by the proceeding. *Chicago &c. R. Co. v. Smith*, 78 Ill. 96. In these cases the proceedings were held void, collaterally, as to persons not named. The interest of the life tenant is not affected by a proceeding against the remainderman. *Railroad Co. v. Boyer*, 13 Pa. St. 497. See also generally as to naming those interested, *Warwick Sav. Inst. v. Providence*, 12 R. I. 144; *Huling v. Kaw Valley R. &c. Co.*, 130 U. S. 559, 9 Sup. Ct. 603, 32 L. ed. 1045.

upon which the parties are not entitled to a hearing and as to those questions it is not necessary that there should be notice, unless the statute requires it.<sup>88</sup> The question whether the proposed improvement shall be made, and in what mode, are political questions which may be settled in any manner chosen by the legislature, without any notice to the owner except such as it sees fit to prescribe,<sup>89</sup> provided, of course, that the proposed use is a public one,<sup>90</sup> and the constitution places no limit upon this right. But where the constitution permits the condemnation of the property only after a public necessity for the taking has been found by a jury, the property owner is entitled to such notice as will enable him to dispute the existence of such a necessity.<sup>91</sup> It has been held that at whatever stage of the proceedings the owner of land sought to be condemned is summoned to appear after such notice he has the right to contest the appropriation of his land to the petitioner's use.<sup>92</sup>

<sup>88</sup> *Weaver v. Templin*, 113 Ind. 298, 14 N. E. 600; *Preble v. Portland*, 45 Maine 241; *People v. Smith*, 21 N. Y. 595; *Baltimore & C. R. Co. v. Pittsburgh & C. R. Co.*, 17 W. Va. 812; *Holt v. Somerville*, 127 Mass. 408. Where the statute requires that notice shall be given upon questions of policy, expediency, necessity or the like, then notice is essential. *Paul v. Detroit*, 32 Mich. 108; *Pearsall v. Board of Supervisors*, 74 Mich. 558, 52 N. W. 77, 4 L. R. A. 193; *State v. Fond du Lac*, 42 Wis. 287. See also *Luther v. Comrs. of Bruscombe Co.*, 164 N. Car. 241, 80 S. E. 386. The statute need not provide for notice of hearing upon questions of expediency or the like, but, owners are entitled to be heard, in general, on all questions subsequent to seizure. *Lancaster v. Augusta Water Dist.*, 108 Maine 137, 79 Atl.

463, Ann. Cas. 1913A, 1252 and note.

<sup>89</sup> *Secombe v. Railroad Co.*, 23 Wall. (U. S.) 109, 23 L. ed. 67; *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71; *Bemis v. Guirl Drainage Co.*, 182 Ind. 36, 105 N. E. 496; *Challiss v. Atchison & C. R. Co.*, 16 Kans. 117; *Harper v. Lexington & C. R. Co.*, 2 Dana (Ky.) 227; *Weir v. St. Paul & C. R. Co.*, 18 Minn. 155; *Kramer v. Cleveland & C. R. Co.*, 5 Ohio St. 140; *Zimmerman v. Canfield*, 42 Ohio St. 463.

<sup>90</sup> *Baltimore & C. R. Co. v. Pittsburgh & C. R. Co.*, 17 W. Va. 812.

<sup>91</sup> *Seifert v. Brooks*, 34 Wis. 443. See also *Baltimore & C. R. Co. v. Pittsburgh & C. R. Co.*, 17 W. Va. 812.

<sup>92</sup> *Baltimore & C. R. Co. v. Pittsburgh & C. R. Co.*, 17 W. Va. 812.

§ 1307 (1022). **Notice—Description.**—No precise and particular description of the property taken need be contained in the notice unless the statute particularly requires it,<sup>93</sup> and even where a description was required, it has been held sufficient to describe the land as that “now occupied by the New Jersey railroad company as the location of its track,”<sup>94</sup> or to describe it by reference to a map filed by the condemning company.<sup>95</sup> But where the statute provides for a definite description, it must be somewhat strictly complied with.<sup>96</sup> Defective descriptions may be cured by amendment and courts will generally refuse to set aside an order appointing commissioners until the moving party has had an opportunity to apply to amend and has failed to do so.<sup>97</sup> The principle that if the persons entitled to notice appear and take part in the proceedings, of which they are required to be notified, failure to object operates as a waiver of objections, applies to the descriptions, and, indeed, to all other parts of the notice.<sup>98</sup>

§ 1308 (1023). **Service of notice.**—Where the mode of giving or serving notice is prescribed by statute that mode must be substantially pursued. Where notice is prescribed and the mode of

<sup>93</sup> *Doughty v. Somerville &c. R. Co.*, 21 N. J. L. 442; *Wilkin v. First Division &c. R. Co.*, 16 Minn. 271.

<sup>94</sup> *Coster v. New Jersey R. Co.*, 23 N. J. L. 227.

<sup>95</sup> *Hazen v. Boston &c. R. Co.*, 2 Gray (Mass.) 574. But see *Central Park Comrs., In re*, 51 Barb. (N. Y.) 277.

<sup>96</sup> *Strang v. Beloit &c. R. Co.*, 16 Wis. 635; *Vail v. Morris &c. R. Co.*, 21 N. J. L. 189. See also *Midland R. Co. v. Smith*, 109 Ind. 488, 9 N. E. 474; *Lyle v. Chicago &c. R. Co.*, 55 Minn. 223, 56 N. W. 820.

<sup>97</sup> *Woodcliff Land Imp. Co. v. New Jersey &c. R. Co.*, 72 N. J. L. 137, 60 Atl. 44; *Savannah &c. R. Co. v. Postal Tel. &c. Co.*, 115 Ga. 554, 42 S. E. 1.

<sup>98</sup> *Huston v. Clark*, 112 Ill. 344; *Swinney v. Fort Wayne &c. R. Co.*, 59 Ind. 205, 219; *Indiana &c. R. Co. v. Allen*, 100 Ind. 409; *Atchison &c. R. Co. v. Patch*, 28 Kans. 470; *Stephens v. Commissioners*, 36 Kans. 664, 14 Pac. 175; *Barre Turnpike Co. v. Appleton*, 2 Pick. (Mass.) 430; *East Saginaw &c. R. Co. v. Benham*, 28 Mich. 459; *Concord R. Co. v. Greely*, 17 N. H. 47; *Boston &c. R. Co. v. Folsom*, 46 N. H. 64; *Brock v. Barnet*, 57 Vt. 172; *Muire v. Falconer*, 10 Grat. (Va.) 12; *Corrigal v. London &c. R. Co.*, 5 M. & G. 219, 44 Eng. C. L. 123. See also *Union Depot Co. v. Frederick*, 117 Mo. 138, 21 S. W. 1118, 1130, 26 S. W. 530; *Galveston &c. R. Co. v. Bandat*, 18 Tex. Civ. App. 595, 45 S. W. 939.



service is not designated, it seems to us that service would be good if made in accordance with the general rules governing service, for the particular statute may, in that respect, be aided by other statutes and other rules of law.<sup>99</sup> It has been held that where service upon an agent is relied upon, it must be shown that the agent was authorized to receive such service,<sup>1</sup> but this may be done by showing the duties or position of the agent, and that he is embraced within the statute authorizing service upon the agents.<sup>2</sup> Where the statute provides for notice by publication and the notice is published in different newspapers, sent to different subscribers for part of the prescribed time, it will not be effective although taking all the publications in the different papers, it appears that it was published the prescribed number of weeks.<sup>3</sup> Where the notice is by publication the affidavit prescribed by statute must be filed.<sup>4</sup> It is a general rule that where notice by publication is prescribed it must be given in accordance with the statute in all material particulars.<sup>5</sup> There are cases

<sup>99</sup> Notice by mail, unless such notice is provided for by the statute, is not sufficient. *Morgan v. Chicago &c. R. Co.*, 36 Mich. 428. But see *Crane v. Camp*, 12 Conn. 464. Notice by publication, as prescribed by statute, is good. *Huling v. Kaw Valley R. &c. Co.*, 130 U. S. 559, 9 Sup. Ct. 603, 32 L. ed. 1045; *St. Paul &c. R. Co. v. Minneapolis*, 35 Minn. 141, 27 N. W. 500, 24 Am. & Eng. R. Cas. 309; *Winnebago &c. Co. v. Wisconsin &c. Co.*, 81 Wis. 389, 51 N. W. 576; *Birge v. Chicago &c. R. Co.*, 65 Iowa 440, 21 N. W. 767, 20 Am. & Eng. R. Cas. 291. It is held that where personal service is required, service on the owner in another state satisfies the statute. *State v. Hudson River R. &c. Co. (N. J.)*, 25 Atl. 853.

<sup>1</sup> *Memphis &c. R. Co. v. Parsons &c. Co.*, 26 Kans. 503; *Dunlap v.*

*Toledo &c. R. Co.*, 46 Mich. 190, 9 N. W. 249. But it has been held that service may be either upon the agent or the owner where the statute permits service upon the agent. *Saginaw &c. R. Co. v. Bordrier*, 108 Mich. 236, 66 N. W. 62.

<sup>2</sup> *St. Paul &c. R. Co., In re*, 36 Minn. 85, 30 N. W. 432, 28 Am. & Eng. R. Cas. 255.

<sup>3</sup> *Hull v. Chicago &c. R. Co.*, 21 Nebr. 371, 32 N. W. 162.

<sup>4</sup> *Brown v. St. Paul &c. R. Co.*, 38 Minn. 506, 38 N. W. 698; *Barber v. Morris*, 37 Minn. 194, 33 N. W. 559, 5 Am. St. 836. See also *New Jersey Cent. R. Co.'s Appeal*, 102 Pa. St. 38; *Parker v. Ft. Worth &c. R. Co.*, 84 Tex. 333, 19 S. W. 518.

<sup>5</sup> *Mississippi River &c. R. Co. v. Jones*, 54 Mo. App. 529. See *Chicago &c. R. Co. v. Smith*, 78 Ill.

holding that where a part only of those entitled thereto are given notice, proceedings which are otherwise regular will bind such as are notified, but will be invalid as to those not receiving notice, but there is some diversity of opinion on the general question.<sup>6</sup> Where notice as to some of the land-owners is insufficient it is not improper to dismiss as to them and continue the proceedings as to those sufficiently notified.<sup>7</sup> Infants, who own an estate in common with their mother, with whom they live, are not bound by a notice addressed to the mother only.<sup>8</sup> Where service is required to be made upon the owner or owners it must be made upon all who come within the meaning of the term "owner" or "owners." In general, the word owner includes the holder of any legal or equitable estate, such as lessees,<sup>9</sup> mortgagees,<sup>10</sup> or

96; *Bradley v. Missouri Pacific R. Co.*, 91 Mo. 493, 4 S. W. 427, 30 Am. & Eng. R. Cas. 379; *Kansas City v. Mastin*, 169 Mo. 80, 68 S. W. 1037; *Hull v. Chicago & C. R. Co.*, 21 Nebr. 371, 32 N. W. 162. But actual personal service on a non-resident has been held equivalent to publication. *State v. Hudson River R. & C. Co. (N. J.)*, 25 Atl. 853. The courts of Washington hold that the statutes of that state do not require that the affidavit for service by publication should state that the owner's residence was unknown to and could not be discovered by any of the agents or officers of the corporation. *Moynahan v. Superior Court*, 42 Wash. 172, 84 Pac. 655; *Hunt v. Smith*, 9 Kans. 137.

<sup>6</sup> *Columbus & C. R. Co. v. With-erow*, 82 Ala. 190, 3 So. 23; *Smith v. Chicago & C. R. Co.*, 67 Ill. 191; *Garmoe v. Sturgeon*, 65 Iowa 147, 21 N. W. 493; *Detroit & C. R. Co. v. Detroit*, 49 Mich. 47, 12 N. W. 904; *Barlage v. Detroit & C. R. Co.*, 54 Mich. 564, 20 N. W. 587, 17 Am. & Eng. R. Cas. 131; *New Orleans*

*R. Co. v. Frederic*, 46 Miss. 1; *Moses v. St. Louis & C. Dock Co.*, 84 Mo. 242; *State v. Easton and Amboy & C. R. Co.*, 36 N. J. L. 181.

<sup>7</sup> *Milwaukee Southern Ry. Co.*, In re, 124 Wis. 490, 102 N. W. 401.

<sup>8</sup> *New Orleans & C. R. Co. v. Frederic*, 46 Miss. 1; *Swinney v. Fort Wayne & C. R. Co.*, 59 Ind. 205. See, generally, *Lohman v. St. Paul & C. R. Co.*, 18 Minn. 174; *Rheiner v. Union & C. R. Co.*, 31 Minn. 289, 17 N. W. 623; 14 Am. & Eng. R. Cas. 373. But see *Charleston & C. Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

<sup>9</sup> *Pennsylvania R. Co. v. Eby*, 107 Pa. St. 166; *Colcough v. Nashville & C. R. Co.*, 2 Head (Tenn.) 171; *Baltimore & C. R. Co. v. Thompson*, 10 Md. 76; *Gilligan v. Providence*, 11 R. I. 258.

<sup>10</sup> *Dodge v. Omaha & C. R. Co.*, 20 Nebr. 276, 29 N. W. 936; *Severin v. Cole*, 38 Iowa 463. But see contra as to mortgagees and judgment creditors, *Williams v. Hutchinson & C. R. Co.*, 62 Kans. 412, 63 Pac. 430, 84 Am. St. 408.

vendees in possession.<sup>11</sup> No general designation of the "persons interested" by the language used in the statute can supply the places of the names of such persons, where the statute requires the notice to be given to "all persons interested."<sup>12</sup> Where one is notified as an occupant, he must defend for whatever interest he has.<sup>13</sup>

**§ 1309 (1024). Summoning the jury or commissioners.**—The general rule is that the provisions of the statute as to the appointment of commissioners or the summoning of a jury must be strictly pursued.<sup>14</sup> But where the statute simply provides that the proceedings shall be in a certain court before a jury, the jury is to be drawn as in other cases.<sup>15</sup> The failure to fix a day for the jury to meet, as required by the statute, has been held to invalidate a warrant for summoning them.<sup>16</sup> Some of the courts hold that the order or warrant under which they act should state definitely the duties which the jury or commissioners are to per-

<sup>11</sup> *Smith v. Ferris*, 6 Hun (N. Y.) 553.

<sup>12</sup> *Birge v. Chicago &c. R. Co.*, 65 Iowa 440, 21 N. W. 767. A mortgagee is a person interested within the meaning of such a statute. *Pratt v. Bright*, 29 N. J. Eq. 128; *Michigan &c. R. Co. v. Barnes*, 40 Mich. 383; *Wilson v. European &c. R. Co.*, 67 Maine 358. So also are persons holding judgment liens against the land. *Watson v. New York Cent. R. Co.*, 6 Abb. (N. Y.) Pr. N. S. 91; *State v. Easton &c. R. Co.*, 36 N. J. L. 181.

<sup>13</sup> *McIntyre v. Easton &c. R. Co.*, 26 N. J. Eq. 425. See generally *Platt v. Bright*, 29 N. J. Eq. 128; *Severin v. Cole*, 38 Iowa 463; *Baltimore &c. R. Co. v. Baltzell*, 75 Md. 94, 23 Atl. 74; *Boynton v. Peterborough*, 4 Cush. (Mass.) 467; *Quincy &c. R. Co. v. Taylor*, 43 Mo. 35; *Cory v. Chicago &c. R. Co.*, 100 Mo. 282, 13 S. W. 346;

*Norton v. Wallkill &c. R. Co.*, 63 Barb. (N. Y.) 77; *New York &c. R. Co., In re*, 29 Hun (N. Y.) 269; *Broadway &c. R. Co., In re*, 34 Hun (N. Y.) 414.

<sup>14</sup> A substantial compliance has been held sufficient. *Queen v. Lancaster &c. R. Co.*, 6 A. & E. N. S. 759, 51 E. C. L. 757.

<sup>15</sup> It is said, however, that there can not be a peremptory challenge to a juror unless it is expressly conferred by statute, and that a statute allowing peremptory challenge in "civil causes" does not apply to proceedings under the right of eminent domain *Peninsular R. Co. v. Howard*, 20 Mich. 18. See *Davis v. Bangor &c.*, 60 Maine 303. We can not believe that the doctrine of the cases cited can apply where the statute provides in general terms for a jury trial.

<sup>16</sup> *Chesapeake &c. Canal Co. v. Key*, 3 Cranch (C. C.) 599.

form, but this rule can not apply where the statute provides for the submission of the matter to an ordinary jury.<sup>17</sup> It is also held that the warrant must be returned to the proper court or all proceedings under it will be void.<sup>18</sup> It is said, however, that if more than the required number of jurors are summoned, the proceedings will not be erroneous, if only twelve are empanelled.<sup>19</sup> A jury, summoned by a disinterested deputy sheriff, while another was interested, was held to have no power to act under a statute which provided that if the sheriff or either of his deputies was interested, the jury should be summoned by the coroner.<sup>20</sup> And where the statute required that a precept be issued to the sheriff to summon a jury, it was held to be error for him to select the jury from a list of names prepared by his deputy.<sup>21</sup>

**§ 1310 (1025). Parties.**—The general rule is that all persons who have an estate, interest or right in the land sought to be appropriated should be parties to the proceedings.<sup>22</sup> As we have

<sup>17</sup> *Heise v. Pennsylvania R. Co.*, 62 Pa. St. 67. But see *Mitchell v. Bridgewater*, 10 Cush. (Mass.) 411.

<sup>18</sup> *Cassidy v. Kennebec &c. R. Co.*, 45 Maine 263.

<sup>19</sup> *Fitchburg R. Co. v. Boston &c. R. Co.*, 3 Cush. (Mass.) 58.

<sup>20</sup> *Barre &c. Corporation v. Appleton*, 2 Pick. (Mass.) 430. Where the officer who summoned the jury was a stockholder the proceedings were set aside and a venire de novo awarded. *Woodstock R. Co. v. Tupper*, 12 New Brunswick 457. By appearing and taking part in the proceedings, the defendant waives all objections on account of the sheriff being an interested party. *Corrigan v. London &c. R. Co.*, 5 M. & G. 219, 44 Eng. C. L. 123.

<sup>21</sup> *Pennsylvania R. Co. v. Heister*, 8 Pa. St. 445.

<sup>22</sup> *Shelton v. Derby*, 27 Conn. 414; *Chicago &c. R. Co. v. Cicero*, 154 Ill. 656, 39 N. E. 574; *Grand Rapids*

*&c. R. Co. v. Alley*, 34 Mich. 18; *Williams v. Monroe*, 125 Mo. 574, 28 S. W. 853; *State v. Easton R. Co.*, 36 N. J. L. 181; *Patterson v. Binghamton*, 88 Hun 272, 34 N. Y. S. 416; *Moore v. Mayor*, 8 N. Y. 110, 59 Am. Dec. 473; *Gwynne v. Cincinnati*, 3 Ohio 24, 17 Am. Dec. 576; *Justice v. Philadelphia*, 169 Pa. St. 503, 32 Atl. 592, 36 W. N. Car. 509; *Davidson v. Texas &c. R. Co.*, 29 Tex. Civ. App. 54, 67 S. W. 1093; *Austin v. Rutland &c. R. Co.*, 45 Vt. 215; *Walbridge v. Cabot*, 67 Vt. 114, 30 Atl. 805; *Charleston &c. R. Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69; *Davis v. La Crosse &c. R. Co.*, 12 Wis. 16; *Philips &c.*, In re, L. R. 6 Eq. 250; *Pfleger*, In re, L. R. 6 Eq. 426. See also *Anderson v. Pemberton*, 89 Mo. 61, 1 S. W. 216; *Rule v. Sioux County*, 94 Nebr. 736, 144 N. W. 806; *South Carolina R. Co. v. American Tel. &c. Co.*, 65 S. Car. 459,

elsewhere said our opinion is that, while it is true that the general rule is as stated, yet it is only persons whose rights, titles, interests, or estates appear of record that must be made parties, except where possession conveys notice. We do not believe that a company desiring to appropriate land is bound to look elsewhere than to the records or to the occupancy of the lands. As a rule proceedings to secure the condemnation of lands must be prosecuted by the party entitled to the lands, and not by a contractor or agent.<sup>23</sup> Where damages are sought under the statute in cases where land is appropriated the owners are, of course, the proper parties plaintiffs.<sup>24</sup> Proceedings for condemnation of the land should be brought in the name of the company authorized to construct the road for which it is taken. And it has been held that the fact that such company has parted with its property and

43 S. E. 970; *Storm Lake v. Iowa Falls &c. R. Co.*, 62 Iowa 218, 17 N. W. 489; *Charleston &c. R. Co. v. Hughes*, 105 Ga. 1, 30 S. E. 972, 70 Am. St. 17. But it is held sufficient to make the trustee a party without the beneficiaries. *Small v. Georgia So. R. Co.*, 87 Ga. 602, 13 S. E. 694; *National R. Co. v. Easton &c. R. Co.*, 36 N. J. L. 181. And in a proceeding to condemn the rights of an abutting owner the municipality in which the highway lies is not a necessary party. *Philadelphia &c. Ferry Co. v. Intercity Link R. Co.*, 73 N. J. L. 86, 62 Atl. 184. Some courts require the petitioner at his peril to ascertain and name in the petition the true owner of the land sought to be condemned and taken, and the person so named is not required to prove title. *Chicago &c. R. Co. v. Diver*, 213 Ill. 26, 72 N. E. 758. The Illinois courts construe a statute requiring petitions in condemnation proceeding to describe all persons interested in the property not to

make it necessary that all persons interested in the property should be made parties, but damages may be assessed to the persons made parties, and they can not complain of the failure to bring in other interested persons. *Dowie v. Chicago &c. R. Co.*, 214 Ill. 49, 73 N. E. 354.

<sup>23</sup> *Colorado &c. R. Co. v. Ruedi*, 2 Colo. App. 202, 29 Pac. 1034; *Kansas &c. R. Co. v. Streeter*, 8 Kans. 133. See *Cory v. Chicago &c. R. Co.*, 100 Mo. 282, 13 S. W. 346; *Deitrichs v. Lincoln &c. R. Co.*, 13 Nebr. 361, 13 N. W. 624; *Junction &c. R. Co. v. Silver*, 27 Kans. 741, 14 Am. & Eng. R. Cas. 324; *Proprietors &c. v. Nashua &c. Co.*, 10 Cush. (Mass.) 385.

<sup>24</sup> *Hibbs v. Chicago &c. R. Co.*, 39 Iowa 340. But it is held that unless the statute authorizes the owner to initiate the proceedings he can not do so. *Indianapolis &c. Co. v. Reed*, 52 Ind. 357; *Bentonville &c. R. Co. v. Baker*, 45 Ark. 252. In Pennsylvania the proceed-

franchises by sale,<sup>25</sup> or lease,<sup>26</sup> does not prevent the institution of such proceedings in its name. The proceeding may be maintained by a de facto corporation.<sup>27</sup> So, it has been held that the fact that proceedings are prosecuted in the name of the petitioner as agent of the railroad company does not invalidate them.<sup>28</sup> Where damages are to be assessed for land already appropriated, the owner of the land at the time it was taken is the proper party defendant,<sup>29</sup> and in case of his death pending proceedings, they should ordinarily be revived in the name of his personal representatives.<sup>30</sup> But if a future acquisition of title is sought, the

ing must be by the holder of the title as owner or lessee; it can not be by an administrator. *Mountz v. Philadelphia &c. R. Co.*, 203 Pa. 128, 52 Atl. 15.

<sup>25</sup> *Cory v. Chicago &c. R. Co.*, 100 Mo. 282, 13 S. W. 346. In this case it was held that a statute requiring actions to be brought in the name of the real party in interest does not embrace proceedings of this character nor affect the jurisdiction of the court.

<sup>26</sup> *Gottschalk v. Lincoln &c. R. Co.*, 14 Nebr. 389, 15 N. W. 695. See also *State v. Superior Court of King County*, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897; *Chicago &c. R. Co. v. Illinois Cent. R. Co.*, 113 Ill. 156; *Metropolitan El. R. Co.*, In re, 18 N. Y. St. 134, 2 N. Y. S. 278.

<sup>27</sup> *Morrison v. Indianapolis &c. R. Co.*, 166 Ind. 511, 76 N. E. 961, 77 N. E. 744, and cases there cited in the opinion of the court; ante, § 1201; note in 50 L. R. A. (N. S.) 236.

<sup>28</sup> *Hannibal &c. R. Co. v. Morton*, 27 Mo. 317.

<sup>29</sup> *Davidson v. Boston &c. R. Co.*, 3 Cush. (Mass.) 91; *Drury v. Midland R. Co.*, 127 Mass. 571. In *Pennsylvania*, the location of a

railroad fixes its right to take any lands across which it runs, and all assessments of damages must be made with reference to the date of the location, and in favor of the person owning the land at that time. *Davis v. Titusville &c. R. Co.*, 114 Pa. St. 308, 6 Atl. 736.

<sup>30</sup> *Valley R. Co. v. Bohm*, 29 Ohio St. 633; *Peoria &c. R. Co. v. Rice*, 75 Ill. 329; *Darling v. Blackstone &c. Co.*, 16 Gray (Mass.) 187; *Upper Appomattox Co. v. Hardings*, 11 Grat. (Va.) 1; *Monterey County v. Cushing*, 83 Cal. 507, 23 Pac. 700. But it is held in some jurisdictions at least, that the heirs should be made parties. *Valley R. Co. v. Bohm*, 29 Ohio St. 633; *Satterfield v. Crow*, 8 B. Mon. (Ky.) 553. See also *Peoria &c. R. Co. v. Rice*, 75 Ill. 329. If proceedings to assess the compensation for lands already taken are brought after the death of the owner, his personal representatives, and not the heirs or devisees, are the proper parties. *Whitman v. Boston &c. R. Co.*, 3 Allen (Mass.) 133; *Church v. Grand Rapids &c. R. Co.*, 70 Ind. 161; *Neal v. Knox &c. R. Co.*, 61 Maine 298. But see *Kane v. Kansas City &c. R. Co.*, 112 Mo. 34, 20 S. W. 532.

owner of the land at the time the proceedings are instituted is the proper defendant.<sup>31</sup> If the land has been seized by the railroad company without right, and subsequently a proceeding is begun to acquire title, the owner of the land at the time the proceeding is instituted is entitled to the compensation.<sup>32</sup>

**§ 1311 (1025a). Parties — Grantor or grantee — Interested parties generally.**<sup>33</sup>—A right to compensation once accrued does not pass by a subsequent conveyance of the land, even with covenants of warranty, unless the deed contains an express stipulation to that effect.<sup>34</sup> It follows from this rule that the grantor, where there is no assignment, is the proper party in the proceedings to recover the damages. Though even where the compen-

<sup>31</sup> *Smith v. Chicago &c. R. Co.*, 67 Ill. 191; *Elizabethtown &c. R. Co. v. Helm*, 8 Bush. (Ky.) 681; *Stewart v. White*, 98 Mo. 226, 11 S. W. 568; *Houston v. Paterson &c. Traction Co.*, 69 N. J. L. 168, 54 Atl. 403. One who was not an owner of the land at the time the proceedings were instituted can not take an appeal from the award; the fact that he has purchased the property after condemnation proceedings were begun does not make him a proper party to such proceedings. *Connable v. Chicago &c. R. Co.*, 60 Iowa 27, 14 N. W. 75; *Cedar Rapids &c. R. Co. v. Chicago &c. R. Co.*, 60 Iowa 35, 14 N. W. 76. One who purchases land after the condemnation of a right of way across it has no claim to the compensation therefor. After condemnation the claim to compensation is a personal claim of the owner in whose favor it was assessed. *Dixon v. Baltimore &c. R. Co.*, 1 Mackey (D. C.) 78, 3 Am. & Eng. R. Cas. 201. See also ante, § 1274, et seq.

<sup>32</sup> *Hatfield v. Central R. Co.*, 29 N. J. L. 571; *Donald v. St. Louis &c. R. Co.*, 52 Iowa 411, 3 N. W. 462; *Harrington v. St. Paul &c. R. Co.*, 17 Minn. 215; *Galveston &c. R. Co. v. Pfeuffer*, 56 Tex. 66. *Contra* *McLendon v. Atlanta &c. R. Co.*, 54 Ga. 293. See *Pomeroy v. Chicago &c. R. Co.*, 25 Wis. 641.

<sup>33</sup> Part of this section was part of § 1025 in the original edition.

<sup>34</sup> *McLendon v. Atlanta &c. R. Co.*, 54 Ga. 293; *Chicago &c. R. Co. v. Maher*, 91 Ill. 312; *Indiana &c. R. Co. v. Allen*, 100 Ind. 409; *Drury v. Midland R. Co.*, 127 Mass. 571; *Carli v. Stillwater &c. R. Co.*, 16 Minn. 260; *Tenbrooke v. Jahke*, 77 Pa. St. 392; *Davis v. Titusville &c. R. Co.*, 114 Pa. St. 308, 6 Atl. 736; *Lewis v. Wilmington &c. R. Co.*, 11 Rich. L. (S. Car.) 91; *Paducah &c. R. Co. v. Stovall*, 12 Heisk. (Tenn.) 1; *Central R. Co. v. Merkel*, 32 Tex. 723; *Pomeroy v. Chicago &c. R. Co.*, 25 Wis. 641. See also *Little Rock &c. R. Co. v. Greer*, 77 Ark. 387, 96 S. W. 129; ante, § 1274, et seq.

sation is required to precede the taking, it has been held that the construction of a railroad upon the land of another with his knowledge and without any objection on his part so far fixes the rights of the parties that the subsequent conveyance of the land carries with it no right to the damages caused by such construction.<sup>35</sup> But the right although it does not pass with the land may be an assignable one. As we have said the proceeding must be against all persons having an interest in the land sought to be taken.<sup>36</sup> This would seem to include mortgagees, whether

<sup>35</sup> A mortgagee in possession is entitled to the same notice as an owner. *Ballard v. Ballard Vale Co.*, 5 Gray (Mass.) 468; *Parker, Petitioner*, 36 N. H. 84. In England an equitable mortgagee is entitled to notice. *Martin v. London & C. R. Co.*, 35 L. J. Ch. 795. Where the statute simply provides for a proceeding against the "owners" and contains no provision for the protection of the inchoate rights the company may acquire the land free from all inchoate rights by simply proceeding against those holding the present title, and rights of dower, curtesy, etc., etc., can only be urged against the compensation awarded. *Moore v. New York*, 4 Sandf. (N. Y.) 456; *McCracken v. Hayward*, 2 How. (U. S.) 608, 11 L. ed. 398.

<sup>36</sup> In *State v. Missouri Pac. R. Co.*, 75 Nebr. 4, 105 N. W. 983, there was a tax lien, and the lienholder was not made a party, and the court said: "The lien of these

taxes was a matter of record. It could have been easily ascertained, and could have easily been provided for. Several cases have been brought to our attention in which the courts of other states have held that upon the suggestion of the railway company the court would require taxes then existing upon the land to be paid out of the condemnation money while the same was in the hands of the court. *Philadelphia & C. R. Co. v. Pennsylvania & C. R. Co.*, 151 Pa. 569, 25 Atl. 177. However this may be, there can be no doubt that under our statute the railway company might protect itself by making lienholders parties to the proceedings, and, if it neglects to do this, and allows the holder of the fee to obtain the entire award, it can not afterwards insist that the lienholders shall, by such proceeding, be deprived of their interest in the property."



in possession,<sup>37</sup> or not.<sup>38</sup> If the statute gives the right to compensation to the person owning the property taken at a particular time, as "when the railroad is finished," a subsequent grantee can not have the damages assessed.<sup>39</sup> Some of the courts hold that judgment creditors are necessary parties,<sup>40</sup> but other courts, with better reason, hold otherwise distinguishing between a mortgage lien and a judgment lien.<sup>41</sup> Vendees holding under an executory contract for the purchase of the land taken, should be parties to the proceedings,<sup>42</sup> as well as those who are properly

<sup>37</sup> *South Park Comrs. v. Todd*, 112 Ill. 379; *Severin v. Cole*, 38 Iowa 463; *Wilson v. European &c. R. Co.*, 67 Maine 358; *Michigan &c. R. Co. v. Barnes*, 40 Mich. 383; *Stewart v. Raymond R. Co.*, 7 S. & M. (Miss.) 568; *North Hudson &c. R. Co. v. Booraefn*, 28 N. J. Eq. 450; *Adams v. St. Johnsbury &c. R. Co.*, 57 Vt. 240; *Aspinwall v. Chicago &c. Co.*, 41 Wis. 474; *Wooster v. Sugar River Valley R. Co.*, 57 Wis. 311, 15 N. W. 401; *Martin v. London &c. R. Co.*, L. R. 1 Eq. Cas. 145; 2 *Jones Mortg.* (7th ed.) § 681a. In *Breed v. Eastern R. Co.*, 5 Gray (Mass.) 470, n, it is said that the mortgagor can recover the full amount of damages without reference to the mortgagee. And a similar holding has been made in other cases. But the courts in which this rule obtains holds that the mortgage lien in equity follows the fund which is a substitute for the land, and, that by the timely application to a court of chancery, the mortgagee may have such fund applied on his debt, although it is not due. *Crane v. Elizabeth*, 36 N. J. Eq. 339; *McIntyre v. Easton &c. R. Co.*, 26 N. J. Eq. 425; *Farnsworth v. Boston*, 126 Mass. 1; *Astor v. Hoyt*, 5 Wend. (N. Y.) 603.

<sup>38</sup> *Indiana &c. R. Co. v. Allen*, 100 Ind. 409. See also *Severin v. Cole*, 38 Iowa 463; *Wilson v. European &c. R. Co.*, 67 Maine 358; *Platt v. Bright*, 29 N. J. Eq. 128. But compare *Schumacker v. Toberman*, 56 Cal. 508; *Chicago &c. R. Co. v. Sheldon*, 53 Kans. 169, 35 Pac. 1105. See ante, § 1278.

<sup>39</sup> *Lewis v. Wilmington &c. R. Co.*, 11 Rich. L. (S. Car.) 91.

<sup>40</sup> Where the statute provides that a judgment shall operate as a lien upon the lands of the defendant, a payment of the damages to such a judgment creditor amounts pro tanto, to a payment to the owner. *Chicago &c. R. Co. v. Chamberlain*, 84 Ill. 333.

<sup>41</sup> *Watson v. New York &c. R. Co.*, 47 N. Y. 157; *Gimbel v. Stolte*, 59 Ind. 446; *Shirk v. Thomas*, 121 Ind. 147, 149, 22 N. E. 976, 16 Am. St. 381. See also *Williams v. Hutchinson &c. R. Co.*, 62 Kans. 412, 63 Pac. 430, 84 Am. St. 408.

<sup>42</sup> *Pinkerton v. Boston &c. R. Co.*, 109 Mass. 527; *Hastings &c. R. Co. v. Ingalls*, 15 Nebr. 123, 16 N. W. 762; *St. Louis &c. R. Co. v. Wilder*, 17 Kans. 239; *Colcough v. Nashville &c. R. Co.*, 2 Head. (Tenn.) 171. The holder of an equitable interest is entitled to compensation under a statute which

designated "the owners."<sup>43</sup> The courts have held the term "owners" broad enough to include lessees,<sup>44</sup> life tenants,<sup>45</sup> rever-

provides for the payment of damages to "parties interested." *Drury v. Midland R. Co.*, 127 Mass. 571. See also *Anderson v. Pemberton*, 89 Mo. 61, 1 S. W. 216.

<sup>43</sup> Vendees in possession have been held to be owners. *Smith v. Ferris*, 6 Hun (N. Y.) 553. And so have mortgagees. *Dodge v. Omaha &c. R. Co.*, 20 Nebr. 276, 29 N. W. 936; *Severin v. Cole*, 38 Iowa 463; *Wade v. Hennessy*, 55 Vt. 207.

<sup>44</sup> *McCauley v. Brooks*, 16 Cal. 11; *Storm Lake v. Iowa Falls &c. R. Co.*, 62 Iowa 218, 17 N. W. 489; *Baltimore &c. R. Co. v. Thompson*, 10 Md. 76; *Rogers v. Docks Co.*, 34 L. J. Eq. 165; *North Pennsylvania R. Co. v. Davis*, 26 Pa. St. 238; *Getz v. Philadelphia &c. R. Co.*, 105 Pa. St. 547; *Pennsylvania R. Co. v. Eby*, 107 Pa. St. 166; *Colcough v. Nashville &c. R. Co.*, 2 Head. (Tenn.) 171; *Telephone &c. Co. v. Forke*, 2 Tex. App. Civ. Cas. 318; *Willey v. Southeastern R. Co.*, 1 McN. & G. 58; ante, § 1308. Where a tenancy expires pending condemnation proceedings, the tenant can not, by holding over with the consent of the owner, acquire any right as against the condemning corporation, *Schreiber v. Chicago &c. R. Co.*, 115 Ill. 340, 3 N. E. 427. See *Englewood &c. R. Co. v. Chicago &c. R. Co.*, 117 Ill. 611, 6 N. E. 684. Where the land is held by lease the compensation should be apportioned between the lessor and lessee according to the value of their respective interests. *Baltimore &c. R. Co. v. Thompson*, 10 Md. 76. The damage to the

lessee should be ascertained by reference to the difference between the annual value of the land before, and after the taking. *Lawrence v. Boston*, 119 Mass. 126. Lessees of land with covenants of renewal are entitled to the value of their rights under such covenants, in addition to the value of the remaining term. *North Pennsylvania R. Co. v. Davis*, 26 Pa. St. 238; *Norwich R. Co. v. Wodehouse*, 11 Beav. 382. See *Alabama R. Co. v. Kenney*, 39 Ala. 307. Where the tenant had a reasonable expectancy of many years' possession of the land of which she had long held possession, she was held entitled to the marketable value of such expectancy. *Farlow*, Ex parte, 2 B. & Ad. 341. Most cases, however, hold that a tenant can assert no rights as against the condemning corporation which he could not interpose to a notice from his landlord to quit. *Reg. v. Hungerford Market Co.*, 4 B. & Ad. 596; *Reg. v. London &c. R. Co.*, 10 Ad. & El. 3; *Rex v. Liverpool &c. R. Co.*, 4 Ad. & El. 650; *Palmer &c. Market Co.*, Matter of, 9 Ad. & El. 463. Where a new lease has been executed to take effect when the old term ends, the tenant is entitled to the value of the new lease. *Cobb v. Boston*, 109 Mass. 438.

<sup>45</sup> *Railroad Co. v. Boyer*, 13 Pa. St. 497; *Ross v. Elizabethtown &c. R. Co.*, 20 N. J. L. 230; *Bentonville R. Co. v. Baker*, 45 Ark. 252. The value of the life-tenant's interest is to be estimated by multiplying the net annual value of the premises

sioners,<sup>46</sup> heirs or devisees,<sup>47</sup> the owner of land dedicated as a street, but not accepted,<sup>48</sup> and tenants in common,<sup>49</sup> or persons with vested interests which make up the entire estate.<sup>50</sup> Also, persons holding estates in trust<sup>51</sup> and persons holding under

by the years of the life-tenant's expectancy of life, and reducing the same by calculation to a cash basis. *Pittsburgh &c. R. Co. v. Bentley*, 88 Pa. St. 178.

<sup>46</sup> *Ross v. Elizabethtown &c. R. Co.*, 20 N. J. L. 230; *Bentonville R. Co. v. Baker*, 45 Ark. 252. See also *Charleston &c. R. Co. v. Hughes*, 105 Ga. 1, 30 S. E. 972, 70 Am. St. 17.

<sup>47</sup> *Boynton v. Peterborough &c. R. Co.*, 4 Cush. (Mass.) 467; *Pittsburgh &c. R. Co. v. Swinney*, 97 Ind. 586. Where the owner dies after the right of compensation has accrued, the right to compensation vests in his personal representatives. *Whitman v. Boston &c. R. Co.*, 3 Allen (Mass.) 133; *Neal v. Knox &c. R. Co.*, 61 Maine 298; *Church v. Grand Rapids &c. R. Co.*, 70 Ind. 161. But executors are not ordinarily necessary parties. *Highway Comrs. of Ross v. Chambers*, 265 Ill. 113, 106 N. E. 492.

<sup>48</sup> *Pease v. Paterson &c. Trac-tion Co.*, 69 N. J. L. 524, 54 Atl. 524.

<sup>49</sup> *Bowman v. Venice &c. R. Co.*, 102 Ill. 459; *Pittsburgh &c. R. Co. v. Hall*, 25 Pa. St. 336; *Columbia &c. Bridge Co. v. Geise*, 34 N. J. L. 268; *Watson v. Milwaukee &c. R. Co.*, 57 Wis. 332, 15 N. W. 468. Under the statutes of some states, it has been held that the omission to make one tenant in common a party would avoid the proceedings. *Grand Rapids &c. R. Co. v. Alley*, 34 Mich. 16; *Phillips v. Sherman*, 61 Maine 548; *Morgan's Louisiana*

*&c. R. Co. v. Bourdier*, McGloin (La.), 232; *Railroad Co. v. Bucher*, 7 Watts (Pa.) 33.

<sup>50</sup> *Philadelphia &c. R. Co. v. Williams*, 54 Pa. St. 103; *Lexington &c. R. Co. v. McMurtry*, 3 B. Mon. (Ky.) 516; *Colcough v. Nashville &c. R. Co.*, 2 Head. (Tenn.) 171; *Gerrard v. Omaha &c. R. Co.*, 14 Nebr. 270, 15 N. W. 231; *Stoneham v. London &c. R. Co.*, L. R. 7 Q. B. 1. See also *Grandjean v. San Antonio (Tex.)*, 38 S. W. 837 (reversed 91 Tex. 430, 41 S. W. 477, 44 S. W. 476); *Chehalis Co. v. Ellingson*, 21 Wash. 638, 59 Pac. 485. Where compensation is assessed to but one of several owners of an estate, the presumption will be that it is his interest in the premises. *Rex v. Nottingham Water Works*, 6 Ad. & El. 355. Where the statute requires the company to "make compensation to the owners or proprietors of all private lands, etc., taken, or for any loss or damage they may sustain thereby," it was held that compensation must be made to any person having a beneficial interest in the land. *Lis-ter v. Loblely*, 6 Nev. & M. 340; *Russell v. Shenton*, 3 Q. B. 449; *Chauntler v. Robinson*, 4 Exch. 163. The holder of an easement is entitled to compensation for the destruction of his easement. *Philadelphia &c. R. Co. v. Williams*, 54 Pa. St. 103.

<sup>51</sup> *State v. Easton &c. R. Co.*, 36 N. J. L. 181; *Davis v. Charles River &c. R. Co.*, 11 Cush. (Mass.)

a tax deed,<sup>52</sup> or by adverse possession which might ripen into an absolute title,<sup>53</sup> have likewise been held to be necessary parties.<sup>54</sup> One who has taken steps to acquire title to public lands under the homestead or preemption laws has a vested right which makes him a necessary party to the condemnation of a right of way across such lands.<sup>55</sup> But it has been held that the holder of a mere license not coupled with an interest is not entitled to compensation for taking the lands upon which the license is to be exercised.<sup>56</sup> Some of the cases hold that the husband or wife of the land-owner should be made a party, that all interests in the land may be properly adjudicated,<sup>57</sup> but we do not believe this

506; *Hidden v. Davisson*, 51 Cal. 138. Where one partner held property in trust for the firm, it was held proper for both to join in a petition for damages. *Reed v. Hanover &c. R. Co.*, 105 Mass. 303. Where the railroad company institutes proceedings, it is irregular to join the cestui que trust as a party. *State v. Easton &c. R. Co.*, 36 N. J. L. 181. A receiver of a railroad whose property is sought to be condemned is a necessary party. *State v. Superior Court of King County*, 77 Wash. 593, 138 Pac. 277.

<sup>52</sup> *Gerrard v. Omaha &c. R. Co.*, 14 Nebr. 270, 15 N. W. 231. See also *Sanitary Dist. v. Munger*, 264 Ill. 256, 106 N. E. 185 (a proper party); *State v. Missouri Pac. R. Co.*, 75 Nebr. 4, 105 N. W. 983. But it is held that the holder of an invalid tax deed does not have any interest in the land and is not entitled to compensation out of the award. *Sanitary Dist. v. Murphy*, 261 Ill. 269, 103 N. E. 1001.

<sup>53</sup> *Winder, Ex parte*, L. R. 6 Ch. Div. 696.

<sup>54</sup> A trespasser in possession has no such interest as to entitle him

to be made a party. *Rosa v. Missouri &c. R. Co.*, 18 Kans. 124.

<sup>55</sup> *Red River &c. R. Co. v. Sture*, 32 Minn. 95, 20 N. W. 229; *Doran v. Central Pacific R. Co.*, 24 Cal. 245; *Rosa v. Missouri &c. R. Co.*, 18 Kans. 124. One in possession of public lands without right can not recover compensation for anything but crops and improvements. *California Northern R. Co. v. Gould*, 21 Cal. 254; *Doran v. Central Pacific R. Co.*, 24 Cal. 245; *Western Pac. R. Co. v. Tevis*, 41 Cal. 489; *Rosa v. Missouri &c. R. Co.*, 18 Kans. 124; *Knoth v. Barclay*, 8 Colo. 300, 6 Pac. 924; *Allard v. Lobau*, 3 Martin (La.) N. S. 293.

<sup>56</sup> *Bird v. Great Eastern R. Co.*, 34 L. J. C. P. 366. And it has been held that the holder of a note secured by deed of trust on the land is not entitled to notice and has no right to attack the proceedings in an independent suit in his own name. *Martin v. Dist. of Columbia*, 26 App. D. C. 146.

<sup>57</sup> *East Tennessee &c. R. Co. v. Love*, 3 Head. (Tenn.) 63; *Corey v. Probate Judge*, 56 Mich. 524, 23 N. W. 205. See also *Colorado Cent. R. Co. v. Allen*, 13 Colo. 229,

to be sound doctrine, where the title is wholly in the one, for we think an inchoate right is not such a right as entitles the person possessed of it to be made a party in proceedings under the right of eminent domain.<sup>58</sup>

**§ 1312. Parties—Joinder—Effect of failure to join.**—If the title is doubtful, all persons claiming an interest should be made parties.<sup>59</sup> Proceedings in which a necessary party was not joined are not binding as to such party.<sup>60</sup> But, according to the weight

22 Pac. 605. Some authorities hold that the title to land held in fee by the husband can be divested without making the wife a party. *Randall v. Texas Cent. R. Co.*, 63 Tex. 586; *Wheeler v. Kirtland*, 27 N. J. Eq. 534. See *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355. After the death of the husband, his widow is a necessary party to the condemnation of land in which her right of dower has not been otherwise divested. *Columbia &c. Bridge Co. v. Geise*, 34 N. J. L. 268; *New Orleans &c. R. Co. v. Frederic*, 46 Miss. 1. In Colorado, it is necessary to join both husband and wife as defendants in a condemnation proceeding. *Colorado &c. R. Co. v. Allen*, 13 Colo. 229, 22 Pac. 605.

<sup>58</sup> *Venable v. Wabash &c. R. Co.*, 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68, 71, quoting *Elliott Roads and Streets*, 108; *Baker v. Atchison &c. R. Co.*, 122 Mo. 396, 30 S. W. 301; *Chouteau v. Missouri Pac. R. Co.*, 122 Mo. 375, 22 S. W. 458, 30 S. W. 299.

<sup>59</sup> *Bentonville &c. R. Co. v. Stroud*, 45 Ark. 278. See also *McCurdy v. Chestnut Hill R. Co.*, 8 Weekly Notes Cas. (Pa.) 143; *Wade v. Hennessy*, 55 Vt. 207; *Charleston &c. Co. v. Comstock*, 36

W. Va. 263, 15 S. E. 69. The fact that one owner is omitted does not affect the validity of the proceedings as to those who are made parties unless the statute expressly requires all parties in interest to be joined in a single proceeding. *State v. Easton &c. R. Co.*, 36 N. J. L. 181. In some cases the fact that proceedings were void as to one party in interest has been held to invalidate them as to all. *Anderson v. Pemberton*, 89 Mo. 61, 1 S. W. 216; *Brush v. Detroit*, 32 Mich. 43.

<sup>60</sup> *Detroit &c. R. Co. v. Detroit*, 49 Mich. 47, 12 N. W. 904; *Smith v. Chicago &c. R. Co.*, 67 Ill. 191; *Indiana &c. R. Co. v. Conness*, 184 Ill. 178, 56 N. E. 402; *Charleston &c. R. Co. v. Hughes*, 105 Ga. 1, 30 S. E. 972, 70 Am. St. 17. Under a statute providing that, in condemnation proceedings by a telegraph company to obtain a right of way along a railroad right of way, it is sufficient to give jurisdiction if the corporation owning the easement is made a party defendant, but that only the interest of the parties before the court shall be condemned in such proceedings, it has been held that the owner of the fee, who is not a party to such proceedings,

of authority, this will not necessarily invalidate the proceedings as against those who were properly made parties.<sup>61</sup> Where the corporation had in good faith condemned the title of all persons of whose interest it had any knowledge, and was proceeding in good faith to build its road, it was held that a court of equity should refuse to enjoin the construction of the road at the suit of one not made a party if the corporation would execute a sufficient bond to insure the speedy condemnation of the complainant's interests and payment of his damages.<sup>62</sup> In a proceeding against an infant, it is usually necessary that he be personally served with notice, and that his interests be actively defended by a guardian ad litem appointed by the court.<sup>63</sup> Unless the statute provides otherwise, all persons having an interest in the land sought to be taken may be joined in a single proceeding although

is not affected by a judgment of condemnation against the railroad company. *Phillips v. Postal Tel. Cable Co.*, 130 N. Car. 513, 41 S. E. 1022, 89 Am. St. 868, judgment reversed on rehearing, 42 S. E. 587. *State v. Easton &c. R. Co.*, 36 N. J. L. 181; *Garmoe v. Sturgeon*, 65 Iowa 147, 21 N. W. 493; *Columbus &c. R. Co. v. Witherow*, 82 Ala. 190, 3 So. 23; *Hagar v. Brainerd*, 44 Vt. 294.

<sup>61</sup> *St. Louis &c. R. Co. v. Postal &c. Co.*, 173 Ill. 508, 51 N. E. 382; *Indiana &c. R. Co. v. Conness*, 184 Ill. 178, 56 N. E. 402; *Stevens v. Norfolk*, 46 Conn. 227; *Houston &c. R. Co. v. Postal &c. Co.*, 18 Tex. Civ. App. 502, 45 S. W. 179; *State v. Super. Ct. King County*, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897 and note. See also *Rowland v. Mercer County Trac. Co.*, 90 N. J. L. 82, 102 Atl. 814. But compare *Grand Rapids &c. R. Co. v. Alley*, 34 Mich. 16; *Morgan's*

*Louisiana &c. R. Co. v. Bourdier*, 1 McGloin (La.) 232.

<sup>62</sup> *Columbus &c. R. Co. v. Witherow*, 82 Ala. 190, 3 So. 23. Any considerable delay on the part of a land-owner in asserting his rights will be sufficient reason to refuse an injunction restraining the operation of the railroad across his land, after the rights of the public have intervened. *Whittlesey v. Hartford &c. R. Co.*, 23 Conn. 421. See *Richards v. Des Moines Valley R. Co.*, 18 Iowa 259; *Irish v. Burlington &c. R. Co.*, 44 Iowa 380; *Torrey v. Camden &c. R. Co.*, 18 N. J. Eq. 293; *Stretton v. Great Western &c. R. Co.*, 40 L. J. Eq. 50.

<sup>63</sup> *Hotchkiss v. Auburn &c. R. Co.*, 36 Barb. (N. Y.) 600; *Missouri Pacific R. Co. v. Carter*, 85 Mo. 448; *Clarke v. Gilmanton*, 12 N. H. 515. But see *New Orleans &c. R. Co. v. Hemphill*, 35 Miss. 17.

their interests are separate.<sup>64</sup> But a provision that "any number of owners, residents in the same county or circuit, may be joined in one petition," was held to impliedly forbid the joinder of those not residing in the same county or circuit.<sup>65</sup>

§ 1313 (1026). **Parties—Amendments.**—There is a diversity of opinion as to the right to amend, some of the cases holding that as the proceedings are in invitum, material amendments can not be allowed, but other cases take a more liberal view and allow amendments.<sup>66</sup> Thus it has been held that the proceedings may be amended at any time upon cause shown,<sup>67</sup> either by the addition of new parties,<sup>68</sup> or by discontinuing as to those found to have no interests.<sup>69</sup> Where there is a change of interest the company acquiring the interest may be substituted as petitioner.<sup>70</sup> The tendency of the modern cases is to liberally extend

<sup>64</sup> Hot Springs R. Co. v. Tyler, 36 Ark. 205; Evergreen &c. Assn. v. Beecher, 53 Conn. 551, 5 Atl. 353; Webster v. Holland, 58 Maine 168; Goodwin v. Gibbs, 70 Maine 243; Proprietors &c. v. Nashua &c. R. Co., 10 Cush. (Mass.) 385; Reed v. Hanover Branch R. Co., 105 Mass. 303; McKee v. St. Louis, 17 Mo. 184; Troy &c. R. Co. v. Cleveland, 6 How. Pr. (N. Y.) 238; Railroad v. Boyer, 13 Pa. St. 497; Getz v. Philadelphia &c. R. Co., 105 Pa. St. 547; Colcough v. Nashville &c. R. Co., 2 Head (Tenn.) 171. Persons who are jointly interested in the land should be joined as defendants. East Saginaw &c. R. Co. v. Benham, 28 Mich. 459; Grand Rapids &c. R. Co. v. Alley, 34 Mich. 16; Southern Pacific R. Co. v. Wilson, 49 Cal. 396; Ashby v. Eastern R. Co., 5 Met. (Mass.) 368, 38 Am. Dec. 426 and note; Whitcher v. Benton, 48 N. H. 157, 97 Am. Dec. 97.

<sup>65</sup> Quincy &c. R. Co. v. Kellogg,

54 Mo. 334. See as to defendants, Kansas City Interurban R. Co. v. Nelson, 193 Mo. 297, 91 S. W. 1036.

<sup>66</sup> Littlefield v. Boston &c. R. Co., 65 Maine 248; Colorado &c. R. Co. v. Allen, 13 Colo. 229, 22 Pac. 605.

<sup>67</sup> Chicago &c. R. Co. v. Gates, 120 Ill. 86, 11 N. E. 527; Davidson v. Boston &c. R. Co., 3 Cush. (Mass.) 91; New York &c. R. Co., In re, 26 Hun (N. Y.) 194; Bowman v. Venice &c. R. Co., 102 Ill. 459. See generally Quincy &c. R. Co. v. Kellogg, 54 Mo. 334; Missouri Pacific R. Co. v. Wilson, 45 Mo. App. 1; Wood v. Commissioners, 122 Mass. 394; Fitch v. Stevens, 2 Metc. (Mass.) 505.

<sup>68</sup> New York &c. R. Co., Matter of, 26 Hun (N. Y.) 194; Wood v. Comrs. of Bridges, 122 Mass. 394.

<sup>69</sup> Missouri Pac. R. Co. v. Carter, 85 Mo. 448.

<sup>70</sup> California &c. R. Co. v. Hooper, 76 Cal. 404, 18 Pac. 599.

the right to make amendments, and this, we think, is the true doctrine.<sup>71</sup> The right to amend should not, however, be so extended as to work injustice to a party by unjustly delaying proceedings or depriving him of reasonable opportunity to prepare for trial.<sup>72</sup>

§ 1314 (1027). **Effort to agree.**—In most of the states railroad companies are only authorized to resort to an assessment of the damages for land taken under the power of eminent domain after an ineffectual attempt to agree upon a price for its purchase. The decisions upon this subject are numerous and not entirely harmonious.<sup>73</sup> In some of the states the statutes expressly require the petition for such an assessment to show that the company has been unable to acquire title to the land sought, and the reason of its inability to do so, and under such a statute the

See generally *Rochester &c. R. Co.*, In re, 54 Hun 634, 26 N. Y. S. 753.

<sup>71</sup> The text is quoted with approval in *Houston &c. R. Co. v. Postal Tel. &c. Co.*, 18 Tex. Civ. App. 502, 45 S. W. 179, 182. See also *New York Munic. Ry. Corp. v. Parkhill*, 145 N. Y. S. 447; *Coons v. McKees Rocks Borough*, 243 Pa. 340, 90 Atl. 141.

<sup>72</sup> *Southwestern &c. R. Co. v. Hickory &c. Ditch Co.*, 18 Colo. 489, 33 Pac. 275; *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 323; *Windham v. Litchfield*, 22 Conn. 226; *Coolman v. Fleming*, 82 Ind. 117; *Midland &c. R. Co. v. Smith*, 109 Ind. 488, 9 N. E. 474; *Chicago &c. R. Co. v. Hunter*, 128 Ind. 213, 27 N. E. 477; *Eslich v. Mason City &c. R. Co.*, 75 Iowa 443, 39 N. W. 700; *Grand Junction &c. R. Co. v. County Com.*, 14 Gray (Mass.) 553; *Young v. Laconia*, 59 N. H. 534; *Prospect &c. R. Co.*, Matter

of, 67 N. Y. 371; *Boyd v. Negley*, 40 Pa. St. 377; *Pennsylvania &c. R. Co. v. Bunnell*, 81 Pa. St. 414. A petition can not be so amended as to bring the proceedings under a statute different from that under which they were commenced. *Peoria &c. R. Co. v. Black*, 58 Ill. 33. And it is held that a notice cannot be amended while the matter is before the assessors. *Nashville &c. R. Co. v. Western Un. Tel. Co.*, 142 Ga. 525, 83 S. E. 123.

<sup>73</sup> *Reed v. Ohio &c. R. Co.*, 126 Ill. 48, 17 N. E. 807, 36 Am. & Eng. R. Cas. 234; *Suburban R. Co. v. Metropolitan &c. El. R. Co.*, 193 Ill. 217, 61 N. E. 1090; *Swinney v. Fort Wayne &c. R. Co.*, 59 Ind. 205; *Lake Shore &c. R. Co. v. Cincinnati &c. R. Co.*, 116 Ind. 578, 19 N. E. 440, 37 Am. & Eng. R. Cas. 430; *Council Bluffs &c. R. Co. v. Bentley*, 62 Iowa 446, 17 N. W. 668, 20 Am. & Eng. R. Cas. 401; *Minneapolis &c. R. Co. v.*



reason should be stated in the petition.<sup>74</sup> By some of the courts it is held that inability to agree is a jurisdictional fact in the absence of which the court can not entertain a proceeding to condemn property,<sup>75</sup> but there are decisions asserting a different

Chicago &c. R. Co., 116 Iowa 681, 88 N. W. 1082; Grand Rapids &c. R. Co. v. Weiden, 70 Mich. 390, 38 N. W. 294; Fort Street &c. Co. v. Jones, 83 Mich. 415, 47 N. W. 349; Marquette &c. R. Co. v. Longyear, 133 Mich. 94, 94 N. W. 670, 10 Det. Leg. N. 111; Chicago &c. R. Co. v. Young, 96 Mo. 39, 8 S. W. 776; Wilkinson v. St. Louis &c. Co., 102 Mo. 130, 14 S. W. 177; State v. National Docks &c. Co., 55 N. J. L. 194, 26 Atl. 145; New York &c. R. Co. v. Godwin, 12 Abb. Pr. N. S. (N. Y.) 21; Allen v. Wilmington &c. R. Co., 102 N. Car. 381, 9 S. E. 4; Hickory v. Southern R. Co., 137 N. Car. 189, 49 S. E. 202; Oregon &c. R. Co. v. Oregon &c. Co., 3 Ore. 178; Neal v. Pittsburgh &c. R. Co., 2 Grant (Pa.) 137; Sullivan v. Missouri &c. R. Co., 29 Tex. Civ. App. 429, 68 S. W. 745.

<sup>74</sup> Marsh, Matter of, 71 N. Y. 315.

<sup>75</sup> Lincoln v. Colusa Co., 28 Cal. 662; Williams v. Hartford &c. R. Co., 13 Conn. 397; Chicago &c. R. Co. v. Chamberlain, 84 Ill. 333; Reed v. Ohio &c. R. Co., 126 Ill. 48, 17 N. E. 807; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co., 116 Ind. 578, 19 N. E. 440; Whisler v. Drain Comrs., 40 Mich. 591; Ellis v. Pacific R. Co., 51 Mo. 200; Kansas City &c. R. Co. v. Campbell, 62 Mo. 585; Doughty v. Somerville &c. R. Co., 21 N. J. L. 442; Coster v. New Jersey R. Co., 23

N. J. L. 227; New York &c. R. Co., Matter of, 62 Barb. (N. Y.) 85; Adams v. Saratoga &c. R. Co., 10 N. Y. 328; Lockport &c. R. Co., Matter of, 77 N. Y. 557, 563; Powers v. Hazelton &c. R. Co., 33 Ohio St. 429; Oregon R. &c. Co. v. Oregon Real Estate Co., 10 Ore. 444; Reitenbaugh v. Chester Valley R. Co., 21 Pa. St. 100. See also South Dakota Cent. R. Co. v. Chicago &c. R. Co., 141 Fed. 578; Howard Realty Co. v. Paducah &c. R. Co., 182 Ky. 494, 206 S. W. 774. In a case where a court in condemnation proceedings by a railway company decided on the issue whether, before the commencement of the proceedings, the company had made a bona fide effort to acquire the land by offering a fair price therefor, that on the evidence offered it was a case for the jury, but that the land-owner might later offer additional evidence to perfect his record, it was held that the refusal of another judge hearing the case to hear such additional testimony did not oust the court of its jurisdiction to impanel the jury, and that the decision of the court that it was a proper case for the jury was a decision that the company had made a bona fide effort to acquire the land necessary as a condition precedent for the impaneling of a jury. Detroit &c. R. Co. v. Hall, 133 Mich. 302, 94 N. W. 1066.

doctrine.<sup>76</sup> In some states where an attempt to agree is made necessary, proceedings in which no attempt to agree was shown, have been held void, even upon a collateral attack.<sup>77</sup> But it has been held that the fact that there was no failure to agree as alleged in the petition was not ground for an injunction against entry thereunder since the landowner had a perfect remedy at law by trial in the condemnation proceeding.<sup>78</sup> And it is held that the effort to agree must extend to all the matters sought to be settled by the condemnation proceedings.<sup>79</sup> The general rule is that the petition must allege an unsuccessful attempt to agree.<sup>80</sup> It is generally sufficient to aver the inability to agree in the lan-

<sup>76</sup> It was held in Illinois that such a provision in a statute was directory. *Hall v. People*, 57 Ill. 307. And in Massachusetts and Tennessee, it has been held that under the statutes in question, one of the parties could elect not to agree, and begin proceedings forthwith. *Aetna Mills v. Waltham*, 126 Mass. 422; *Bigelow v. Mississippi Central &c. R. Co.*, 2 Head (Tenn.) 624. See *Chicago &c. R. Co. v. Randolph &c.*, 103 Mo. 451, 15 S. W. 437. In *Farnsworth v. Lime Rock R. Co.*, 83 Maine 440, 22 Atl. 373, it is held that it is not fatal to fail to allege a failure to agree as it will be presumed. See also *Texas Midland R. Co. v. Southwestern Tel. Co.*, 24 Tex. Civ. App. 198, 58 S. W. 152.

<sup>77</sup> *Whitely v. Platte County*, 73 Mo. 30; *Cunningham v. Pacific R. Co.*, 61 Mo. 33; *Moses v. St. Louis Sectional Dock Co.*, 84 Mo. 242; *Adams v. Saratoga &c. R. Co.*, 10 N. Y. 328. Contra, *Ney v. Swinney*, 36 Ind. 454. See *Lake Shore &c. R. Co. v. Cincinnati &c. R. Co.*, 116 Ind. 578, 19 N. E. 440; *Portland v. Mississippi &c. R. Co.*,

8 Iowa 148; *Oregonian &c. R. Co. v. Hill*, 9 Ore. 377; *Southern Ill. &c. Co. v. Stone*, 194 Mo. 175, 92 S. W. 475.

<sup>78</sup> *St. Louis &c. R. Co. v. Southwestern Tel. Co.*, 121 Fed. 276.

<sup>79</sup> *Lake Shore &c. R. Co. v. Cincinnati &c. R. Co.*, 116 Ind. 578, 19 N. E. 440.

<sup>80</sup> *Portland &c. Co. v. Bobb*, 88 Ky. 226, 10 S. W. 794; *Contra Costa R. Co. v. Moss*, 23 Cal. 323; *Lockport &c. R. Co., Matter of*, 77 N. Y. 557; *Oregon R. &c. Co. v. Oregon &c. Co.*, 10 Ore. 444; *O'Hara v. Pennsylvania R. Co.*, 25 Pa. St. 445; *Darlington v. United States*, 82 Pa. St. 382, 22 Am. Rep. 766. In *Pennsylvania R. Co. v. Porter*, 29 Pa. St. 165, the petitioner was permitted to amend its petition by inserting an allegation of inability to agree upon the compensation. See *Cunningham v. Pacific &c. R. Co.*, 61 Mo. 33; *Gear v. Dubuque &c. R. Co.*, 20 Iowa 523, 89 Am. Dec. 550; *Toledo &c. R. Co. v. Detroit &c. R. Co.*, 62 Mich. 564, 29 N. W. 500, 4 Am. St. 875, 28 Am. & Eng. R. Cas. 272; *Kansas City &c. R. Co. v. Camp-*

guage of the statute,<sup>81</sup> and it is not necessary to set forth, in specific detail, what has been done.<sup>82</sup> The general averment of an inability "to acquire the right of way from said owners by voluntary grant or purchase" was held to be a substantial compliance with a statute authorizing condemnation only in case the compensation could not be agreed upon.<sup>83</sup> And under a similar statute an allegation that the parties were unable to agree as to the right of way was held sufficient after verdict.<sup>84</sup> The averment of an effort to agree should, however, be positive and not merely by way of recital.<sup>85</sup> Proof must be made of the attempt to agree in like manner with the other facts averred,<sup>86</sup> though it has been said that a failure to traverse the allegation of such an attempt waived the necessity for proof upon this point.<sup>87</sup> The affidavit of an agent of the corporation has been held sufficient prima facie evidence that it could not agree with the land-

bell, 62 Mo. 585; *St. Louis &c. R. Co. v. Lewright*, 113 Mo. 660, 21 S. W. 210; *Oregon &c. R. Co. v. Oregon &c. Co.*, 10 Ore. 444; *Philadelphia &c. Co.*, In re, 7 Phila. (Pa.) 461.

<sup>81</sup> *Cory v. Chicago &c. R. Co.*, 100 Mo. 282, 13 S. W. 346; *Lockport &c. R. Co.*, Matter of, 77 N. Y. 557; *Reitenbaugh v. Chester Valley R. Co.*, 21 Pa. St. 100.

<sup>82</sup> *Suburban R. T. Co.*, Matter of, 38 Hun (N. Y.) 553; *Hannibal &c. R. Co. v. Muder*, 49 Mo. 165; *United States v. Oregon R. &c. Co.*, 16 Fed. 524. See also *St. Louis &c. R. Co. v. Postal Tel. Co.*, 173 Ill. 508, 51 N. E. 382; *Colorado Fuel &c. Co. v. Four Mile R. Co.*, 29 Colo. 90, 66 Pac. 902; *Cincinnati &c. R. Co. v. Bay City &c. R. Co.*, 106 Mich. 473, 64 N. W. 471.

<sup>83</sup> *Bowman v. Venice &c. R. Co.*, 102 Ill. 459; *Chicago &c. R. Co. v. Chamberlain*, 84 Ill. 333.

<sup>84</sup> *Oregon R. &c. Co. v. Oregon &c. Co.*, 10 Ore. 444.

<sup>85</sup> *Lake Shore &c. R. Co. v. Cincinnati &c. R. Co.*, 116 Ind. 578, N. E. 440.

<sup>86</sup> *Gilmer v. Lime Point*, 19 Cal. 47; *Williams v. Hartford &c. R. Co.*, 13 Conn. 397; *Marsh*, Matter of, 71 N. Y. 315; *Schenectady R. Co. v. Lyons*, 41 Misc. 506, 85 N. Y. S. 40; *Powers v. Hazelton &c. R. Co.*, 33 Ohio St. 429; *Oregon R. &c. Co. v. Oregon &c. R. Co.*, 10 Ore. 444. But see *Southern Ill. &c. Co. v. Stone*, 194 Mo. 175, 92 S. W. 475.

<sup>87</sup> *Ward v. Minnesota &c. R. Co.*, 119 Ill. 287, 10 N. E. 365; *President &c. v. Diffebach*, 1 Yates (Pa.) 367. In *Cory v. Chicago &c. R. Co.*, 100 Mo. 282, 13 S. W. 346, the plaintiff sought to set aside as void condemnation proceedings based upon a petition which contained the averment that the company "can not agree with the defendants

owner.<sup>88</sup> The attempt to agree must be made in good faith, but an attempt to buy at what the company deems a reasonable price has been held sufficient.<sup>89</sup> And where no answer was returned to either of two propositions submitted to the land-owner, the company was permitted to condemn.<sup>90</sup> Where several estates in the same land were held by different persons it was held that an inability to agree with the owner of the fee was sufficient.<sup>91</sup> So it has been held that an effort need not be made to obtain the consent of the mortgagee where the owner of the premises has refused his consent.<sup>92</sup>

**§ 1315 (1028). Petition or articles of appropriation.**—The pleading on the part of a party seeking to secure the condemnation of land is usually called a petition, but in some states it is called the “article of appropriation.” We shall use the term “petition” as designating the pleading or instrument filed by a party who seeks to secure the condemnation of private property. According to some of the authorities a petition for the assessment of damages constitutes a complaint, the sufficiency of

as to the amount of compensation to be paid.” The court said: “This averment conformed to the general law, was sufficient, and it was not necessary to sustain this averment of the petition by oral testimony; nor was it competent for the plaintiff to nullify the effect of the record by denying the truth of such assertion.”

<sup>88</sup> *Doughty v. Somerville R. Co.*, 21 N. J. L. 442. Proof of inability to agree with an agent not disclosing his principal's identity has been held insufficient. *Pittsburg &c. Ry. Co. v. Gage*, 280 Ill. 639, 117 N. E. 726. As to proving an effort to agree, see *Ward v. Minnesota &c. R. Co.*, 119 Ill. 287, 10 N. E. 365; *Bridwell v. Gate City &c. Co.*, 127 Ga. 520, 56 S. E. 624; *Rochester*

*&c. R. Co., In re*, 110 N. Y. 119, 17 N. E. 678; *Niagara &c. R. Co., In re*, 108 N. Y. 375, 15 N. E. 429; *Fort Street &c. Co. v. Jones*, 83 Mich. 415, 47 N. W. 349; *West Virginia &c. Co. v. Volcanic &c. R.*, 5 W. Va. 382. See *Coster v. New Jersey &c. R. Co.*, 23 N. J. L. 227.

<sup>89</sup> *Prospect Park &c. R. Co., Matter of*, 67 N. Y. 371.

<sup>90</sup> *West Virginia Trans. Co. v. Volcanic Oil &c. Co.*, 5 W. Va. 382.

<sup>91</sup> *Toledo &c. R. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271. See also *Thomas v. St. Louis &c. R. Co.*, 164 Ill. 634, 46 N. E. 8.

<sup>92</sup> *Coles v. Midland Tel. &c. Co.*, 67 N. J. L. 490, 51 Atl. 448.

which may be tested as in ordinary actions,<sup>93</sup> but additional pleadings are not contemplated under many of the statutes, and it has been held that if any are filed, they may be stricken from the files on motion.<sup>94</sup> The general rule is that until a proper petition is filed, the court has no power to take any action in the

<sup>93</sup> *Church v. Grand Rapids &c. R. Co.*, 70 Ind. 161. In *Denver &c. R. Co. v. Lamborn*, 8 Colo. 380, 8 Pac. 582, it is said that proceedings to condemn land are special proceedings, and are governed by different rules of pleading and practice. The time and way to object for want of proper title, parties, etc., is by exceptions to the report of the appraisers when it is filed. *Camp v. Coal Creek &c. R. Co.*, 11 Lea (Tenn.) 705. A petition for condemnation for a right of way, containing an accurate description of the property, and alleging the authority of the petitioner to take the property, the names of the occupants and the owners, and the purpose of the taking, and that petitioner has located its line in good faith, is a sufficient compliance with Rev. St. § 1544. *Florida Cent. &c. R. Co. v. Bell*, 43 Fla. 319, 31 So. 259.

<sup>94</sup> *Smith v. Chicago &c. R. Co.*, 105 Ill. 511; *Johnson v. Freeport &c. R. Co.*, 111 Ill. 413. See also *Fayetteville &c. R. Co. v. Hunt*, 51 Ark. 330, 11 S. W. 418; *St. Louis &c. R. Co. v. Postal &c. Co.*, 173 Ill. 508, 51 N. E. 382; *New Orleans &c. R. Co. v. McNeely*, 47 La. Ann. 1298, 17 So. 798; *Sheldon v. Minneapolis &c. R. Co.*, 29 Minn. 318, 13 N. W. 134. But see *Reed v. Ohio &c. R. Co.*, 126 Ill. 48, 17 N. E. 807; *Decatur v. Grand Rapids &c. R. Co.*, 146 Ind. 577, 45

N. E. 793; *Mellichar v. Iowa City*, 116 Iowa 390, 90 N. W. 86. In some jurisdictions provision is made for filing written objections which may not only operate as a demurrer but may raise certain issues of fact to be determined before appraisers are appointed. *Morrison v. Indianapolis &c. R. Co.*, 166 Ind. 511, 76 N. E. 961, 77 N. E. 744. And a cross-petition has been held proper in some cases. *Mix v. Lafayette &c. R. Co.*, 67 Ill. 319; *Port Huron &c. R. Co. v. Voorheis*, 50 Mich. 506, 15 N. W. 882. Under the Illinois statute, where the interests of the defendant are not accurately stated in the petition, a cross-petition may be filed, setting out fully his interests. *Johnson v. Freeport &c. R. Co.*, 116 Ill. 521, 6 N. E. 211. An answer describing land and claiming damage thereto was held to answer the purpose of a cross-petition. *Chicago &c. R. Co. v. Hopkins*, 90 Ill. 316. At whatever stage of the proceedings additional parties are made defendants to such a proceeding, they may, after notice to appear, contest the appropriation. *Baltimore &c. R. Co. v. Pittsburgh &c. R. Co.*, 17 W. Va. 812. An answer is not necessary in Washington, but the property-owner may show value and damage without it. *Postal Tel. &c. Co. v. Northern Pac. R. Co.*, 211 Fed. 824.

premises.<sup>95</sup> Jurisdictional facts must be averred.<sup>96</sup> Proceedings to condemn property under the power of eminent domain are purely statutory, and the statute must be strictly pursued,<sup>97</sup> and the fact that all preliminary requirements of the statute have been met should be stated in the petition,<sup>98</sup> except where the statute provides what the petition shall contain. It is competent for the legislature to prescribe what the petition shall contain, and if it conforms to the statutory requirement it is sufficient. A substantial compliance with the requirements of the statute, as to the form and wording of the petition, is sufficient,<sup>99</sup> but it is held that the omission of any averment required by the statute will render it fatally defective.<sup>1</sup> The allegations of the petition

<sup>95</sup> *Smith v. Chicago &c. R. Co.*, 105 Ill. 511; *Toledo &c. R. Co. v. East Saginaw &c. R. Co.*, 72 Mich. 206, 40 N. W. 436; *Flint &c. R. Co. v. Board &c.*, 72 Mich. 234, 40 N. W. 448.

<sup>96</sup> *Durham &c. R. Co. v. Richmond &c. R. Co.*, 106 N. Car. 16, 10 S. E. 1041, 44 Am & Eng. R. Cas. 168. See *New York &c. R. Co.*, In re, 62 Barb. (N. Y.) 85; *Norton v. Wallkill &c. R. Co.*, 61 Barb. (N. Y.) 476; *St. Louis &c. R. Co. v. Lewright*, 113 Mo. 660, 21 S. W. 210; *Trester v. Missouri Pac. R. Co.*, 33 Nebr. 171, 49 N. W. 1110.

<sup>97</sup> *Colorado Cent. R. Co. v. Allen*, 13 Colo. 229, 22 Pac. 605.

<sup>98</sup> *Colorado Cent. R. Co. v. Allen*, 13 Colo. 229, 22 Pac. 605; *Durham &c. R. Co. v. Richmond &c. R. Co.*, 106 N. Car. 16, 10 S. E. 1041; *Front &c. R. Co.'s Petition*, 1 Pennew. (Del.) 370, 41 Atl. 200.

<sup>99</sup> *Townsend v. Chicago &c. R. Co.*, 91 Ill. 545; *Bowman v. Venice &c. R. Co.*, 102 Ill. 459; *Indianapolis &c. R. Co. v. Christian*, 93 Ind. 360; *Stevens v. Board of Supervisors*, 41 Iowa 341. Where the

statute authorized the land-owner to petition for the assessment of damages, a general statement of the fact that the railroad "angled" across his land was held sufficiently definite to authorize the assessment of damages for land upon which a railroad had already been constructed. *Martinsville &c. R. Co. v. Bridges*, 6 Ind. 400.

<sup>1</sup> *Grove St.*, In re, 61 Cal. 438. (Failure to aver that "public interests required" the improvement.) *Reed v. Ohio &c. R. Co.*, 126 Ill. 48, 17 N. E. 807; *Lake Shore &c. R. Co. v. Cincinnati &c. R. Co.*, 116 Ind. 578, 19 N. E. 440. (Failure to aver an inability to agree.) *Powers v. Irish*, 23 Mich. 429; *Hays v. Campbell*, 17 Ind. 430. (Failure to state names of owners of land taken.) *Durham &c. R. Co. v. Richmond &c. R. Co.*, 106 N. Car. 16, 10 S. E. 1041. (Failure to allege filing of map, giving notice, etc.) *Colorado Cent. R. Co. v. Allen*, 13 Colo. 229, 22 Pac. 605. (No averment of value of property sought to be taken.) See *United States v. Oregon R. &c. Co.*, 16 Fed. 524.

should be positive and not merely by way of recital,<sup>2</sup> and the facts set forth must be definitely stated.<sup>3</sup> The petition must be properly signed, and where the statute requires verification it must be verified by the proper party.<sup>4</sup> A failure to give the names of the owners in the petition has been held to be cause for demurrer,<sup>5</sup> but this defect may be cured by amendment.<sup>6</sup> It has been held sufficient to give the names and residences of a number of land-owners, with a description of the property of each, in schedules attached to the petition.<sup>7</sup> If the name of one joint-owner is contained in the petition it is sufficient to give the court jurisdiction, though where the rights of one, in any material sense, depend upon the disposition of the case as to the others, each party would have a right to insist on all the parties being brought before the court before proceeding to a trial.<sup>8</sup> Where the petition avers ownership on the part of a defendant he need offer no proof of his title,<sup>9</sup> but the character of his estate may be

<sup>2</sup> *Lake Shore &c. R. Co. v. Cincinnati &c. R. Co.*, 116 Ind. 578, 19 N. E. 440.

<sup>3</sup> *Hays v. Campbell*, 17 Ind. 430.

<sup>4</sup> *Harvey v. Lloyd*, 3 Pa. St. 331; *Metropolitan &c. R. Co.*, In re, 7 N. Y. S. 708; *New York &c. R. Co.*, In re, 33 Hun (N. Y.) 148. Verification by attorney held sufficient. *St. Lawrence &c. R. Co.*, In re, 133 N. Y. 270, 31 N. E. 218. As to signature and execution by a corporation or its agent, see *Detroit v. Beecher*, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813; *Trester v. Missouri Pac. R. Co.*, 33 Nebr. 171, 49 N. W. 1110; *Coles v. Midland &c. Co.*, 67 N. J. L. 490, 51 Atl. 448; *Metropolitan El. R. Co.*, In re, 26 N. Y. St. 968, 7 N. Y. S. 707; *Reitenbaugh v. Chester Valley R. Co.*, 21 Pa. St. 100.

<sup>5</sup> *Morton v. Franklin Co.*, 62 Maine 455. See *Hill v. Glendon &c. R. Co.*, 113 N. Car. 259, 18

S. E. 171; *Peoria &c. R. Co. v. Laurie*, 63 Ill. 264; *Union &c. Co. v. Frederick*, 117 Mo. 138, 21 S. W. 1118, 57 Am. & Eng. R. Cas. 656; *California Southern R. Co. v. Colton Land &c. Co. (Cal.)*, 2 Pac. 38.

<sup>6</sup> *Russell v. Turner*, 62 Maine 496; *Washington Ice Co. v. Lay*, 103 Ind. 48, 2 N. E. 222; *Bowman v. Venice &c. R. Co.*, 102 Ill. 459.

<sup>7</sup> *Board of Commissioners, Matter of*, 52 N. Y. 131.

<sup>8</sup> *Bowman v. Venice &c. R. Co.*, 102 Ill. 459. Including as joint owners, persons having no interest in the property is immaterial, if the true owners are named. *Boyd v. Negley*, 40 Pa. St. 377. See generally as to naming owners, *Toledo &c. R. Co. v. Munson*, 57 Mich. 42, 23 N. W. 455; *Thomas v. St. Louis &c. R. Co.*, 164 Ill. 634, 46 N. E. 8.

<sup>9</sup> *Crise v. Auditor*, 17 Ark. 572; *Selma R. Co. v. Camp*, 45 Ga. 180;

inquired into,<sup>10</sup> and it has been held that naming a person as a respondent in proceedings for the condemnation of land is an admission of his title, unless it is expressly denied.<sup>11</sup>

§ 1316. **Limited and unlimited petitions.**—Where the statute does not compel a railroad company to take a certain fixed interest or amount, the company may usually limit the interest or taking in its petition or instrument of appropriation, and, in such case the award of damages will ordinarily be smaller but may not cover future injuries or additional uses, or constitute a bar to future damages, to the extent that it would under a general and less limited petition. If the company has by stipulation or limited petition confined the taking to the right to use in a specified manner or only to a limited extent the damages are usually assessed on that basis and if the company afterwards undertakes to make a change not contemplated therein an action for damages may lie against it; but where the petition and order do not limit the taking the general rule is that the condemning party will acquire the right to constitute or change its works in any way within its powers so long as it is not negligent and does not violate the rights of adjacent land-owners and keeps within the

Peoria &c. R. Co. v. Laurie, 63 Ill. 264; St. Louis &c. R. Co. v. Teters, 68 Ill. 144; Norristown Turnpike Co. v. Burket, 26 Ind. 53; St. Paul &c. R. Co. v. Matthews, 16 Minn. 341; Rippe v. Chicago &c. R. Co., 23 Minn. 18. It is said that in all cases where the land-owner seeks to recover damages for land not taken, he must establish his ownership of the land. St. Paul &c. R. Co. v. Matthews, 16 Minn. 341.

<sup>10</sup> International &c. R. Co. v. Benitos, 59 Tex. 326. The owner is at liberty to show that his title is different from that stated in the petition. Brisbane v. St. Paul &c.

R. Co., 23 Minn. 114. Unless the statute provides for submitting the question of title to them, commissioners to assess damages, can not pass upon questions of title. Spring Valley Water Works v. San Francisco, 22 Cal. 434. As to statement of title in petition, see Sanitary Dist. v. Pittsburgh &c. R. Co., 216 Ill. 575, 75 N. E. 248.

<sup>11</sup> Golden &c. R. Co. v. Haggart, 9 Colo. 346, 12 Pac. 215; Chicago &c. R. Co. v. Hopkins, 90 Ill. 316. See also Tracy v. Mt. Pleasant, 165 Iowa 435, 146 N. W. 78; Flint &c. R. Co. v. Detroit &c. R. Co., 64 Mich. 350, 31 N. W. 281.



limits of the original appropriation.<sup>12</sup> The instrument of appropriation and the order are usually looked to for a description of what was taken and as fixing the basis for the assessment of damages.<sup>13</sup> The petition should be broad enough to authorize the condemnation for the use desired, for the condemnor is usually confined to the use specified therein.<sup>14</sup> And, so, on the other hand, it should not be too broad if only a limited use is desired. If the petition specifies and asks for the condemnation of the entire interest the condemnor can not insist on taking a different and less interest and limiting the compensation to that without amendment or consent of the other party.<sup>15</sup>

**§ 1317 (1029). Contents of the petition.**—In many of the states the petition must state that the taking is necessary for public use,<sup>16</sup> and this, in effect, is required in most of the states.<sup>17</sup>

<sup>12</sup> *Cleveland &c. R. Co. v. Hadley*, 179 Ind. 429, 439, 440, 101 N. E. 473, 45 L. R. A. (N. S.) 796; *Cleveland &c. R. Co. v. Doan*, 47 Ind. App. 322, 94 N. E. 598.

<sup>13</sup> *Southern Ind. R. Co. v. Indianapolis &c. R. Co.*, 168 Ind. 360, 81 N. E. 65, 13 L. R. A. (N. S.) 197; *Cleveland &c. R. Co. v. Hadley*, 179 Ind. 429, 438, 439, 101 N. E. 473, 45 L. R. A. (N. S.) 796.

<sup>14</sup> *Barnes v. Chicago &c. R. Co.* (Tex. Civ. App.), 33 S. W. 601.

<sup>15</sup> *Richmond v. Thompson's Heirs*, 116 Va. 178, 81 S. E. 105.

<sup>16</sup> *Valley R. Co. v. Bohm*, 34 Ohio St. 114; *Atchison &c. R. Co. v. Lyon*, 24 Kans. 745; *South Carolina &c. R. Co. v. Blake*, 9 Rich. L. (S. Car.) 228; *Grand Rapids &c. R. Co. v. Van Drielo*, 24 Mich. 409; *Smith v. Chicago &c. R. Co.*, 105 Ill. 511; *Grove St.*, In re, 61 Cal. 438. See *Louisville &c. R. Co. v. Lang*, 160 Ky. 702, 170 S. W. 2; *Colville v. Judy*, 73 Mo. 651; *Helena v. Harvey*, 6 Mont. 114, 9

*Pac.* 903; *Northwestern Elec. Co. v. Zimmerman*, 67 Ore. 150, 135 Pac. 330, Ann. Cas. 1915C, 927n. The petition must be broad enough to authorize the condemnation for the use desired, for the petitioner will be confined to the use specified in the petition. *Barnes v. Chicago &c. R. Co.* (Tex.), 33 S. W. 601.

<sup>17</sup> In Illinois the statute requires the petition to set forth "the purpose for which said property is sought to be taken," and from this the court is required to judge of the necessity of taking the property, and of the public nature of the use for which it is sought to be taken. *Smith v. Chicago &c. R. Co.*, 105 Ill. 511. See also *Valley R. Co. v. Bohm*, 34 Ohio St. 114; *Broadway &c. R. Co.*, Matter of, 73 Hun 7, 25 N. Y. S. 1080. But as to what is sufficient, see *Fletcher v. Chicago &c. R. Co.*, 67 Minn. 339, 69 N. W. 1085; *Mobile &c. R. Co. v. Postal Tel. &c. Co.*, 120 Ala. 21, 24 So. 408; *Eckart v. Ft.*

It seems to us that even where there is no statute requiring the petition to show that the land is needed for a public use this fact must be alleged, but that the allegation is sufficient if it shows that the land is required for legitimate railroad purposes. The purpose for which property is sought to be taken should be stated that it may be known whether such purpose is within the objects for which land may be taken by authority of the particular statute under which the proceeding is brought.<sup>18</sup> The authority of corporations to take land under the eminent domain should appear in the petition either by reference to the laws under which it was incorporated<sup>19</sup> or by other averments. But in New Jersey, and probably in many of the states, it is not necessary to set out that the borough consented to the location of the route.<sup>20</sup>

**§ 1318. Contents of petition—Description of property.**—In some states the petitioner may, by leave of court, amend the description contained in his petition, and the writ issued thereon for the assessment of damages.<sup>21</sup> If only a general description is required by statute, the courts can not require more,<sup>22</sup> but

Wayne &c. Trac. Co., 181 Ind. 352, 104 N. E. 762; *Clarke v. Chicago &c. R. Co.*, 23 Nebr. 613, 37 N. W. 484. In California it is held that the petition need not contain a statement that the proposed location is compatible with the greatest public good and the least private injury is required. *San Francisco &c. R. Co. v. Leviston*, 134 Cal. 412, 66 Pac. 473.

<sup>18</sup> *New York Central &c. Co., Matter of*, 5 Hun (N. Y.) 86. The petition must show a case within the statute. *Mound City v. Mason*, 262 Ill. 392, 104 N. E. 685; *Westport &c. Co. v. Thomas*, 175 Ind. 319, 94 N. E. 406. See also *Valley Railway Co. v. Bohm*, 34 Ohio St. 114.

<sup>19</sup> *Atkinson v. Marietta &c. R. Co.*, 15 Ohio St. 21. See also *Illinois Cent. R. Co. v. Chicago*,

138 Ill. 453, 28 N. E. 740; *Hartford &c. R. Co. v. Wagner*, 73 Conn. 506, 48 Atl. 218; *Brinkerhoff v. Newark &c. Traction Co.*, 66 N. J. L. 478, 49 Atl. 812. Commissioners appointed in pursuance to such a petition have no authority to pass upon the corporate existence of the petitioner. *Schroeder v. Detroit &c. R. Co.*, 44 Mich. 387, 6 N. W. 872.

<sup>20</sup> *Brinkerhoff v. Newark &c. Traction Co.*, 66 N. J. L. 478, 49 Atl. 812.

<sup>21</sup> *Hunt v. New York &c. R. Co.*, 99 Ind. 593; *Midland R. Co. v. Smith*, 109 Ind. 488, 9 N. E. 474. See also *New York Munic. Ry. Corp. v. Parkhill*, 145 N. Y. S. 447; *City of Chehalis v. Centralia*, 77 Wash. 673, 138 Pac. 293.

<sup>22</sup> *Wright v. Wilson*, 95 Ind. 408.

there should always be a reasonably accurate description of the land sought to be seized.<sup>23</sup> That is certain which can be made certain by references contained in the petition.<sup>24</sup> Stating the

<sup>23</sup> *California &c. R. Co. v. Hooper*, 76 Cal. 404, 18 Pac. 599; *Chicago &c. R. Co. v. Chicago*, 132 Ill. 372, 23 N. E. 1036; *Prather v. Jeffersonville &c. R. Co.*, 52 Ind. 16; *Manistee &c. R. Co. v. Fowler*, 73 Mich. 217, 41 N. W. 261; *Bay City &c. R. Co. v. Hitchcock*, 90 Mich. 533, 51 N. W. 808; *Detroit &c. R. Co. v. Gartner*, 95 Mich. 318, 54 N. W. 946; *Sheldon v. Minneapolis &c. R. Co.*, 29 Minn. 318, 13 N. W. 134; *West v. West &c. R. Co.*, 61 Miss. 536; *St. Louis &c. R. Co. v. Lewright*, 113 Mo. 660, 21 S. W. 210; *Atchison &c. R. Co. v. Boerner*, 34 Nebr. 240, 51 N. W. 842, 33 Am. St. 637; *State v. Hudson &c. R. Co.*, 38 N. J. L. 548; *Metropolitan &c. R. Co. v. Dominick*, 55 Hun 198, 8 N. Y. S. 151; *Ames v. Union Co.*, 17 Ore. 600, 22 Pac. 118, 27 Am. & Eng. Corp. Cas. 60; *O'Hara v. Pennsylvania &c. R. Co.*, 25 Pa. St. 445; *Pennsylvania &c. R. Co. v. Porter*, 29 Pa. St. 165; *Parker v. Fort Worth &c. R. Co.*, 84 Tex. 333, 19 S. W. 518; *Strang v. Beloit &c. R. Co.*, 16 Wis. 635. See also *San Francisco &c. R. Co. v. Gould*, 122 Cal. 601, 55 Pac. 411; *Omaha &c. R. Co. v. Rickards*, 38 Nebr. 847, 57 N. W. 739; *New York Munic. Ry. Corp. v. Parkhill*, 145 N. Y. S. 447; *Houston &c. R. Co. v. Postal &c. Co.*, 18 Tex. Civ. App. 502, 45 S. W. 179, 181 (citing text). Where it is properly described an erroneous statement as to the number of acres will not

render the petition bad. *Illyes v. White River &c. Co.*, 175 Ind. 118, 93 N. E. 670. And it has been held that the decree may correct an erroneous description in the petition. *City of Chelralin v. Centralia*, 77 Wash. 673, 138 Pac. 293.

<sup>24</sup> *Quincy &c. R. Co. v. Kellogg*, 54 Mo. 334; *Miller v. Porter*, 71 Ind. 521; *Illinois Cent. R. Co. v. Lasant*, 167 Ill. 85, 47 N. E. 62; *Suver v. Chicago &c. R. Co.*, 123 Ill. 293, 14 N. E. 12. In a petition and warrant for the assessment of damages occasioned by one railroad building its road across the road of another, the place injured was described as a "part of the land and bridge heretofore held and occupied by the petitioners, for railroad purposes, measuring about five rods in length and forty feet in width and laying a little west of the draw in their bridge from Charleston to Somerville, and nearly contiguous thereto," with a reference added to the field location and actual construction of their road. *Grand Junction &c. R. Co. v. County Comrs.* 14 Gray (Mass.) 553. See *California &c. R. Co. v. Southern &c. R. Co.*, 67 Cal. 59, 7 Pac. 123; *Marion &c. R. Co. v. Ward*, 9 Ind. 123; *Cleveland &c. R. Co. v. Prentice*, 13 Ohio St. 373; *Bennett, Ex parte*, 26 S. Car. 317, 2 S. E. 389; *Ohio River &c. R. Co. v. Harness*, 24 W. Va. 511; *London v. Sample &c. Co.*, 91 Ala. 606, 8 So. 281.

particular eighty acres through which the road would run and the general direction it would follow, with a reference to a map filed with the petition was held a sufficient description.<sup>25</sup> Where a petition describes three different surveys and locations of a railroad, without designating which one it seeks to condemn, it has been held to be a nullity,<sup>26</sup> but we doubt the soundness of this decision, for we think such proceeding could not be assailed collaterally, although the petition would be insufficient as against a direct assault. It is held that a description by reference to the map and survey on file in the county register's office is not sufficient.<sup>27</sup> Where the statute requires the petition to contain a

<sup>25</sup> *Kansas City &c. R. Co. v. Story*, 96 Mo. 611, 10 S. W. 203; *Cory v. Chicago &c. R. Co.*, 100 Mo. 282, 13 S. W. 346, 44 Am. & Eng. R. Cas. 183; *Cincinnati &c. R. Co. v. Bay City &c. R. Co.*, 106 Mich. 473, 64 N. W. 471; *State v. Cent. N. J. &c. Co.*, 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664; *Stillwater &c. R. Co. v. Slade*, 36 App. Div. 587, 55 N. Y. S. 966. Aiding description by reference to maps and plats. *Cory v. Chicago &c. R. Co.*, 100 Mo. 282, 13 S. W. 346, 44 Am. & Eng. R. Cas. 183; *Kansas City &c. R. Co. v. Story*, 96 Mo. 611, 10 S. W. 203; *St. Louis &c. R. Co. v. Fowler*, 113 Mo. 458, 20 S. W. 1069; *New York &c. R. Co.*, In re, 70 N. Y. 191; *Fremont &c. R. Co. v. Mattheis*, 35 Nebr. 48, 52 N. W. 698; *Vail v. Morris &c. R. Co.*, 21 N. J. L. 189. Construction of statutes requiring maps, plans or profiles to be filed. *Chicago &c. R. Co. v. Chicago &c. R. Co.*, 112 Ill. 589; *Johnson v. Towsley*, 13 Wall. (U. S.) 72, 20 L. ed. 485; *Lansdale v. Daniels*, 100 U. S. 113, 25 L. ed. 588; *United States v. McLaughlin*, 30 Fed. 147, 127 U. S. 428, 8 Sup. Ct. 1177, 32

L. ed. 213; *San Francisco &c. R. Co. v. Mahoney*, 29 Cal. 112; *Jacksonville &c. R. Co. v. Adams*, 28 Fla. 631, 10 So. 465, 14 L. R. A. 533; *Chicago &c. R. Co. v. Abbott*, 44 Kans. 170, 24 Pac. 52; *Baltimore &c. Co. v. Morgan's Louisiana &c. Co.*, 37 La. Ann. 883; *Meriam v. Brown*, 128 Mass. 391; *Brock v. Old Colony &c. R. Co.*, 146 Mass. 194, 15 N. E. 555; *Morris &c. Co. v. Central R. Co.*, 16 N. J. Eq. 419; *Doughty v. Somerville &c. Co.*, 21 N. J. L. 442; *South Brooklyn &c. R. Co.*, In re, 50 Hun 405, 2 N. Y. 613; *Wheeling &c. R. Co. v. Camden &c. Co.*, 35 W. Va. 205, 13 S. E. 369.

<sup>26</sup> *Gulf &c. R. Co. v. Mud Creek &c. R. Co.*, 1 Tex. App. Civ. Cas. 169.

<sup>27</sup> *Chicago &c. R. Co. v. Sanford*, 23 Mich. 418. The petition must contain such a description of the land sought to be condemned as will show its location and boundaries. A defective description can not be remedied by a reference in the petition to a deed. *New York &c. R. Co.*, In re, 70 N. Y. 191. But see *Grand Junction &c. R. Co.*

description of each tract of land taken by map or definite survey, it is not sufficient to describe it simply "as staked out upon and across" a certain section.<sup>28</sup> It has been held unnecessary that the petitioner shall embrace in one petition all the descriptions in the county necessary for the construction of the road.<sup>29</sup> Neither should the petition include separate tracts of land lying outside the county except where one tract lies partly within and partly without the county.<sup>30</sup> Describing the land sought to be condemned as a certain number of feet on each side of the center line of the railroad, as the same is located, staked, and marked, has been held sufficient.<sup>31</sup> So, also, it seems, is the description of the right of way as extending diagonally through "a tract of land," from a point near the northeast corner to a point near the southwest corner.<sup>32</sup> A description of a right of way as a strip "about one hundred feet wide" extending across a quarter section "about ten rods north" of the center thereof, however, has been held insufficient.<sup>33</sup> The description should in all cases be sufficiently definite to enable one skilled in such matters to locate it on the ground.<sup>34</sup> The petition should show that the

v. County Comrs., 14 Gray (Mass.) 553; Lancaster v. Augusta Water Dist., 108 Maine 137, 79 Atl. 463, Ann. Cas. 1913A, 1252.

<sup>28</sup> Toledo &c. R. Co. v. Munson, 57 Mich. 42, 23 N. W. 455. But reference to stakes and the like may be sufficient in other cases. Chicago &c. R. Co. v. Swan, 120 Mo. 30, 25 S. W. 534; Suver v. Chicago &c. R. Co., 123 Ill. 293, 14 N. E. 12; West v. West &c. R. Co., 61 Miss. 536.

<sup>29</sup> Marquette &c. R. Co. v. Longyear, 133 Mich. 94, 94 N. W. 670, 10 Det. Leg. N. 111.

<sup>30</sup> Toluca &c. R. Co. v. Haws, 194 Ill. 92, 62 N. E. 312.

<sup>31</sup> Lower v. Chicago &c. R. Co., 59 Iowa 563, 13 N. W. 718; Cleveland &c. R. Co. v. Prentice, 13 Ohio St. 373; State v. Superior

Court, 45 Wash. 321, 88 Pac. 334, 335 (citing text). Such a description will control other parts of the petition inconsistent therewith. Lower v. Chicago &c. R. Co., 59 Iowa 563, 13 N. W. 718.

<sup>32</sup> Indianapolis &c. R. Co. v. Newsom, 54 Ind. 121.

<sup>33</sup> Midland R. Co. v. Smith, 109 Ind. 488, 9 N. E. 474. **See however** where it was also described as lying west of and adjoining a railroad right of way. Joliff v. Muncie Elec. Light Co., 181 Ind. 650, 105 N. E. 234.

<sup>34</sup> Rising Sun &c. Co. v. Hamilton, 50 Ind. 580; Spofford v. Bucksport &c. R. Co., 66 Maine 26; Chicago &c. R. Co. v. Sanford, 23 Mich. 418; Mansfield &c. R. Co. v. Clark, 23 Mich. 519; Toledo &c. R. Co. v. Munson, 57 Mich. 42, 23

property is within the jurisdiction of the court.<sup>35</sup> Some of the courts hold that the petition must state the value of the land sought to be appropriated,<sup>36</sup> but this is not always required.<sup>37</sup> The petitioner in a cross-petition praying for an award of damages to land which is not taken must allege that he is the owner of the tract alleged to be damaged, and if the petitioner desires to question such allegation it must raise the issue by appropriate pleadings.<sup>38</sup>

**§ 1319 (1029a). Petition—Defects and manner of testing.—**

As already stated, in some jurisdictions the petition is treated much as an ordinary complaint. It has been held that it may be demurred to in a proper case,<sup>39</sup> but that a motion to strike out<sup>40</sup> or dismiss it<sup>41</sup> will not lie. Some statutes provide that the defendant may file written objections and that no pleadings other than the petition and that no other pleadings shall be allowed aside from exception to the report of the appraisers. Under such a statute it is held that if the objections challenge the sufficiency

N. W. 455; *Wilkin v. First Division &c. R. Co.*, 16 Minn. 271; *West v. West &c. R. Co.*, 61 Miss. 536; *Quincy &c. R. Co. v. Kellogg*, 54 Mo. 334; *State v. American &c. Co.*, 43 N. J. L. 381; *New York &c. R. Co.*, In re, 90 N. Y. 342; *Hussner v. Brooklyn City R. Co.*, 96 N. Y. 18; *Pennsylvania R. Co. v. Porter*, 29 Pa. St. 165; *Ohio River R. Co. v. Harness*, 24 W. Va. 511. This is also held sufficient in the recent case of *Joliff v. Muncie Elec. Light Co.*, 181 Ind. 650, 105 N. E. 234.

<sup>35</sup> *Collins v. Rupe*, 109 Ind. 340, 10 N. E. 91; *Schoff v. Upper Conn. River &c. Co.*, 57 N. H. 110; *State v. Van Derveer*, 48 N. J. L. 80, 2 Atl. 771.

<sup>36</sup> *Colorado &c. R. Co. v. Allen*, 13 Colo. 229, 22 Pac. 605, 44 Am. & Eng. R. Cas. 193. But see Cali-

*fornia &c. R. Co. v. Southern &c. R. Co.*, 67 Cal. 59, 7 Pac. 123, 20 Am. & Eng. R. Cas. 309; *United States v. Oregon &c. R. Co.*, 16 Fed. 524.

<sup>37</sup> See cases last cited in last preceding note.

<sup>38</sup> *Chicago &c. R. Co. v. Diver*, 213 Ill. 26, 72 N. E. 758. See also *Westport Stone Co. v. Thomas*, 175 Ind. 319, 94 N. E. 406.

<sup>39</sup> *Johnson v. Freeport &c. R. Co.*, 111 Ill. 413; *Parker v. Snohomish Co.*, Super. Ct., 25 Wash. 544, 66 Pac. 154. Compare also *Westport Stone Co. v. Thomas*, 175 Ind. 319, 94 N. E. 406.

<sup>40</sup> *Johnson v. Freeport &c. R. Co.*, 111 Ill. 413.

<sup>41</sup> *Willard v. Boston*, 149 Mass. 176, 21 N. E. 298. See *Cella v. Chicago &c. R. Co.*, 217 Ill. 326, 75 N. E. 373.

of the complaint they perform the office of a demurrer and tender issues of law for the decision of the court.<sup>42</sup> But it is also held that the objection may set up matter not apparent on the face of the complaint and if it does so it does not perform the office of a special demurrer, but of an answer, and thus tenders an issue of fact.<sup>43</sup> The same strictness is not usually required as in a complaint in an ordinary action,<sup>44</sup> and, if the petition is not attacked at the proper time, there are many defects that may be waived or cured by proof.<sup>45</sup>

§ 1320 (1030). **Title.**—After land has been condemned as the property of a defendant, the railroad company can not, without tendering an issue as to the ownership, dispute his title on appeal.<sup>46</sup> Where the land-owner brings the suit, he must show that he has title to the land for which damages are sought;<sup>47</sup> but under some statutes it has been held that the fact of his being

<sup>42</sup> *Westport Stone Co. v. Thomas*, 170 Ind. 91, 83 N. E. 617; *Vandalia Coal Co. v. Indianapolis & C. R. Co.*, 168 Ind. 144, 79 N. E. 1082; *Westport Stone Co. v. Thomas*, 175 Ind. 319, 94 N. E. 406 (and a general denial raises no issue under the statute).

<sup>43</sup> *Westport Stone Co. v. Thomas*, 175 Ind. 319, 94 N. E. 406; *Morrison v. Indianapolis & C. R. Co.*, 166 Ind. 511, 512, 76 N. E. 961, 77 N. E. 744.

<sup>44</sup> *Rochester R. Co. v. Robinson*, 133 N. Y. 242, 30 N. E. 1088; *Martinsville & C. R. Co. v. Bridges*, 6 Ind. 400. But, as already shown, all the necessary jurisdictional facts must be stated.

<sup>45</sup> *New Milford Water Co. v. Watson*, 75 Conn. 237, 53 Atl. 57; *Rochester & C. R. Co. v. Hartshorn*, 26 N. Y. St. 753, 7 N. Y. S. 279; *Washington St. Matter of*, 38 N.

Y. St. 346, 14 N. Y. S. 470. But see as to filing objections under the late Indiana statute, *Morrison v. Indianapolis & C. Ry. Co.*, 166 Ind. 511, 76 N. E. 961, 77 N. E. 744.

<sup>46</sup> *Republican Valley & C. R. Co. v. Hayes*, 13 Nebr. 489, 14 N. W. 521. See also *Enid & C. R. Co. v. Wiley*, 14 Okla. 310, 78 Pac. 96. If the title of a defendant is found to be defective, the railroad company should dismiss the proceedings, or move to set the inquest aside because of his lack of ownership. *Auditor v. Crise*, 20 Ark. 540; *Mayor v. Richardson*, 1 Stew. & P. (Ala.) 12. Evidence of title may be given by producing record in partition proceedings. *Tucker v. Chicago & C. R. Co.*, 91 Wis. 576, 65 N. W. 515.

<sup>47</sup> *Robbins v. Milwaukee & C. R. Co.*, 6 Wis. 636; *Directors v. Railroad Co.*, 7 W. & S. (Pa.) 236.

in possession is prima facie sufficient proof of title,<sup>48</sup> and that evidence to impeach his title can only be offered by the corporation under an answer setting up want of title as a defense.<sup>49</sup> In other states it is held that the corporation is bound to pay for only the title which it has taken, and that one who petitions for damages must prove the nature and extent of his ownership.<sup>50</sup>

§ 1321 (1030a). **Defenses—Questions of law or fact.**—As already shown, many of the condemnation statutes do not contemplate formal pleadings subsequent to the petition, yet it is customary in most jurisdictions to put the case at issue by an answer or other proper pleading, and, in general, the evidence is confined, although not always closely, to such issue or issues.<sup>51</sup> As a general rule the defendant may, by a proper pleading, set up any matters of fact constituting a valid defense.<sup>52</sup> But it has been held that it is not a good defense to show that the corporation is a mere de facto corporation, or is insolvent, or is improperly ex-

<sup>48</sup> *Sacramento Valley R. Co. v. Moffatt*, 7 Cal. 577.

<sup>49</sup> *Daley v. St. Paul*, 7 Minn. 390. Where the company claims title in itself by reason of a former condemnation proceeding against another claimant, the proper remedy for one asserting title to the land has been held to be an action of ejectment. *Webster v. Southeastern R. Co.*, 15 Jur. (Eng.) 73.

<sup>50</sup> *Peoria &c. R. Co. v. Bryant*, 57 Ill. 473; *Winebiddle v. Pennsylvania R. Co.*, 2 Grant's Cas. (Pa.) 32; *Directors &c. R. Co.*, 7 W. & S. (Pa.) 236; *Allyn v. Providence R. Co.*, 4 R. I. 457; *East Tennessee &c. R. Co. v. Love*, 3 Head (Tenn.) 63; *Robbins v. Milwaukee &c. R. Co.*, 6 Wis. 636.

<sup>51</sup> See *Colorado Cen. R. Co. v. Allen*, 13 Colo. 229, 22 Pac. 605; *Mix v. Lafayette &c. R. Co.*, 67 Ill. 319; *Becker v. Philadelphia &c. R.*

*Co.*, 177 Pa. St. 252, 35 Atl. 617; 35 L. R. A. 583; *Barnes v. Chicago &c. R. Co. (Tex.)*, 33 S. W. 601; *Northern Pac. R. Co. v. Coleman*, 3 Wash. 228, 28 Pac. 514; *Postal Tel. Cable Co. v. Northern Pac. Ry.*, 211 Fed. 824 (answer unnecessary in Washington). *Mason v. Iowa Cent. R. Co.*, 131 Iowa 468, 109 N. W. 1 (holding that although formal pleading are not required yet defendant, having undertaken to plead formally by written answer, could not avail itself of an affirmative defense not pleaded). A plea in the nature of a plea in abatement may be filed in a proper case. *Willard v. Boston*, 149 Mass. 176, 21 N. E. 298.

<sup>52</sup> *St. Joseph Terminal R. Co. v. Hannibal &c. R. Co.*, 94 Mo. 635, 6 S. W. 691; *Union Pac. R. Co. v. Colorado &c. Co.*, 30 Colo. 133, 69 Pac. 564, 97 Am. St. 106.



exercising its franchises, nor that there has been a prior condemnation.<sup>53</sup> As in other cases, questions of law are for the court, and questions of fact are generally for the jury or commissioners.<sup>54</sup>

**§ 1322 (1030b). Further of defenses.**—On the general ground that the matter was solely one between the state and the railroad company, and not between the land-owner and the railroad company, it has been held that the land-owner could not urge as a defense that the railroad company had no license to cross or traverse the streets of the town in which the defendant's property was located,<sup>55</sup> or that the condemnor had not obtained the consent of the government to the occupancy of certain public lands required for the enterprise,<sup>56</sup> or that the railroad company improperly occupied a public highway,<sup>57</sup> or that other lands necessary could not be condemned because owned by the state.<sup>58</sup>

<sup>53</sup> *Brown v. Calumet River R. Co.*, 125 Ill. 600, 18 N. E. 283; *Thomas v. St. Louis &c. R. Co.*, 164 Ill. 634, 46 N. E. 8; *Denver Power &c. Co. v. Denver &c. R. Co.*, 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383; *Lester v. Ft. Worth &c. R. Co.* (Tex.), 26 S. W. 166; *Holly Shelter R. Co. v. Newton*, 133 N. Car. 132, 45 S. E. 549, 98 Am. St. 701. See also *Dowie v. Chicago &c. R. Co.*, 214 Ill. 49, 73 N. E. 354. But compare *Great Western &c. R. Co. v. Hawkins*, 30 Ind. App. 557, 66 N. E. 765; *Honaker v. New River &c. R. Co.*, 116 Va. 662, 82 S. E. 727.

<sup>54</sup> As to questions held to be for the court, see *Cincinnati &c. R. Co. v. Ohio Postal Tel. Co.*, 68 Ohio St. 306, 67 N. E. 890, 62 L. R. A. 941; *St. Louis &c. R. Co. v. Southwestern Tel. &c. Co.*, 121 Fed. 276; *Colorado Fuel Co. v. Four Mile R. Co.*, 29 Colo. 90, 66 Pac. 902; *O'Hare v. Chicago &c. R. Co.*, 139 Ill. 151, 28 N. E. 923; *Manistee &c.*

*R. Co. v. Fowler*, 73 Mich. 217, 41 N. W. 261; *Tennessee Cent. R. Co. v. Campbell*, 109 Tenn. 655, 73 S. W. 112. But questions of fact may also be for the court in some instances. As to questions for the jury, see *Kansas City &c. R. Co. v. Vicksburg &c. R. Co.*, 49 La. Ann. 29, 21 So. 144; *Chicago &c. R. Co. v. Huncheon*, 130 Ind. 529, 30 N. E. 636; *Chicago Electric R. Co. v. Chicago &c. R. Co.*, 211 Ill. 352, 71 N. E. 1017.

<sup>55</sup> *Dowie v. Chicago &c. R. Co.*, 214 Ill. 49, 73 N. E. 354; *Pittsburg &c. R. Co. v. Gage*, 280 Ill. 639, 117 N. E. 726.

<sup>56</sup> *Denver Power &c. Co. v. Denver &c. R. Co.*, 30 Colo. 204, 69 Pac. 569.

<sup>57</sup> *Collier v. Union R. Co.*, 113 Tenn. 96, 83 S. W. 155.

<sup>58</sup> *Shamberg v. New Jersey Shore Line R. Co.*, 72 N. J. L. 140, 60 Atl. 46. But this decision was reversed in 64 Atl. 114.

or that the railroad company had not complied with the law as to the completion of the road within the required time,<sup>59</sup> or that the charter of the railroad company was a fraud on the public, in that while it was obtained for general railroad purposes, it was really intended to be operated as a lumber railroad.<sup>60</sup> Similarly, it has been held that a railroad company could not object to the condemnation of its right of way by a telegraph company on the ground that the latter had not obtained leave from the municipal authorities to erect its line through the towns along the proposed route, as required by law.<sup>61</sup> But it has been held that the question of the right of a railroad company to construct and operate a parallel line contrary to statute may be raised in proceedings to construct one of the lines though the line paralleled is in another state, and that it is not necessary to resort to quo warranto.<sup>62</sup> It may be said generally that the selection by a railroad company of the location of its proposed road, being given by statute, courts have no right to deny the exercise of the power of eminent domain to condemn such selected right of way because they think some other location is as good or better and hence it can not be urged as a defense by the land-owner that the railroad company could have selected a better route.<sup>63</sup> Again the question of the good faith of the incorporators can not be raised in the condemnation proceeding. This question, it is said, can be raised only by quo warranto.<sup>64</sup>

<sup>59</sup> *Brinkerhoff v. Newark &c. Trac. Co.*, 66 N. J. L. 478, 49 Atl. 812.

<sup>60</sup> *Holly Shelter R. Co. v. Newton*, 133 N. Car. 132, 45 S. E. 549.

<sup>61</sup> *Union Pac. R. Co. v. Colorado &c. Cable Co.*, 30 Colo. 133, 69 Pac. 564.

<sup>62</sup> *Illinois State Trust Co. v. St. Louis &c. R. Co.*, 208 Ill. 419, 70 N. E. 357.

<sup>63</sup> *Kansas &c. R. Co. v. Northwestern Coal &c. Co.*, 161 Mo. 288, 61 S. W. 684, 51 L. R. A. 936, 84 Am. St. 717.

<sup>64</sup> *Madera R. Co. v. Raymond*

*Granite Co.* 3 Cal. App. 668, 87 Pac. 27. Compare *Colorado &c. R. Co. v. Boagni*, 118 La. 268, 42 So. 932. In an action against a company which had constructed a third track without authority it was held that while it could not institute condemnation proceedings it might nevertheless be considered as a corporation acting in good faith, acquiring easements in aid of the construction of its track by entering into contracts with abutting owners. *Knott v. Manhattan R. Co.*, 187 N. Y. 243, 79 N. E. 1015.

§ 1323 (1031). **Effect of pendency of proceedings to condemn.**—Where a corporation begins proceedings for the condemnation of property, the immediate effect necessarily is to prevent the sale or improvement of such property until the condemnation proceedings are determined, and it would be manifestly unjust to a land-owner that a corporation should be permitted to harass him with a protracted suit or succession of suits for this purpose, and in case the assessment of damages proved to be more than the corporation cared to pay, that it should be at liberty to abandon the proceedings without repaying the costs and damages to which the land-owner has been subjected. In New York, it is held that the court may require the corporation to pay so much of the costs and expenses of the opposite party as may be equitable, as the condition upon which it may discontinue condemnation proceedings begun by it,<sup>65</sup> and a similar view has been taken or suggested by a few other courts.<sup>66</sup> In other states where the right to discontinue is held to be absolute, the courts have intimated that the land-owner could recover by suit any damages to which the suit for condemnation may have subjected him.<sup>67</sup> The only cases, however, where such a recovery has been sustained, at least for more than costs or expenses, so far as we have been able to ascertain, have been actions in tort for the unreasonable and culpable abuse of the power of eminent domain against the owners of property not needed by the corpo-

<sup>65</sup> *Hudson River R. Co. v. Outwater*, 3 Sandf. (N. Y.) 689; *New York &c. R. Co., Matter of*, 1 How. Pr. (N. Y.) N. S. 190; *New York &c. R. Co. v. Nelson*, 152 App. Div. 245, 136 N. Y. S. 514; *Waverly Water Works, Matter of*, 85 N. Y. 478.

<sup>66</sup> See *Clarke v. Manchester*, 56 N. H. 2; *Water Comrs., Matter of*, 31 N. J. L. 72, 86 Am. Dec. 199 and note; *Stevens v. Duck River Nav. Co.*, 1 Sneed (Tenn.) 237; *Manion v. Louisville &c. R. Co.*, 90 Ky. 491, 14 S. W. 532; *St. Louis &c. R.*

*Co. v. Southern R. Co.*, 138 Mo. 591, 39 S. W. 471.

<sup>67</sup> *North Missouri R. Co. v. Lackland*, 25 Mo. 515; *Graff v. Baltimore*, 10 Md. 544; *Gear v. Dubuque &c. R. Co.*, 20 Iowa 523, 89 Am. Dec. 550. See also *Centralia &c. R. Co. v. Henry*, 31 Ill. App. 456; *Isley v. Attica (Ind.)*, 109 N. E. 918; *St. Louis &c. R. Co. v. Cape Girardeau &c. R. Co.*, 126 Mo. App. 272, 102 S. W. 1042; *Kirn v. Cape Girardeau &c. R. Co.*, 124 Mo. App. 271, 101 S. W. 673; *Lohse v. Missouri Pac. R. Co.*, 44 Mo. App. 645.

ration,<sup>68</sup> or for the occupancy of the lands to which all right has been forfeited by a dismissal of the condemnation proceedings, in which case the original entry is held to have been wrongful.<sup>69</sup>

§ 1324 (1032). **Dismissal of proceedings—Effect of.**—The fact that the proceedings were dismissed has been held to be an admission that the taking was not necessary, and, therefore, that the proceedings were not in good faith,<sup>70</sup> but we suppose that the petitioner may explain the dismissal and show that it was in good faith and for sufficient cause. We do not believe that the mere fact of dismissal is conclusive evidence that the petitioner acted in bad faith.<sup>71</sup> In another case, however, it is said that the

<sup>68</sup> *Leisse v. St. Louis &c. R. Co.*, 72 Mo. 561; *Black v. Baltimore*, 50 Md. 235, 33 Am. Rep. 320; *Mayor &c. v. Black*, 56 Md. 333; *McLaughlin v. Municipality*, 5 La. Ann. 504. In *Carson v. Hartford*, 48 Conn. 68, the plaintiff sued to recover for the depreciation in value of his land between the time that the city council voted to lay a street across such land, and caused the owner's damages to be assessed, and the time when it reconsidered its former action and abandoned the improvement, a period of three and one-half years. The court said: "The allegation that the city 'did wrongfully and unnecessarily prolong the proceedings,' is too vague and general to support a judgment. It neither points to an act, nor to an omission to act for the purpose of delay, and is without suggestion as to whether the obstruction was for a day or a year. Moreover, it calls upon us to say that, of legal necessity, the intervention of three and one-half years between the first and last votes would of itself and under all circumstances subject the city to damages. This we

can not do. But, while preserving to the council the privilege of considering after knowledge, we do not say that it can not abuse this privilege nor that as a consequence of such abuse, the city may not be compelled to indemnify land-owners who have suffered loss by inexcusable delay." *Stevens v. Danbury*, 53 Conn. 9, 22 Atl. 1071. See also *Bergman v. St. Paul &c. R. Co.*, 21 Minn. 533.

<sup>69</sup> *Pittsburg &c. R. Co. v. Swinney*, 97 Ind. 586; *Van Valkenburgh v. Milwaukee*, 43 Wis. 574, as explained in *Feiten v. Milwaukee*, 47 Wis. 494, 2 N. W. 1148; *Hullin v. Second Municipality*, 11 Rob.(La.) 97, 43 Am. Dec. 202. But see *Pine Bluff &c. R. Co. v. Kelly*, 78 Ark. 83, 93 S. W. 562. See generally 1 *Elliott Roads and Streets* (3rd ed.), §§ 306, 307, 308; and post § 1326.

<sup>70</sup> *Leisse v. St. Louis &c. R. Co.*, 72 Mo. 561; *McLaughlin v. Municipality*, 5 La. Ann. 504. See also *Pittsburg &c. R. Co. v. Swinney*, 97 Ind. 536; *Simpson v. Kansas City*, 111 Mo. 237, 20 S. W. 38.

<sup>71</sup> *Cooper v. Anniston &c. R. Co.*, 85 Ala. 106, 4 So. 689, 36 Am. & Eng. R. Cas. 581. See also

question whether the corporation was guilty of such a culpable and unreasonable delay in the prosecution and abandonment of proceedings to take land for its use as to amount to actionable negligence was a question for the jury.<sup>72</sup> In most of the cases, however, in which it has been sought to charge a corporation with damages due to the abandonment of condemnation proceedings, before confirmation or possession taken, the courts have denied the right to recover.<sup>73</sup> In several of the states, it is provided by statute that the owner may recover damages for any unreasonable delay in prosecuting or abandoning condemnation proceedings which are not promptly carried to an issue and followed by payment of the damages awarded, or for damages done by cutting or grading in the construction of the road upon a location which is afterward abandoned.<sup>74</sup> Such damages must be sought in a separate suit,<sup>75</sup> unless the statute fixes the damages in

*Simpson v. Kansas City*, 111 Mo. 237, 20 S. W. 38.

<sup>72</sup> *Mayor &c. v. Black*, 56 Md. 333.

<sup>73</sup> *Bergman v. St. Paul &c. R. Co.*, 21 Minn. 533; *Martin v. Brooklyn*, 1 Hill (N. Y.) 545; *Whyte v. Kansas*, 22 Mo. App. 409; *Feiten v. Milwaukee*, 47 Wis. 494, 2 N. W. 1148; *Carson v. Hartford*, 48 Conn. 68. In the first case cited the plaintiff sought to recover for his loss of time, attorney's fees and expenses in defending a condemnation proceeding begun by the defendant and afterward abandoned. The court said: "If the plaintiff is entitled to recover, it must by virtue of some contract, express or implied, or of some positive rule of law conferring upon him a right of action, or upon the ground that defendant has been guilty of tort. Certainly there is no contract here, nor is there any positive rule of law upon which the plaintiff can base a right of action. Neither is there anything

in the complaint tending to show any tortious or malicious conduct on the part of the defendant. On the contrary, defendant's proceedings are expressly admitted to have been duly and regularly taken, and there is nothing whatever to raise a suspicion that defendant's motives in instituting, conducting or dismissing the proceedings were not entirely proper. In other words the complaint does not set up a cause of action in tort, nor assume to do so."

<sup>74</sup> Such damages may be recovered in the absence of any statute in states where the constitution requires the payment of damages to precede the taking, if the corporation secures possession of the property under an award which is set aside, and the proceedings are afterward discontinued. *Pittsburgh &c. R. Co. Swinney*, 97 Ind. 586.

<sup>75</sup> *Drury v. Boston*, 101 Mass. 439.

some way by which they can be definitely ascertained and expressly authorizes the assessment of such damages upon dismissal of the condemnation suit.<sup>76</sup> But a railroad company which dismisses condemnation proceedings and withdraws the condemnation money will be estopped, when sued by the land-owner, to claim that the dismissal was ineffectual and that the land-owner should be required to have his damages assessed in the condemnation proceedings.<sup>77</sup>

§ 1325 (1032a). **Dismissal—Other cases.**—It has been held that where the property is sought to be condemned for a purpose which is partly legal and partly illegal, and it can not be determined how much of the property is necessary for the purpose that is legal, that the proceedings will be dismissed as an entirety.<sup>78</sup> It has also been held that the dismissal of proceedings to condemn land for railroad purposes, as to a portion of the joint owners, for want of service, is practically a dismissal as to all, since it leaves the court without power to proceed further with the inquest.<sup>79</sup> And in another case it was held proper, where there had been an inexcusable delay, for the court to dismiss the proceedings for want of prosecution.<sup>80</sup>

<sup>76</sup> *Minneapolis &c. R. Co. v. Woodworth*, 32 Minn. 452, 21 N. W. 476. In this case the statute provided that if damages awarded were not paid within sixty days after the entry of final judgment the proceedings should be deemed to be abandoned, and the party in whose favor the award was made might have judgment entered against the corporation for damages at the rate of ten per cent. from the date of the award. By another statute the land-owner was permitted to recover his costs and expenses in an abandoned condemnation proceeding, including reasonable attorney's fees. The court held that an adversary pro-

ceeding by which the corporation should be allowed to dispute the amount of the attorney's fees was necessary in order to the allowance of the same, and that the allowance of a fee of \$50 for the land-owner's counsel, upon a dismissal of proceedings for non-payment of the award was unwarranted, and could not be sustained.

<sup>77</sup> *Enid &c. R. Co. v. Wiley*, 14 Okla. 310, 78 Pac. 96.

<sup>78</sup> *Metropolitan Elevated R. Co., In re*, 12 N. Y. S. 506.

<sup>79</sup> *Grand Rapids &c. R. Co. v. Alley*, 34 Mich. 16.

<sup>80</sup> *Sanitary Dist. of Chicago v. Chapin*, 226 Ill. 499, 80 N. E. 1017.

§ 1326 (1033). **Abandonment of proceedings.**—The general rule is that a railroad company may, unless restrained by statute, dismiss its proceedings to condemn land at any time before the rights of the parties have become vested, which in some jurisdictions is on payment and taking possession and in others on judgment of confirmation or final judgment.<sup>81</sup> And this it may do even though it has obtained possession of the premises pending proceedings by depositing in court a sum of money to secure the payment of the assessed damages.<sup>82</sup> But where the company has taken possession pending the proceedings, an abandonment of the proceedings forfeits its right to possession,<sup>83</sup> and renders

<sup>81</sup> See *Eureka &c. R. Co. v. McGrath*, 74 Cal. 49, 15 Pac. 360; *St. Louis &c. R. Co. v. Martin*, 29 Kans. 750; *Manion v. Louisville &c. R. Co.*, 90 Ky. 491, 14 S. W. 532; *Kremer v. Chicago &c. R. Co.*, 51 Minn. 15, 52 N. W. 977, 38 Am. St. 468; *North Missouri R. Co. v. Lackland*, 25 Mo. 515. See also *Chicago v. Goodwillie*, 208 Ill. 252, 70 N. E. 228; *Terre Haute v. Sacks*, 171 Ind. 679, 86 N. E. 45; and elaborate note to *Cunningham v. Memphis R. &c. Co.* (126 Tenn. 343, 149 S. W. 103) in *Ann. Cas.* 1913E, 1058; where the particular rule prevailing in each of the states is given with supporting authorities.

<sup>82</sup> *Union &c. Co. v. Slee*, 123 Ill. 57, 12 N. E. 543; *Leavenworth &c. R. Co. v. Whitaker*, 42 Kans. 634, 22 Pac. 733; *Manion v. Louisville &c. R. Co.*, 90 Ky. 491, 14 S. W. 532, 47 Am. & Eng. R. Cas. 107; *Chicago &c. R. Co. v. Gates*, 120 Ill. 86, 11 N. E. 527, 30 Am. & Eng. R. Cas. 268; *Denver &c. R. Co. v. Lamborn*, 8 Colo. 380, 8 Pac. 582. See *Pittsburgh &c. R. Co. v. Swinney*, 97 Ind. 586. In Illinois,

it is held that the judgment for damages should be absolute where the company is already in possession of the premises. *St. Louis &c. R. Co. v. Teters*, 68 Ill. 144. See *Witt v. St. Paul &c. R. Co.*, 35 Minn. 404, 29 N. W. 161; *Alabama &c. R. Co. v. Newton*, 94 Ala. 443, 10 So. 89; *Crolley v. Minneapolis &c. R.*, 30 Minn. 541, 16 N. W. 422; *Wilcox v. St. Paul &c. R. Co.*, 35 Minn. 439, 29 N. W. 148; *Kremer v. Chicago &c. R. Co.*, 51 Minn. 15, 52 N. W. 977; *North Missouri R. Co. v. Lackland*, 25 Mo. 515; *Cape Girardeau &c. R. Co. v. Dennis*, 67 Mo. 438; *Drath v. Burlington &c. R. Co.*, 15 Nebr. 367, 18 N. W. 717; *Hull v. Chicago &c. R. Co.*, 21 Nebr. 371, 32 N. W. 162; *Syracuse &c. R. Co.*, In re, 4 Hun (N. Y.) 311; *Rhinebeck &c. R. Co.*, In re, 67 N. Y. 242; *Dayton &c. R. Co. v. Marshall*, 11 Ohio St. 497; *State v. Cincinnati &c. R. Co.*, 17 Ohio St. 103; *Pittsburgh &c. R. Co. v. Peet*, 152 Pa. St. 488, 25 Atl. 612, 19 L. R. A. 467.

<sup>83</sup> *Witt v. St. Paul &c. R. Co.*, 35 Minn. 404, 29 N. W. 161. See

the company a trespasser ab initio and liable as such for all damages done while it held possession.<sup>84</sup> The fact that the damages have been assessed does not destroy the right to abandon such proceedings, if the assessment is afterward set aside on appeal.<sup>85</sup> Indeed, the weight of authority holds that the effect of proceed-

Hastings v. Burlington &c. R. Co., 38 Iowa 316; Pittsburgh &c. R. Co. v. Swinney, 97 Ind. 586; Skillman v. Chicago &c. R. Co., 78 Iowa 404, 43 N. W. 275, 16 Am. St. 452; Wilcox v. St. Paul &c. R. Co., 35 Minn. 439, 29 N. W. 148; Green v. Missouri &c. R. Co., 82 Mo. 653; Hatch v. Cincinnati &c. R. Co., 18 Ohio St. 92; Cincinnati &c. R. Co. v. Zinn, 18 Ohio St. 417; First National Bank v. West River &c. R. Co., 49 Vt. 167.

<sup>84</sup> Pittsburgh &c. R. Co. v. Swinney, 97 Ind. 586; Van Valkenburgh v. Milwaukee, 43 Wis. 574; Lee v. Northwestern U. R. Co., 33 Wis. 222; Hullin v. Second Municipality, 11 Rob. (La.) 97, 43 Am. Dec. 202. See however Louisville &c. R. Co. v. Ryan, 64 Miss. 399, 8 So. 173. The license which the statute confers upon a railroad company to take possession of land pending proceedings, upon paying into court the damages as originally assessed by the commissioners, is upon the implied, but none the less evident condition that the company will proceed in good faith, and without unnecessary delay, to have the amount, which it will be required to pay for the land, ascertained and finally established, and that it will, within a reasonable time thereafter, pay to the owner the amount thus finally established. Lee v.

North Western R. Co., 33 Wis. 222; Chicago v. Barbian, 80 Ill. 482; Pittsburgh &c. R. Co. v. Swinney, 97 Ind. 586. See generally Leisse v. St. Louis &c. R. Co., 72 Mo. 561; Centralia &c. R. Co. v. Henry, 31 Ill. App. 456; Gibbons v. Missouri &c. R. Co., 40 Mo. App. 146; Lohse v. Missouri &c. R. Co., 44 Mo. App. 645; Pittsburgh &c. R. Co. v. Reed (Pa. St.), 6 Atl. 838, 34 Pitts. L. J. 191; Lyon v. McDonald, 78 Texas 71, 14 S. W. 261, 9 L. R. A. 295 and note, 47 Am. & Eng. R. Cas. 217. In Pine Bluff &c. R. Co. v. Kelly 78 Ark. 83, 93 S. W. 562, it is held that where the company, on instituting proceedings to condemn land for a right of way, took possession, and used it for a short time, and then abandoned it, the measure of damages is the rental value of the land taken for the time it was occupied, and the depreciation in the value thereof by reason of acts done thereon, and the damage resulting to the other land from the building of the road and from flooding caused by the construction thereof, the time of the occupancy being considered, and that for all other damages occasioned torts done by the company the owner's remedy is by action to recover the same.

<sup>85</sup> Wright v. Wisconsin Central R. Co., 29 Wis. 341; Vail v. Fall



ings for condemnation is simply to fix the price at which the party condemning can take the property, unless the statute gives it some greater effect, and that the company may, within a reasonable time after the judgment or confirmation, abandon its proceedings without incurring any liability to pay the damages awarded.<sup>86</sup> Where, however, the company has taken possession pending proceedings, under a statute permitting it to proceed with the construction of its road upon paying or securing the

Creek Turnp. Co., 32 Ind. 198. When the circuit court ordered a new appraisal of the land the award of the appraisers ceased to be of binding force upon the parties. . . . The subsequent dismissal of the proceedings did not reinstate the award for any purpose. Pittsburgh &c. R. Co. v. Swinney, 97 Ind. 586, 594. See also Denver &c. R. Co. v. Lam-born, 8 Colo. 380, 8 Pac. 582.

<sup>86</sup> Baltimore &c. R. Co. v. Nes-bit, 10 How. (U. S.) 395, 13 L. ed. 469; Denver &c. R. Co. v. Lam-born, 8 Colo. 380, 8 Pac. 582; St. Louis &c. R. Co. v. Teters, 68 Ill. 144; Peoria &c. R. Co. v. Rice, 75 Ill. 329; Winkelman v. Chicago, 213 Ill. 360, 72 N. E. 1066; Evans-ville &c. R. Co. v. Miller, 30 Ind. 209; Gear v. Dubuque &c. R. Co., 20 Iowa 523, 89 Am. Dec. 550; St. Louis &c. R. Co. v. Wilder, 17 Kans. 239; City of Kansas v. Kan-sas Pac. R. Co., 18 Kans. 331; Elizabethtown &c. R. Co. v. Thompson, 79 Ky. 52; Black v. Baltimore, 50 Md. 235, 33 Am. Rep. 320; Commonwealth v. Blue-Hill Turnp. Co., 5 Mass. 420; Derby v. Gage, 60 Mich. 1, 26 N. W. 820; Williams v. New Orleans &c. R. Co., 60 Miss. 689; State v. Hug, 44 Mo. 116; State v. Cincinnati &c. R.

Co., 17 Ohio St. 103; Oregon R. Co. v. Bridwell, 11 Ore. 282, 3 Pac. 684; Schuylkill &c. Nav. Co. v. Decker, 2 Watts (Pa.) 343; Stacey v. Vermont Central R. Co., 27 Vt. 39; Chesapeake &c. R. Co. v. Bradford, 6 W. Va. 220; State v. Mills, 29 Wis. 322. See also Georgia R. &c. Co. v. Mooney, 147 Ga. 212, 93 S. E. 206; Kenakanni v. United States, 244 Fed. 923. The subject is also considered in Ford v. Board, 148 Iowa 1, 126 N. W. 1030, and notes in Ann. Cas. 1912B, 940, and 1916D, 709 (showing that while there is in general no liability to pay the award in such a case, there is conflict of authority as to whether costs and other special damages can be recovered, and in many states this is governed by statute). The courts of Kansas hold that the fact that a railroad company has conducted proceedings to condemn land to completion, and has deposited the condemnation money with the county treasurer, does not prevent it from reclaiming the deposit, if it has made no actual entry on the land, and has abandoned its intention to use the land for such purpose, and has given notification thereof. Atchison &c. R. Co. v. Wilson, 66 Kans. 233, 69 Pac. 342.

damages awarded by the commissioners, an absolute personal judgment should be rendered for the damages assessed on appeal.<sup>87</sup> The courts of Illinois hold that where the right to abandon condemnation proceedings is absolute, the defendant is not entitled on such dismissal to recover counsel fees and expenses in defending the same unless the statutes authorize their recovery.<sup>88</sup> The permission to take possession pending proceedings is necessarily upon the implied condition that the company will pay to the owner the value of the land taken as finally ascertained and determined.<sup>89</sup> In Nebraska, the supreme court has held that a final judgment on appeal from an assessment of damages stands on the same footing as any other judgment, and that execution may issue to collect the same without regard to the future intentions of the company,<sup>90</sup> and a similar conclusion has been reached by the court of appeals of New York.<sup>91</sup> Where the statute provides for issuing an execution upon the award it is

<sup>87</sup> *Peoria &c. R. Co. v. Mitchell*, 74 Ill. 394; *St. Louis &c. R. Co. v. Teters*, 68 Ill. 144; *Carr v. Boone*, 108 Ind. 241, 9 N. E. 110; *Harness v. Chesapeake &c. Canal Co.*, 1 Md. Ch. 248; *Curtis v. St. Paul &c. R. Co.*, 21 Minn. 497; *Robbins v. St. Paul &c. R. Co.*, 24 Minn. 191. *Contra Denver &c. R. Co. v. Lamborn*, 8 Colo. 380, 8 Pac. 582. In *Louisville &c. R. Co. v. Ryan*, 64 Miss. 939, 8 So. 173, it was held that the company should be left at liberty to abandon the location and become liable as a trespasser if it so desired, and that a personal judgment was erroneous. In *Pennsylvania*, the location of a railroad constitutes an appropriation of the land, and the right of the landowner to damages therefor becomes vested as soon as they are assessed, and can not be divested by a change of location made before the commissioner's report is

confirmed. *Beale v. Pennsylvania R. Co.*, 86 Pa. St. 509.

<sup>88</sup> *Winkelman v. Chicago*, 213 Ill. 360, 72 N. E. 1066. See also *Denver &c. R. Co. v. Mills*, 59 Colo. 198, 147 Pac. 681, Ann. Cas. 1916E, 985 and note; *McCready v. Rio Grande &c. R. Co.*, 30 Utah 1, 83 Pac. 331, 8 Ann. Cas. 732; *Gibbs v. Rex. (Can.)*, Ann. Cas. 1916D, 709. <sup>89</sup> *Lee v. Northwestern U. R. Co.*, 33 Wis. 222.

<sup>90</sup> *Drath v. Burlington &c. R. Co.*, 15 Nebr. 367, 18 N. W. 717; *Dietrichs v. Lincoln &c. R. Co.*, 12 Nebr. 225, 10 N. W. 718. See *Brown v. Chicago &c. R. Co.*, 64 Nebr. 62, 89 N. W. 405, where it is held that a railroad company, having abandoned a right of way, is estopped to abandon it, and is bound to pay the award to the land-owner.

<sup>91</sup> *Rhinebeck &c. R. Co., Matter of*, 67 N. Y. 242.

held that the railroad company can not avoid its liability nor defeat the land-owner's right to an execution by the abandonment of its location.<sup>92</sup> An abandonment of the proceedings may be evidenced by a failure to pay the damages awarded within a reasonable time,<sup>93</sup> as well as by affirmative acts done with that end in view. In some states the time within which proceedings to condemn must be abandoned and the acts which will constitute an abandonment are prescribed by statute. Thus under a statute in Missouri, the railroad company may, "within ten days from the return of the assessment, elect to abandon the proposed appropriation of the land by an instrument in writing to that effect to be filed with the clerk;" and a failure to file such an instrument within ten days fixes the rights of the parties under the assessment.<sup>94</sup> The courts of that state hold that the railroad on abandoning the proceedings is liable to the property owner for all costs and expenses, including attorney's fees, in resisting the proceedings.<sup>95</sup> In Tennessee, the petitioner on the trial on appeal can not dismiss the proceeding as to a portion of the land sought to be condemned merely because in its opinion the damages assessed were too high.<sup>96</sup> In states where compensation is not required to precede the taking, the legislature may authorize a railroad corporation to acquire title to lands before

<sup>92</sup> *Neal v. Pittsburgh &c. R. Co.*, 31 Pa. St. 19. After a railroad had been partly constructed over plaintiff's land, and after the damages therefor had been awarded, an act was passed providing that, in case the route was abandoned before the payment of damages the owner should receive only his actual damages. It was held that the right of the owner to the damages awarded was complete before the act was passed, and was not affected by it. *Smart v. Portsmouth &c. R. Co.*, 20 N. H. 233.

<sup>93</sup> *State v. Cincinnati &c. R. Co.*, 17 Ohio St. 103; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306,

73 Am. Dec. 575. See *Chicago &c. R. Co. v. Chamberlain*, 84 Ill. 333; *Pittsburgh &c. R. Co. v. Peet*, 152 Pa. St. 488, 25 Atl. 612, 19 L. R. A. 467; *Ross v. Pennsylvania Co.*, 17 Phila. 339; *Mehle v. New York &c. R. Co.*, 86 Tex. 459, 25 S. W. 607. See also *Alabama Midland R. Co. v. Newton*, 94 Ala. 443, 10 So. 89; *Minneapolis &c. R. Co. v. Woodworth*, 32 Minn. 452, 21 N. W. 476.

<sup>94</sup> *Gray v. St. Louis &c. R. Co.*, 81 Mo. 126.

<sup>95</sup> *Sterrett v. Delmar Ave. &c. Ry. Co.*, 108 Mo. App. 650, 84 S. W. 150.

<sup>96</sup> *Union R. Co. v. Standard Wheel Co.*, 149 Fed. 698.

the institution of proceedings to ascertain their value. In such case, the abandonment of proceedings subsequently brought for this purpose does not affect the land-owner's right to compensation for the original taking and he may enforce payment of the value of his land, although the company never actually occupies the property.<sup>97</sup> In Pennsylvania, it is held that the right to damages vests upon the location of a railroad, and that a change of location before the confirmation of the commissioner's report will not defeat this right.<sup>98</sup> In Wisconsin the railroad company may not, after the filing of the commissioner's report, dismiss the proceeding. The filing is regarded as a judgment fixing the rights of the parties.<sup>99</sup> In Illinois it is held in a case where there was an abandonment after an entry of judgment of condemnation that the measure of damages to which the land-owner was entitled was the difference between the value of the land at the time he could have sold it, but for the pendency of the condemnation proceedings, and its value at the time the proceedings were dismissed.<sup>1</sup> The fact that proceedings for the condemnation of property have been abandoned,<sup>2</sup> does not bar a new proceeding in good faith for the same purpose.<sup>3</sup> Where the statute provided that a failure to pay for or take possession of the land condemned for six months after the assessment of compensation should avoid the effect of the judgment, and cause a forfeiture of all the rights of the corporation in such land, it was held that after the lapse of six months new proceedings could be instituted to take the same land.<sup>4</sup>

<sup>97</sup> Welles v. Cowles, 4 Conn. 182, 10 Am. Dec. 115; Briggs v. Cape Cod &c. Co., 137 Mass. 71; Kimball v. Rockland, 71 Maine 137.

<sup>98</sup> Beale v. Pennsylvania R. Co., 86 Pa. St. 509.

<sup>99</sup> Sprague v. Northern Pac. R. Co., 122 Wis. 509, 100 N. W. 842.

<sup>1</sup> Winkelman v. Chicago, 213 Ill. 360, 72 N. E. 1066.

<sup>2</sup> Corbin v. Cedar Rapids &c. R. Co., 66 Iowa 73, 23 N. W. 270.

<sup>3</sup> Alabama Midland R. Co. v. Newton, 94 Ala. 443, 10 So. 89; Cor-

bin v. Cedar Rapids &c. R. Co., 66 Iowa 73, 23 N. W. 270; Cincinnati Southern R. Co. v. Haas, 42 Ohio St. 239. But see where the abandonment was in bad faith, Chicago &c. R. Co. v. Chicago, 148 Ill. 479, 36 N. E. 72. Neither does the prosecution to final judgment of proceedings which are so defective as not to transfer the title of the property sought. State v. Dover &c. R. Co., 43 N. J. L. 528.

<sup>4</sup> Trustees Cincinnati So. R. Co. v. Haas, 42 Ohio St. 239.

§ 1327 (1034). **Meetings of commissioners or jurors.**—If the order appointing the commissioners fixes a time and place of meeting, they must meet in obedience to the terms of such order, or their proceedings will be invalid.<sup>5</sup> Where the proceedings are in a court of general superior jurisdiction, holding regular terms at times designated by a public law, the parties, having proper notice, must take notice of the time of holding the terms of court and of the proceedings of the court during term.<sup>6</sup> Where the commissioners are allowed to fix the time and place of meeting, and are required to give notice of such meeting to the land-owner, notice must be given. After the jury commissioners have met in obedience to the order on motion they may adjourn to such other time and place as may be reasonably necessary in pursuing their investigations, notice of such adjournment being publicly announced.<sup>7</sup> The adjourned meeting should be regularly convened and a further adjournment had, if necessary, that the continuity of the original meeting may not be broken.<sup>8</sup>

<sup>5</sup> *State v. Capner*, 49 N. J. L. 555, 9 Atl. 781; *Roberts v. Williams*, 13 Ark. 355; *State v. Horn*, 34 Kans. 556, 9 Pac. 208. The parties are entitled to reasonable notice of the time and place of meeting. *Minneapolis &c. R. Co. v. Kanne*, 32 Minn. 174, 19 N. W. 975, 17 Am. & Eng. R. Cas. 122; *Manhattan &c. R. Co. v. Stroub*, 68 Hun 90, 22 N. Y. S. 602. See *Rheiner v. Union &c. R. Co.*, 31 Minn. 289, 17 N. W. 623; *Williams v. Hartford &c. Co.*, 13 Conn. 397; *Chicago &c. R. Co. v. Chamberlain*, 84 Ill. 333; *Roosa v. St. Joseph &c. R. Co.*, 114 Mo. 508, 21 S. W. 1124; *Virginia &c. R. Co. v. Lovejoy*, 8 Nev. 100; *State v. Capner*, 49 N. J. L. 555, 9 Atl. 781; *Ruhland v. Jones*, 55 Wis. 673, 13 N. W. 689; *Gill v. Milwaukee &c. R. Co.*, 76 Wis. 293, 45 N. W. 23.

<sup>6</sup> *St. Louis v. Gleason*, 15 Mo.

App. 25; *Board v. Magoon*, 109 Ill. 142; *Thorndike v. County Commissioners*, 117 Mass. 566. See *Exchange Alley, Matter of*, 4 La. Ann. 4; *New Orleans &c. R. Co. v. Bougere*, 23 La. Ann. 803.

<sup>7</sup> *Goodwin v. Wethersfield*, 43 Conn. 437; *Polly v. Saratoga &c. R. Co.*, 9 Barb. (N. Y.) 449; *Leavenworth v. Meyer*, 50 Kans. 25, 31 Pac. 700; *Butman v. Fowler*, 17 Ohio 101. See *Memphis &c. R. Co. v. Parsons &c.*, 26 Kans. 503; *Michigan &c. R. Co. v. Probate Judge*, 48 Mich. 638, 14 Am. & Eng. R. Cas. 351; *Masters v. McHolland*, 12 Kans. 17; *Commonwealth v. County Commissioners*, 8 Pick. (Mass.) 343; *Pegler v. Highway Commissioners*, 34 Mich. 359.

<sup>8</sup> *State v. Capner*, 49 N. J. L. 555, 9 Atl. 781; *McPherson v. Holdridge*, 24 Ill. 38.

§ 1328 (1035). **Open and close.**—In New York it has been held that it rests in the discretion of the commissioners to decide which party shall open and close.<sup>9</sup> In some states the landowner has been held entitled to this privilege, as having the affirmative of the issue as to the value of the land,<sup>10</sup> while in others this right has been held to be with whichever party brings the action.<sup>11</sup> There is much conflict of opinion, and a general rule can not be safely stated,<sup>12</sup> but the better rule would seem to be that where the railroad company institutes the proceedings and has the burden of proof it should have the open and close.<sup>13</sup>

§ 1329 (1035a). **Evidence generally.**—As upon the question of the right to open and close, so upon the question as to the burden of proof, there is some conflict among the authorities, but much depends upon the particular question and the way in

<sup>9</sup> Albany &c. R. Co. v. Lansing, 16 Barb. (N. Y.) 68; New York &c. R. Co., In re, 33 Hun (N. Y.) 148. See to the same effect Charleston &c. R. Co. v. Blake, 12 Rich. L. (S. Car.) 634.

<sup>10</sup> Springfield &c. R. Co. v. Rhea, 44 Ark. 258; Evansville &c. R. Co. v. Miller, 30 Ind. 209; Indiana &c. R. Co. v. Cook, 102 Ind. 133, 26 N. E. 203; Connecticut River R. Co. v. Clapp, 1 Cush. (Mass.) 559; Burt v. Wigglesworth, 117 Mass. 302; Minnesota Valley R. Co. v. Doran, 17 Minn. 188; St. Paul &c. R. Co. v. Murphy, 19 Minn. 500; Omaha &c. R. Co. v. Umstead, 17 Nebr. 459, 23 N. W. 350; Oregon &c. R. Co. v. Barlow, 3 Ore. 311; Charleston &c. R. Co. v. Blake, 12 Rich. L. (S. Car.) 634.

<sup>11</sup> McReynolds v. Burlington &c. R. Co., 106 Ill. 152; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co., 17 W. Va. 812; Montgomery &c. R. Co. v. Sayre, 72 Ala. 443; Harrison v. Young, 9 Ga. 359.

<sup>12</sup> Springfield &c. R. Co. v. Rhea, 44 Ark. 258; Indiana &c. R. Co. v.

Cook, 102 Ind. 133, 26 N. W. 203; Connecticut &c. R. Co. v. Clapp, 1 Cush. (Mass.) 559; Burt v. Wigglesworth, 117 Mass. 302; St. Louis &c. R. Co. v. North, 31 Mo. App. 345; Omaha &c. R. Co. v. Walker, 17 Nebr. 432, 23 N. W. 348; Morris &c. R. Co. v. Bonnell, 34 N. J. L. 474; Oregon &c. R. Co. v. Barlow, 3 Ore. 311; Gainesville &c. R. Co. v. Waples, 3 Tex. App. Civil Cas. 482; Bellingham &c. R. Co. v. Strand, 4 Wash. 311, 30 Pac. 144, 51 Am. & Eng. R. Cas. 608; Seattle &c. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. 720. See also "The Right to begin and reply in Special Proceedings," 25 Cent. L. J. 483.

<sup>13</sup> Williams v. Macon &c. R. Co., 94 Ga. 709, 21 S. E. 997; McReynolds v. Burlington &c. R. Co., 106 Ill. 152; Ft. Worth &c. R. Co. v. Culver (Tex. Civ. App.), 14 S. W. 1013; Seattle &c. R. Co. v. Gilchrist, 4 Wash. 509, 30 Pac. 738; Seattle &c. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. 720; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co., 17 W. Va. 812. See 1 Elliott Ev. § 138.

which it is presented. Ordinarily, we think, the burden is upon the petitioner to show at least such controverted jurisdictional facts as entitle it to condemn.<sup>14</sup> But as to some questions the burden has been held to be upon the land-owner,<sup>15</sup> and in many instances it has been held to be upon him to show the amount of his damages.<sup>16</sup> Where the corporate existence of the railroad company seeking to condemn land is properly challenged, it is

<sup>14</sup> *Postal Tel. &c. Co. v. Northern Pac. R. Co.*, 211 Fed. 824; *Pittsburgh &c. R. Co. v. Gage*, 280 Ill. 639, 117 N. E. 726; *Chicago v. Lehman*, 262 Ill. 468, 104 N. E. 829; *Terre Haute &c. R. Co. v. Flora*, 29 Ind. App. 442, 64 N. E. 648; *Chicago &c. R. Co. v. Porter*, 43 Minn. 527, 46 N. W. 75; *Minneapolis &c. R. Co. v. Hartland*, 85 Minn. 76, 88 N. W. 423; *Ellis v. Pacific R. Co.*, 51 Mo. 200; *Kountze v. Morris Aqueduct*, 58 N. J. L. 303, 33 Atl. 252; *Carolina &c. R. Co. v. Pennearden Lumber &c. Co.*, 132 N. Car. 644, 44 S. E. 358; *Cleveland &c. R. Co. v. Ohio Postal Tel. &c. Co.*, 68 Ohio St. 306, 67 N. E. 890, 62 L. R. A. 941; *Robinson v. Pennsylvania R. Co.*, 161 Pa. St. 561, 29 Atl. 268; *Wisconsin Cent. R. Co. v. Kneale*, 79 Wis. 89, 48 N. W. 248. As to what is sufficient proof of incorporation, see *Peoria &c. R. Co. v. Peoria &c. R. Co.*, 105 Ill. 110; *Milwaukee Southern R. Co.*, In re, 124 Wis. 490, 102 N. W. 401. As to proof of inability to agree, see *Lake Shore &c. R. Co. v. Baltimore &c. R. Co.*, 149 Ill. 272, 37 N. E. 91; *Grand Rapids &c. R. Co. v. Weiden*, 70 Mich. 390, 38 N. W. 294. In *Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27, it is held that the burden is on the company to show a

public use, but that the good faith of the corporators in forming the corporation can not be questioned. In *Southern Ill. &c. Co. v. Stone*, 194 Mo. 175, 92 S. W. 475, it is held that inability to agree may be shown by facts and circumstances.

<sup>15</sup> *Douglas v. Indianapolis &c. Traction Co.*, 37 Ind. App. 332, 76 N. E. 892; *Minneapolis &c. R. Co. v. Hartland*, 85 Minn. 76, 88 N. W. 423; *Chicago &c. R. Co. v. Cook*, 43 Kans. 83, 22 Pac. 988; *Hyde Park v. Dunham*, 85 Ill. 569 (on cross-petition).

<sup>16</sup> *Colorado Cent. R. Co. v. Allen*, 13 Colo. 229, 22 Pac. 605; *Evansville &c. R. Co. v. Miller*, 30 Ind. 209; *Douglas v. Indianapolis &c. Traction Co.*, 37 Ind. App. 332, 76 N. E. 892. See also *Los Angeles Co. v. Reyes*, 97 Cal. 17, 32 Pac. 233; *Oregon &c. R. Co. v. Barlow*, 3 Ore. 311; *Omaha &c. R. Co. v. Walker*, 17 Nebr. 432, 23 N. W. 348; *New Milford Water Co. v. Watson*, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57. But compare *Seattle &c. R. Co. v. Murphine*, 4 Wash. 448, 30 Pac. 720; *Elliott Roads and Streets* (3d ed.), § 398. In several of these cases, however, the property owner had appealed or affirmatively raised the question and it was the only question to be tried.

incumbent on it to show that it is either a *de jure* or *de facto* corporation.<sup>17</sup> The rules of evidence are the same in most respects, as in ordinary civil cases, except in so far as the nature of the proceedings may, in some respects, require a departure from strict rules.<sup>18</sup> But as the jury or commissioners usually view the premises, and this, whether strictly evidence or not, has an important bearing upon the case, and as the tribunal, in the first instance at least, is often not expert in the law, and for other reasons peculiar to the nature of the proceedings, a considerable latitude is often allowed and the ordinary rules of evidence are not always strictly applied.<sup>19</sup> In two recent cases an interesting question arose as to evidence of noise, and its effect, caused by the construction and operation of a railroad. In one of them, which was a proceeding to recover damages to abutting property from the construction and operation of an elevated railway in the street, the testimony of the keeper of a restaurant on the premises that on several occasions people who came there went out, saying: "We can't talk here. Let us get out of here, and eat somewhere where we can talk and hear ourselves"—was held admissible as showing the effect of the noise of the railway.<sup>20</sup> In the other, which was a proceeding to condemn land for a railroad right of way, it was held that

<sup>17</sup> *Morrison v. Indianapolis &c. R. Co.*, 166 Ind. 511, 76 N. E. 961.

<sup>18</sup> See *Ball v. Keokuk &c. R. Co.*, 71 Iowa 306, 32 N. W. 354. See also *Central Pac. R. Co. v. Pearson*, 35 Cal. 247; *Denver Power &c. Co. v. Denver &c. R. Co.*, 30 Colo. 204, 69 Pac. 568, '60 L. R. A. 383; *Washington &c. R. Co. v. Switzer*, 26 Grat. (Va.) 661; *Elliott Roads and Streets* (3d ed.), § 394; post, § 1335.

<sup>19</sup> See *St. Paul &c. R. Co. v. Covell*, 2 Dak. 483, 11 N. W. 106; *Port Huron &c. R. Co. v. Voorheis*, 50 Mich. 506, 15 N. W. 882; *Gage v. Judson*, 111 Fed. 350; *Columbia &c. Co. v. Geisse*, 36 N. J. L. 537; *White Plains &c. Comrs.*, In re, 71

App. Div. 544, 76 N. Y. S. 11; post, § 1335. It has been held proper to instruct that the purpose of the view was to better enable the jury to understand the testimony and to more intelligently apply it to the issues, and that they should consider the evidence in the light of their view, but determine the facts from the evidence alone. *Guinn v. Iowa &c. R. Co.*, 131 Iowa 680, 109 N. W. 209. See post § 1336, notes 343, 344 for authorities on both sides of this question; also *Baltimore v. Megary*, 122 Md. 20, 89 Atl. 331.

<sup>20</sup> *Pierson v. Boston &c. R. Co.*, 191 Mass. 223, 77 N. E. 769.



the trial court did not err in admitting the reproduction of sounds claimed to have been made by the operation of trains in proximity to the defendant's hotel, by means of a phonograph, a sufficient foundation having been first laid for the same.<sup>21</sup> In another case it was held that an instrument binding a landowner to convey a right of way to a railroad company on payment of a certain sum, specified as liquidated damages, was conclusive on the question of the amount of damages, though the instrument did not bind the company to do anything, but it was shown that it was obtained by the railroad company for the purpose of constructing its road and the company was afterward permitted to enter on and appropriate the land on the faith of the agreement.<sup>22</sup> Maps shown to be correct representations of the locus in quo have been held admissible as valuable aids to the jury in the consideration of the case.<sup>23</sup>

**§ 1330 (1036). Evidence of value—Illustrative instances.—**

It is held that evidence of the selling value of lands in the neighborhood may be given as tending to establish a basis from which

<sup>21</sup> *Boyne City &c. R. Co. v. Anderson*, 146 Mich. 328, 109 N. W. 429.

<sup>22</sup> *Chicago &c. R. Co. v. Douglass*, 33 Tex. Civ. App. 262, 76 S. W. 449.

<sup>23</sup> *Cox v. Philadelphia &c. R. Co.*, 215 Pa. St. 506, 64 Atl. 729. And photographs, not too remote, have been held admissible. *Hubbell v. Des Moines*, 166 Iowa 581, 147 N. W. 908, Ann. Cas. 1916E, 592. See also *Atlanta &c. R. Co. v. Atlanta &c. R. Co.*, 125 Ga. 529, 54 S. E. 736. The last case just cited was a suit for injunction against a railroad company to prevent the laying of its tracks and operation of its trains along a street of a city by one alleging himself to be the owner of the fee in the street subject to the easement, and also the owner of the abutting property,

and alleging that the proposed use of the street against his will, and without the condemnation proceedings authorized by law, was an unlawful taking and damaging of his property; and it not appearing from the evidence offered by the plaintiff that he suffered any special damage other than the mere fact of taking his property, it was held not erroneous for the court, on the hearing of the case for interlocutory injunction, to exclude as irrelevant and immaterial an affidavit offered by the defendant to the effect that the construction of the road along the street would increase the values of the abutting property. It was also held not erroneous to admit an affidavit of the surveyor attached to a plat of the land.

the land-owner's damages can be assessed in cases where the land taken is not shown to have any definite market value,<sup>24</sup> but as a general rule where there is a definite market value that value should be taken as the basis for estimating compensation.<sup>25</sup> Evidence of actual sales of such lands has been held admissible in cases where the market value of the land sought to be condemned was in dispute,<sup>26</sup> though other authorities hold such evidence inadmissible<sup>27</sup> upon the ground that it is the general

<sup>24</sup> *San Diego &c. R. Co. v. Neale*, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; *Chicago &c. R. Co. v. Chicago &c. Co.*, 112 Ill. 589; *Concordia Cemetery Assn. v. Minnesota &c. R. Co.*, 121 Ill. 199. See generally *Greeley &c. R. Co. v. Yount*, 7 Colo. App. 189, 42 Pac. 1023; *Dixon v. Baltimore &c. R. Co.*, 1 Mackey (D. C.) 78; *Pingery v. Cherokee &c. R. Co.*, 78 Iowa 438, 43 N. W. 285; *Teele v. Boston*, 165 Mass. 88, 42 N. E. 506; *Friday v. Pennsylvania R. Co.*, 204 Pa. St. 405, 54 Atl. 339; *Condemnation for New State House, In re*, 19 R. I. 382, 33 Atl. 523; *Calvert &c. R. Co. v. Smith* (Tex. Civ. App.), 68 S. W. 68. See also note in *Ann. Cas.* 1916E, 598. Where property devoted to a certain use—as a quarry—is sought to be taken in condemnation proceedings it may be shown that the county in which the land was situated was not a market in which a purchaser of the property could be expected to be found. *Seattle &c. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. 864.

<sup>25</sup> *Little Rock &c. R. Co. v. Woodruff*, 49 Ark. 381, 4 Am. St. 51, 5 S. W. 792; *Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. 224; *Colorado &c. R. Co. v. Brown*, 15 Colo.

193, 25 Pac. 87; *Kiernan v. Chicago &c. R. Co.*, 123 Ill. 188, 14 N. E. 18; *Kansas City &c. R. Co. v. Fisher*, 49 Kans. 17, 30 Pac. 111; *Missouri &c. R. Co. v. Porter*, 112 Mo. 361, 20 S. W. 568; *Currie v. Waverly &c. R. Co.*, 52 N. J. L. 381, 20 Atl. 56, 19 Am. St. 452 and note, 44 Am. & Eng. R. Cas. 100; *Pittsburgh &c. R. Co. v. Patterson*, 107 Pa. St. 461. Evidence of diminution in mere mortgage value is, it seems, inadmissible, and at all events, evidence that persons applied to were unwilling to loan on mortgage on the property an amount which had been loaned on it is not competent as evidence of diminution in market value. *Piereson v. Boston &c. R. Co.*, 191 Mass. 223, 77 N. E. 769.

<sup>26</sup> *King v. Iowa Midland R. Co.*, 34 Iowa 458 (but see Iowa case cited in note 34); *Edmonds v. Boston*, 108 Mass. 535; *Boston &c. R. Co. v. Old Colony &c. R. Co.*, 3 Allen (Mass.) 142; *Concord R. Co. v. Greely*, 23 N. H. 237; *March v. Portsmouth &c. R. Co.*, 19 N. H. 372; *Lewisburg &c. R. Co. v. Hinds*, 134 Tenn. 293, 183 S. W. 985; *Seattle &c. R. Co. v. Gilchrist*, 4 Wash. 509, 30 Pac. 738.

<sup>27</sup> *Central Pacific R. Co. v. Pearson*, 35 Cal. 247; *Union R. &c. Co.*

selling price of land in the neighborhood which is the test of its value, and not the price paid for particular pieces of property.<sup>28</sup> The sales proven must have been of land similar in character and location to that condemned, and must have been made near the time of the taking.<sup>29</sup> But some of the cases hold that whether offered evidence is sufficient in these regards is largely in the discretion of the officer or judge presiding.<sup>30</sup> Such sales, to be admissible in evidence, must have been voluntary. The price

v. Moore, 80 Ind. 458; Stinson v. Chicago &c. R. Co., 27 Minn. 284, 6 N. W. 784; Witmark v. New York &c. R. Co., 149 N. Y. 393, 44 N. E. 78; Pittsburgh &c. R. Co. v. Rose, 74 Pa. St. 362; Pennsylvania &c. R. Co. v. Bunnell, 81 Pa. St. 414; Curtin v. Nittany Valley R. Co., 135 Pa. St. 20, 19 Atl. 740; Hewitt v. Pittsburgh &c. R. Co., 19 Pa. Super. Ct. 304. The consideration named in deeds for contiguous lands is not admissible in proof of the value of the land sought to be condemned. Seefeld v. Chicago &c. R. Co., 67 Wis. 96, 29 N. W. 904; Esch v. Chicago &c. R. Co., 72 Wis. 229, 39 N. W. 129.

<sup>28</sup> A particular sale may be a sacrifice compelled by necessity, or it may be the result of mere caprice or folly. Pittsburgh &c. R. Co. v. Patterson, 107 Pa. St. 461; Pittsburgh &c. R. Co. v. Vance, 115 Pa. St. 325, 8 Atl. 764; Curtin v. Nittany Valley R. Co., 135 Pa. St. 20, 19 Atl. 740. See also *In re East 161st St.*, 159 App. Div. 662, 144 N. Y. S. 717.

<sup>29</sup> *San Jose &c. R. Co. v. Mayne*, 83 Cal. 566, 23 Pac. 522; *Fleuriston v. Central Ga. &c. Co.*, 140 Ga. 511, 79 S. E. 148; *St. Louis &c. R. Co. v. Guswelle*, 236 Ill. 214, 86 N. E. 230; *Peoria Gaslight &c. Co. v.*

*Peoria &c. R. Co.*, 146 Ill. 372, 34 N. E. 550, 31 L. R. A. 373; *St. Louis Elec. Term. R. Co. v. Mac-Adams*, 257 Mo. 448, 166 S. W. 307; *Laing v. United N. J. &c. Co.*, 54 N. J. L. 576, 25 Atl. 409, 33 Am. St. 682. The value of the land before the location of the road may be shown preparatory to showing what it was worth after the road was constructed. *Durham &c. R. Co. v. Bullock Church*, 104 N. Car. 525, 10 S. E. 761.

<sup>30</sup> *Shattuck v. Stoneham Branch R. Co.*, 6 Allen (Mass.) 115; *Teele v. Boston*, 165 Mass. 88, 42 N. E. 506; *Presbrey v. Old Colony &c. R. Co.*, 103 Mass. 1; *Burley v. Old Colony R. Co.*, 219 Mass. 483, 107 N. E. 365; *Stinson v. Chicago &c. R. Co.*, 27 Minn. 284, 6 N. W. 784; *Montclair R. Co. v. Benson*, 36 N. J. L. 557. See also *St. Louis &c. R. Co. v. Guswelle*, 236 Ill. 214, 86 N. E. 230 (held properly exercised in excluding evidence as too remote); *Chicago R. R. Co. v. Heidenreich*, 254 Ill. 231, 98 N. E. 567, Ann. Cas. 1913C, 266. For instances of the abuse of this discretion leading to a reversal of the case, *Chandler v. Jamaica Pond &c. Co.*, 122 Mass. 305; *Paine v. Boston*, 4 Allen (Mass.) 168; *LaMont v. St. Louis &c. R. Co.*, 62 Iowa

paid upon condemnation of similar property,<sup>31</sup> or by agreement with the owner as a gross sum both for the land purchased and for damages resulting to the residue from the construction of the railroads,<sup>32</sup> is to be excluded as evidence.<sup>33</sup> We incline to doubt the soundness of the cases which hold evidence of particular sales to be competent as substantive independent proof of value, although we think it may be proper to test the knowledge of witnesses by asking them, on cross-examination, whether they know of such sales. It seems to us that to permit evidence in chief of particular sales is to let in collateral questions and lead to confusion and error. We believe the true rule is to confine the question to the market value.<sup>34</sup> The land-owner is at liberty, as a general rule, to prove every fact which he would naturally be expected to adduce as enhancing the price at a

193, 17 N. W. 465. Where there is no similarity between the land taken and other lots in the vicinity, it is error to admit evidence of the value of such lots. *Cummins v. Des Moines &c. R. Co.*, 63 Iowa 397, 19 N. W. 268, note in Ann. Cas. 1916E, 601.

<sup>31</sup> *Bemis v. Springfield*, 122 Mass. 110; *White v. Fitchburgh &c. R. Co.*, 4 Cush. (Mass.) 440; *Wyman v. Lexington &c. R. Co.*, 13 Metc. (Mass.) 316. See also *Chicago v. Lehmann*, 262 Ill. 468, 104 N. E. 829.

<sup>32</sup> *Presbrey v. Old Colony &c. Co.*, 103 Mass. 1; *Cobb v. Boston*, 112 Mass. 181.

<sup>33</sup> See also *Peoria Gaslight &c. Co. v. Peoria &c. R. Co.* 146 Ill. 372, 34 N. E. 550, 31 L. R. A. 373.

<sup>34</sup> *Mississippi &c. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *Payne v. Kansas &c. R. Co.*, 46 Fed. 546; *Harrison v. Young*, 9 Ga. 359; *Chicago &c. R. Co. v. Bowman*, 122 Ill. 595, 13 N. E. 814; *Trustees v. Horshman*, 262 Ill. 72,

104 N. E. 235; *Doud v. Mason City &c. R. Co.*, 76 Iowa 438, 41 N. W. 65; *Watkins v. Wabash R. Co.*, 137 Iowa 441, 113 N. W. 924; *Hubbell v. Des Moines*, 166 Iowa 581, 147 N. W. 908, Ann. Cas. 1916E, 592 (where many cases on both sides are cited in note and the annotator says that the weight of authority is the other way); *Kansas City &c. R. Co. v. Weidenmann*, 77 Kans. 300, 94 Pac. 146; *Kansas City &c. R. Co. v. Splitlog*, 45 Kans. 68, 25 Pac. 202; *Kansas City &c. R. Co. v. Kennedy*, 49 Kans. 19, 30 Pac. 126; *Stinson v. Chicago &c. R. Co.*, 27 Minn. 284, 6 N. W. 784; *Giesy v. Cincinnati R. Co.*, 4 Ohio St. 308; *Neeley v. Western Allegheny R. Co.*, 219 Pa. St. 349, 68 Atl. 829; *Robinson v. New York El. R. Co.*, 175 N. Y. 219, 67 N. E. 431; *Esch v. Chicago &c. R. Co.*, 72 Wis. 229, 39 N. W. 129, 36 Am. & Eng. R. Cas. 620; (but see *American States Sec. Co. v. Milwaukee &c. R. Co.*, 139 Wis. 199, 120 N. W. 844); *Elliott v. § 180*.

private sale.<sup>35</sup> On the other hand, the defendant company may offer such evidence as will put the jury in possession of all those facts about which a prudent purchaser would inquire,<sup>36</sup> and will usually be permitted to prove them on cross-examination of the plaintiff, where he testifies in his own behalf as to the value of his land.<sup>37</sup> It is held that the company may prove the price paid by the owner for his land<sup>38</sup> as tending to show its value. But the

<sup>35</sup> Little Rock &c. R. Co. v. Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. 51; Ohio Co. v. Kerth, 130 Ind. 314, 30 N. E. 298; Chicago &c. R. Co. v. Davidson, 49 Kans. 589, 31 Pac. 131; Montana &c. R. Co. v. Warren, 6 Mont. 275, 12 Pac. 641; Cincinnati &c. R. Co. v. Longworth, 30 Ohio St. 108; Condemnation for New State House, In re, 19 R. I. 382, 33 Atl. 523. Building operations in process of completion on land at some distance from the land taken can not be shown in evidence, to increase the speculative price of the land as the possible site for buildings, in case the former venture should prove a success. Schuylkill River &c. R. Co. v. Stocker, 128 Pa. St. 233, 18 Atl. 399. See Hooker v. Montpelier &c. R. Co., 62 Vt. 47, 19 Atl. 775; Washburn v. Milwaukee &c. R. Co., 59 Wis. 364, 18 N. W. 328; South Park &c. v. Dunlevy, 91 Ill. 49; Tracy v. Mt. Pleasant, 165 Iowa 435, 146 N. W. 78; Sherman v. St. Paul &c. R. Co., 30 Minn. 227, 15 N. W. 239; King v. Minneapolis &c. R. Co., 32 Minn. 224, 20 N. W. 135. But the peculiar value attached to the land by the owner is not to be taken as basis of estimate. Mississippi &c. Co. v. Ring, 58 Mo. 491. See De Buol v. Freeport &c. R. Co., 111

Ill. 499. For illustrative cases of what may be considered, see also Sanitary Dist. v. Pittsburg &c. R. Co., 216 Ill. 575, 75 N. E. 248; Levenson v. Boston El. R. Co., 191 Mass. 75, 77 N. E. 635; Conan v. Ely, 91 Minn. 127, 97 N. W. 737; Cot v. Philadelphia &c. R. Co., 215 Pa. St. 506, 64 Atl. 729, 114 Am. St. 979.

<sup>36</sup> Little Rock &c. R. Co. v. Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. 51; Cameron v. Chicago &c. R. Co., 51 Minn. 153, 53 N. W. 199. See generally Chicago &c. R. Co. v. Catholic &c., 119 Ill. 525, 10 N. E. 372; Stebbing v. Metropolitan &c., L. R. 6 Q. B. 37; Somerville &c. R. Co. v. Doughty, 22 N. J. L. 495; Pittsburg &c. R. Co. v. Vance, 115 Pa. St. 325, 8 Atl. 764; Dupuis v. Chicago &c. R. Co., 115 Ill. 97, 3 N. E. 720, 23 Am. & Eng. R. Cas. 93.

<sup>37</sup> Edmands v. Boston, 108 Mass. 535; St. Louis &c. R. Co. v. Smith, 42 Ark. 265. But see San Antonio &c. R. Co. v. Ruby, 80 Tex. 172, 15 S. W. 1040. For a case in which the cross-examination let in explanatory evidence in rebuttal, see Port Townsend &c. R. Co. v. Barbare, 46 Wash. 275, 89 Pac. 710.

<sup>38</sup> Ham v. Salem, 100 Mass. 350; Swan v. Middlesex County, 101

owner may show by way of explanation, the circumstances under which he bought, the condition of the property at the time, the improvement he has made upon it, and any general advance in prices by which the property has been benefited.<sup>39</sup> An offer on his part to sell the land at a fixed price, and the actual sale of a part of it may be proven as admissions of the owner as to its value.<sup>40</sup> The company may give, as original evidence, the admissions of the owner as to the value of his land, made at or near the time it was taken.<sup>41</sup> So a lease executed by the op-

Mass. 173; *Sexton v. North Bridge-water*, 116 Mass. 200; *St. Louis &c. R. Co. v. Smith*, 42 Ark. 265. But not what he paid for it seventeen years (*Davis v. Pennsylvania R. Co.*, 215 Pa. St. 581, 64 Atl. 774), or even ten years before (*Sullivan v. Missouri &c. R. Co.*, 29 Tex. Civ. App. 429, 68 S. W. 745).

<sup>39</sup> *St. Louis &c. R. Co. v. Smith*, 42 Ark. 265; *Ham v. Salem*, 100 Mass. 350.

<sup>40</sup> *East Brandywine &c. R. Co. v. Ranck*, 78 Pa. St. 454. See also *Springer v. Chicago*, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609 and note; *Halstead v. Vandalia R. Co.*, 48 Ind. App. 96, 95 N. E. 439 (instruction to consider price paid where it had been shown in evidence); *Power v. Savannah &c. R. Co.*, 56 Ga. 471. The railroad company may prove that the owner sold the land in question before the action but after the railroad was located across it, and the price for which it was sold. Such evidence is admissible as an admission of the owner that the property was worth that price even with the railroad across it. *Watson v. Milwaukee &c. R. Co.*, 57 Wis. 332, 15 N. W. 468.

<sup>41</sup> *Power v. Savannah &c. R. Co.*,

56 Ga. 471; *Central Branch R. Co. v. Andrews*, 37 Kans. 162, 641, 16 Pac. 338; *Leroy &c. R. Co. v. Butts*, 40 Kans. 159, 19 Pac. 625; *Webber v. Eastern R. Co.*, 2 Metc. (Mass.) 147; *Concord R. Co. v. Greely*, 23 N. H. 237; *East Brandywine &c. R. Co. v. Ranck*, 78 Pa. St. 454; *Watson v. Milwaukee &c. R. Co.*, 57 Wis. 332, 15 N. W. 468. The sworn valuation placed upon his property by a land-owner in making a return of the property to the assessor for taxation, was held not admissible as original evidence against him in fixing the value upon condemnation, though it was held admissible to discredit the owner's evidence. *Virginia &c. R. Co. v. Henry*, 8 Nev. 165. And the same holding was made as to an assessment list signed by the land-owner, but in which the values were fixed by the assessor. *San Jose &c. R. Co. v. Mayne*, 83 Cal. 566, 23 Pac. 522. So, in Arkansas, upon the ground that the valuation in the assessment for taxation was "made for a different purpose, and was not a fair criterion of the market value." *Texas &c. R. Co. v. Eddy*, 42 Ark. 527; *Springfield &c. R. Co. v. Rhea*, 44 Ark. 258. See *Brown v. Provi-*

erators of a quarry to the owners fixing a royalty has been held admissible as tending to fix the value of the land and the leasehold.<sup>42</sup> Where the owner dies pending suit, his admissions may be proven against his personal representatives.<sup>43</sup> But a witness can not state his mere impressions as to what the owner has said concerning the value of his property.<sup>44</sup> The owner has been allowed to prove the price offered for the property a short time before its condemnation as tending to show that it has a special value above the general market value of surrounding property,<sup>45</sup> but most authorities hold that evidence of unaccepted offers made by third persons<sup>46</sup> or by the condemning corporation<sup>47</sup> are inad-

dence &c. R. Co., 5 Gray (Mass.) 35. But in *Birmingham Mineral R. Co. v. Smith*, 89 Ala. 305, 7 So. 634, the court held that the owner's sworn valuation was an admission on his part as to the value of his property, remarking: "If his unsworn declarations and admissions are admissible against him, certainly his estimate of the value, made under the solemnity of an oath is equally admissible as a declaration or admission. Such valuation is not conclusive upon him, but dependent for its weight upon the circumstances."

<sup>42</sup> *Seattle &c. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. 864.

<sup>43</sup> *Power v. Savannah &c. R. Co.*, 56 Ga. 471; *Central Branch R. Co. v. Andrews*, 37 Kans. 641, 16 Pac. 338.

<sup>44</sup> *New York &c. R. Co., Matter of*, 33 Hun (N. Y.) 231.

<sup>45</sup> *Johnson v. Freeport &c. R. Co.*, 111 Ill. 413. See also *Chicago v. Lehman*, 262 Ill. 468, 104 N. E. 829 (may prove bona fide offers for cash).

<sup>46</sup> *Selma &c. R. Co. v. Keith*, 53

Ga. 178; *Drury v. Midland R. Co.*, 127 Mass. 571; *St. Joseph &c. R. Co. v. Orr*, 8 Kans. 419; *Watson v. Milwaukee &c. R. Co.*, 57 Wis. 332, 15 N. W. 468; *Eastern Texas R. Co. v. Eddings*, 30 Tex. Civ. App. 170, 70 S. W. 98 (offer made five years before); *Stanley v. Sumrell* (Tex. Civ. App.), 163 S. W. 697. The owner's refusal to part with the premises for an offered sum may have proceeded from a special fondness for the land or from an opinion on his part that it would some day be a profitable investment, and can not be taken as evidence of the value of the land. *Pennsylvania &c. R. Co. v. Cleary*, 125 Pa. St. 442, 11 Am. St. 913, 17 Atl. 468.

<sup>47</sup> *Davis v. Charles River Branch R. Co.*, 11 Cush. (Mass.) 506; *Upton v. South Reading Branch R. Co.*, 8 Cush. (Mass.) 600. The award of commissioners appointed to appraise the land can not be introduced as evidence of its value in the trial of an appeal from such award. *Sherman v. St. Paul &c. R. Co.*, 30 Minn. 227, 15 N. W. 239; *Ennis v. Wood River &c.*

missible to fix the value of the land. Unexecuted offers and agreements for the purchase of similar lands in the neighborhood are never competent evidence for this purpose.<sup>48</sup> The fact that the land sold for a particular sum shortly after the railroad was laid across it has been held entitled to great weight in getting at its value as depreciated by the location of the road.<sup>49</sup>

**§ 1331 (1036a). Evidence of value—Further illustrative instances.**—Evidence that the rates of insurance are increased by reason of the proximity of the railroad to the property in question, has been held admissible<sup>50</sup> and conversely where the landowner claims damages by reason of increased exposure it is held proper for the railroad company to show that the rates will not be increased by the construction of the road.<sup>51</sup> Where, however, the land-owner has disclaimed any right to recover damages for increased fire risk, evidence showing insurance rates on his building and on the buildings of others in the city is irrelevant.<sup>52</sup> Where valuable fruit trees stand on the land appropriated for right of way their value may be shown by proof of the value of the land with and without the trees thereon.<sup>53</sup> It has been held not improper to admit the report of commissioners first assessing damages in a later reassessment proceeding, providing the jury

Railroad, 12 R. I. 73. It is incompetent to prove that, after proceedings are commenced, the company offered and an agent of the owner agreed to accept a certain price for the property. *Chicago &c. R. Co. v. Catholic Bishop*, 119 Ill. 525.

<sup>48</sup> *Davis v. Charles River &c. R. Co.*, 11 Cush. (Mass.) 506; *Winnissimmet Co. v. Grueby*, 111 Mass. 543; *Lehmicke v. St. Paul &c. R. Co.*, 19 Minn. 464; *Concord R. Co. v. Greely*, 23 N. H. 237; *Montclair R. Co. v. Benson*, 36 N. J. L. 557.

<sup>49</sup> *Watson v. Milwaukee &c. R. Co.*, 57 Wis. 332, 15 N. W. 468. The necessities of the railroad

company can not be proved for the purposes of augmenting damages. *Virginia &c. R. Co. v. Elliott*, 5 Nev. 358; *Boston &c. Co.*, In re, 22 Hun (N. Y.) 176; *Black River &c. Co. v. Barnard*, 9 Hun (N. Y.) 104. See *New York &c. R. Co.*, In re, 27 Hun (N. Y.) 116, and *DeBuol v. Freeport &c. R. Co.*, 111 Ill. 499.

<sup>50</sup> *Cedar Rapids &c. Co. v. Raymond*, 37 Minn. 204, 33 N. W. 704.

<sup>51</sup> *North Arkansas R. Co. v. Cole*, 71 Ark. 38, 70 S. W. 312.

<sup>52</sup> *Boyne City &c. R. Co. v. Anderson*, 146 Mich. 328, 109 N. W. 429.

<sup>53</sup> *Foote v. Lorain &c. R. Co.*, 21 Ohio Cir. Ct. 319, 11 O. C. D. 685.



were instructed that they were not to allow the amount awarded by the commissioners to influence their judgment as the amount of damages. The admission of such evidence was justified on the ground that it was necessary for the jury to know the amount of the former award in order that credit might be given the landowner for the amount paid, and that interest might be awarded the railroad company for the excess in case the damages found by the jury should exceed that awarded by the commissioners.<sup>54</sup> It is clear that evidence as to the intent of the company in constructing its road, does not respond to the issue before the jury, which is solely as to the damage caused by the taking of the land, and should be excluded.<sup>55</sup> In a comparatively recent case, which was an action to enjoin the operation of an elevated railroad on a certain street unless the owner of an abutting tract was compensated for his damages, evidence of the value and of the rental value of the entire hotel property, which not only included such tract, but extended back to another street, was admitted, and this was held erroneous, but it was also held that the error was cured by cross-examination disclosing the value put on each part of the entire property.<sup>56</sup> And in another and still more recent case it is held that while evidence of the adaptability of the property for other than its present use is admissible, the jury should not be told to consider such adaptability.<sup>57</sup>

<sup>54</sup> *Kansas City &c. R. Co. v. McElroy*, 161 Mo. 584, 61 S. W. 871. But, as shown in the preceding section, a former award is usually inadmissible; and the award of damages made by the commissioners in a railroad condemnation case and included in their report is not competent evidence of defendant's damages on trial of the case in the circuit court on appeal. *Halstead v. Vandalia R. Co.*, 48 Ind. App. 96, 95 N. E. 439.

<sup>55</sup> *Chicago &c. R. Co. v. Loer*, 27 Ind. App. 245, 60 N. E. 319.

<sup>56</sup> *Shaw v. New York &c. R. Co.*, 187 N. Y. 186, 79 N. E. 984. It was

also held that an expert might testify the same general course of appreciation in values would have prevailed in the locality as elsewhere if it had not been for such road. It was the second trial of the action, and, although a company to which the road had been leased subsequent to the first trial was made a party, it was also held that testimony of a witness who had died on the first trial might be read in evidence.

<sup>57</sup> *David v. Louisville &c. R. Co.*, 158 Ky. 721, 166 S. W. 230; *Bray v. Lardy*, 182 Ind. 98, 105 N. E. 772.

**§ 1332 (1036b). Tax lists and assessments as evidence of value.**—Where the owner makes out and swears to his own tax list or schedule and places the value upon the property himself it has been held that it is admissible against him as in the nature of an admission.<sup>58</sup> But the weight of authority is to the effect that such evidence is not ordinarily admissible, except, perhaps, to discredit him.<sup>59</sup> And it seems clear that it is not competent where the valuation is made by the assessor and not by the owner.<sup>60</sup>

**§ 1333 (1037). Competency of witnesses.**—It may be said generally that any competent witness acquainted with the land taken and having knowledge of the market price of such land is competent to testify as to its value.<sup>61</sup> Such a witness does not

<sup>58</sup> Birmingham &c. R. Co. v. Smith, 89 Ala. 305, 7 So. 634. See also King v. Turnbull &c. Co., 8 Can. Exch. 163; Beckwith v. Talbot, 2 Colo. 639; Vernon Shell Road v. Mayor &c., 95 Ga. 387, 22 S. E. 625; Indiana &c. Tract. Co. v. Benadum, 42 Ind. App. 121, 83 N. E. 261; Mifflin Bridge Co. v. County of Juniata, 144 Pa. St. 365, 22 Atl. 896, 13 L. R. A. 431; Chambersburg Turnpike Road, In re, 20 Pa. Super. Ct. 173.

<sup>59</sup> Texas &c. R. Co. v. Eddy, 42 Ark. 527; San Jose &c. Co. v. Mayne, 83 Cal. 566, 23 Pac. 522; Dudley v. Minnesota &c. R. Co., 77 Iowa 408, 42 N. W. 359; New Orleans &c. R. Co. v. Barton, 43 La. Ann. 171, 9 So. 19; Virginia &c. R. Co. v. Henry, 8 Nev. 165; Wray v. Knoxville &c. R. Co., 113 Tenn. 544, 82 S. W. 471. See also to same effect Cincinnati &c. R. Co. v. McDougall, 108 Ind. 179 (distinguished, however, in the Indiana case cited in last preceding note). The refusal of a court to

permit a railroad company to show on cross-examination of the owner of platted property sought to be condemned that he had for many years returned the land for taxation as acreage property and not as lots and blocks can not be complained of, unless it is shown that the valuation by acreage was less than by lots and blocks. Calvert &c. R. Co. v. Smith (Tex. Civ. App.), 68 S. W. 68.

<sup>60</sup> Anthony v. New York &c. R. Co., 162 Mass. 60, 37 N. E. 780; Suffolk &c. R. Co. v. West End &c. Co., 137 N. Car. 330, 49 So. 350, 68 L. R. A. 333; Ridley v. Seaboard &c. R. Co., 124 N. Car. 37, 32 S. E. 379; Nelson v. West Duluth, 55 Minn. 497, 57 N. W. 149; 1 Elliott Ev. § 181.

<sup>61</sup> Selma &c. R. Co. v. Keith, 53 Ga. 178; Illinois &c. R. Co. v. Von Horn, 18 Ill. 257; Lafayette &c. R. Co. v. Winslow, 66 Ill. 219; Evansville &c. R. Co. v. Cochran, 10 Ind. 560; Frankfort &c. R. Co. v. Windsor, 51 Ind. 238; Henry v.

testify as an expert having peculiar skill or scientific attainments, but as having knowledge of the value of property.<sup>62</sup> The weight of the testimony depends in a great degree, of course, upon the knowledge of the witness and the facts upon which his testimony is based. An owner of land taken for a right of way by a railroad company, who has resided upon and improved it for several years, and who swears that he knows what it is worth, is a competent witness,<sup>63</sup> but he has only the same standing as any other witness of equal knowledge, and it is error for the court by its instructions to call special attention to the land-owner's testimony.<sup>64</sup> So, a former owner of the leasehold who has a general familiarity with such values in the neighborhood is competent to express an opinion on the value of the leasehold.<sup>65</sup> A farmer living near and knowing the market value of land in the neighborhood,<sup>66</sup> or who has examined the land with a view of buying

Dubuque &c. R. Co., 2 Iowa 288; Harrison v. Iowa Midland R. Co., 36 Iowa 323; Snow v. Boston &c. R. Co., 65 Maine 230; Russell v. Horn Pond Branch R. Co., 4 Gray (Mass.) 607; Wyman v. Lexington &c. R. Co., 13 Metc. (Mass.) 316; Tucker v. Massachusetts R. Co., 118 Mass. 546; Lehmicke v. St. Paul &c. R. Co., 19 Minn. 464; Sherwood v. St. Paul &c. R. Co., 21 Minn. 127; Tate v. Missouri &c. R. Co., 64 Mo. 149; Republican Valley R. Co. v. Arnold, 13 Nebr. 485, 14 N. W. 478; Troy &c. R. Co. v. Lee, 13 Barb. (N. Y.) 169; Troy &c. R. Co. v. Northern Turnp. Co., 16 Barb. (N. Y.) 100; Rondout &c. R. Co. v. Deys, 5 Lans. (N. Y.) 298; Cleveland &c. R. Co. v. Ball, 5 Ohio St. 568; East Pennsylvania R. Co. v. Hiester, 40 Pa. St. 53; Pittsburg &c. R. Co. v. Rose, 74 Pa. St. 362; Dallas &c. R. Co. v. Chenault, 4 Tex. App. Civ. Cas. 171, 16 S. W. 173; Snyder

v. Western Union R. Co., 25 Wis. 60; 1 Elliott Ev. § 685.

<sup>62</sup> Johnson v. Freeport &c. R. Co., 11 Ill. 413; Diedrich v. Northwestern &c. R. Co., 47 Wis. 662, 3 N. W. 749; Frankfort &c. R. Co. v. Windsor, 51 Ind. 238; Snow v. Boston &c. R. Co., 65 Maine 230; Shattuck v. Stoneham Branch R. Co., 6 Allen (Mass.) 115. See Uniacke v. Chicago &c. R. Co., 67 Wis. 108, 29 N. W. 899.

<sup>63</sup> Burlington &c. R. Co. v. Schluntz, 14 Nebr. 421; Sioux City &c. R. Co. v. Weimer, 16 Nebr. 272, 20 N. W. 349; Edmands v. Boston, 108 Mass. 535.

<sup>64</sup> Jacksonville &c. R. Co. v. Walsh, 106 Ill. 253.

<sup>65</sup> Coons v. McKees Rock Borough, 243 Pa. 340, 90 Atl. 141. See also Cluck v. Houston &c. R. Co., 34 Tex. Civ. App. 452, 79 S. W. 80.

<sup>66</sup> Pingery v. Cherokee &c. R. Co., 78 Iowa 438, 43 N. W. 285; Kansas Central R. Co. v. Allen, 24

it,<sup>67</sup> or a real estate man who has been dealing in lots near those sought to be condemned,<sup>68</sup> or an officer who has assessed the property for taxation,<sup>69</sup> or, in general, any person who is shown to be familiar with the value of the particular piece of land across which the railroad is being built,<sup>70</sup> is a competent witness as to

Kans. 33; Leroy &c. R. Co. v. Hawks, 39 Kans. 638, 18 Pac. 943, 7 Am. St. 566; Leroy &c. R. Co. v. Ross, 40 Kans. 598, 20 Pac. 197, 2 L. R. A. 217 and note; Chicago &c. R. Co. v. Cosper, 42 Kans. 561, 22 Pac. 634; Russell v. Horn Pond Branch R. Co., 4 Gray (Mass.) 607; Northeastern Nebraska R. Co. v. Frazier, 25 Nebr. 53, 40 N. W. 609; Robertson v. Knapp, 35 N. Y. 91; Curtin v. Nittany Valley R. Co., 135 Pa. St. 20, 19 Atl. 740; Snyder v. Western U. R. Co., 25 Wis. 60. Contra, Buffum v. New York &c. R. Co., 4 R. I. 221. In Brown v. Providence &c. R. Co., 12 R. I. 238, it was held that farmers were only competent to say how much land was worth for farming purposes, and not to say what it was worth generally.

<sup>67</sup> Pittsburg &c. R. Co. v. Reed (Pa. St.), 6 Atl. 838, 28 Am. & Eng. R. Cas. 233.

<sup>68</sup> Central Branch R. Co. v. Andrews, 37 Kans. 162, 14 Pac. 509. Any person knowing the selling price of lots in the vicinity may express an opinion as to the value of the land taken. Pittsburg &c. R. Co. v. Robinson, 95 Pa. St. 426. And, in general, any person who has bought or sold land in the vicinity is a competent witness. Houston &c. R. Co. v. Knapp, 51 Tex. 592; Snow v. Boston &c. R.

Co., 65 Maine 230; Curtis v. St. Paul &c. R. Co., 20 Minn. 28; Swan v. Middlesex Co., 101 Mass. 173, Diedrich v. Northwestern U. R. Co., 47 Wis. 662, 3 N. W. 749; Carter v. Thurston, 58 N. H. 104, 42 Am. Rep. 584.

<sup>69</sup> Brown v. Providence &c. R. Co., 5 Gray (Mass.) 35; Oregon Cascade R. Co. v. Vaily, 3 Ore. 164. The official return of municipal assessors fixing the value of the land for purposes of taxation is not admissible in evidence; the officer must be examined under oath. Webber v. Eastern R. Co., 2 Metc. (Mass.) 147; Dudley v. Minnesota &c. R. Co., 77 Iowa 408, 42 N. W. 359. See Birmingham Mineral R. Co. v. Smith, 89 Ala. 305, 7 So. 634; San Jose &c. R. Co. v. Mayne, 83 Cal. 566, 23 Pac. 522.

<sup>70</sup> Blakeley v. Chicago &c. R. Co., 25 Nebr. 207, 40 N. W. 956; Sioux City &c. R. Co. v. Weimer, 16 Nebr. 272, 20 N. W. 349; Republican Valley R. Co. v. Arnold, 13 Nebr. 485, 14 N. W. 478. Persons who have acted as commissioners in assessing damages for similar land taken for public use are competent witnesses as to its value. Webber v. Eastern R. Co., 2 Metc. (Mass.) 147; Dickenson v. Fitchburg, 13 Gray (Mass.) 546. And the fact that the witness was himself a viewer to assess damages in

its value.<sup>71</sup> The usual rule in such cases is to call a witness, and ask him, generally, if he has knowledge of the value of the property in question, or property of that kind. If he answers that he has, he is allowed to state the value in his judgment, and on cross-examination his means of knowledge, or qualifications to testify upon the subject, may be particularly inquired into. If he shows, upon the cross-examination, that he has such knowledge, although his knowledge of values is limited, his testimony is still permitted to go to the jury for what it is worth.<sup>72</sup> But there is no presumption in favor of the competency of a witness who

the same case does not render him incompetent as a witness when the question of damages comes before a jury on appeal. *Dorlan v. East Brandywine &c. R. Co.*, 46 Pa. St. 520. A witness may be asked as to his having previously testified in similar proceedings, in order to test his qualifications. *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544.

<sup>71</sup> In *Winklemans v. Des Moines &c. R. Co.*, 62 Iowa 11, 17 N. W. 82, the court held that the fact that a witness, examined as to the value of land, based his estimate upon what he heard others say in relation thereto, will not render him incompetent, but his knowledge may be fully tested on cross-examination, that the jury may judge of the value of his opinion. The court said: "The knowledge which qualifies a witness to testify as to values, must necessarily consist largely of hearsay. The examination of market reports, and information acquired from others, as to sales of property qualifies a witness to testify as to values." It is not necessary that the witness should himself have been upon the land. *Lehmick v. St. Paul &c. R.*

*Co.*, 19 Minn. 464. But in *Le Roy &c. R. Co. v. Ross*, 40 Kans. 598, 2 L. R. A. 217 and note, the court says: "The opinion of no farmer not living in the neighborhood of the land and not acquainted with its situation and fertility, its advantages, disadvantages, etc., ought to be received in regard to the value of the land. Farmers not employed in buying and selling real estate, and having no knowledge of the facts in issue, ought not to be permitted to give their opinions from a map of the route of the road, and upon hearsay evidence only." *Leroy &c. R. Co. v. Hawk*, 39 Kans. 638, 18 Pac. 943, 7 Am. St. 566.

<sup>72</sup> *Johnson v. Freeport &c. R. Co.*, 111 Ill. 413; *Winklemans v. Des Moines &c. R. Co.*, 62 Iowa 11, 17 N. W. 82; *Snow v. Boston &c. R. Co.*, 65 Maine 230; *Swan v. Middlesex Co.*, 101 Mass. 173; *Sherwood v. St. Paul &c. R. Co.*, 21 Minn. 127; *Carter v. Thurston*, 58 N. H. 104, 42 Am. Rep. 584; *Houston &c. R. Co. v. Knapp*, 51 Tex. 592; *Farrand v. Chicago &c. R. Co.*, 21 Wis. 435; *Diedrich v. Northwestern R. Co.*, 47 Wis. 662, 3 N. W. 749. See *Minnesota &c.*

offers to testify as to the value of land; and where his competency is challenged it must be shown that he has some knowledge upon which to base an opinion as to its value.<sup>73</sup> The extent of his knowledge should be shown to enable the jury to assign to his evidence the proper weight,<sup>74</sup> and it is proper, within reasonable limits, for a witness in his examination in chief to give the reasons upon which his opinion is based.<sup>75</sup> An objection to the competency of a witness must generally be made when he is

*R. Co. v. Gluek*, 45 Minn. 463, 48 N. W. 194; *Wyman v. Lexington &c. R. Co.*, 13 Metc. (Ky.) 316; *Chicago &c. R. Co. v. Woodward*, 48 Kans. 599, 29 Pac. 1146; *Birmingham &c. R. Co. v. Smith*, 89 Ala. 305, 7 So. 634; 1 Elliott Ev. § 635.

<sup>73</sup> *Missouri Pac. R. Co. v. Coon*, 15 Nebr. 232, 18 N. W. 62; *Boston &c. R. Co. v. Montgomery*, 119 Mass. 114; *Central Pac. R. Co. v. Pearson*, 35 Cal. 247; *Buffum v. New York &c. R. Co.*, 4 R. I. 221. See also 1 Elliott Ev. § 635. In *Markowitz v. Pittsburg &c. R. Co.*, 216 Pa. St. 535, 65 Atl. 1097, 1098, it is held that the competency of the witness is a preliminary question to be passed upon by the court after proper examination, before the witness is permitted to testify as to the value, and it is said: "The witness should have some special opportunity for observation, and, to a reasonable extent, have in his mind the data from which a proper estimate of value ought to be made. *Pittsburg &c. R. Co. v. Vance*, 115 Pa. 325, 8 Atl. 764. He should be familiar with the property upon which he is asked to fix a value, its area, the uses to which it may be put, the extent and condition of

its improvements, and, in addition thereto, should have some knowledge of values in the neighborhood and the general selling price of property in the locality at or near the time of the appropriation. *Friday v. Pennsylvania R. Co.*, 204 Pa. 405, 54 Atl. 339." See also *Burkhard v. Pennsylvania Water Co.*, 243 Pa. 369, 90 Atl. 157. Where no objection was offered to the testimony of a witness in the court below, it will be presumed that he was competent to express an opinion as to the value of the land condemned. *Durham &c. R. Co. v. Bullock Church*, 104 N. Car. 525, 10 S. E. 761.

<sup>74</sup> *McReynolds v. Burlington &c. R. Co.*, 106 Ill. 152; *Johnson v. Freeport &c. R. Co.*, 111 Ill. 413. A witness may be interrogated on cross-examination as to the value of other real estate in the neighborhood, for the purpose of testing his competency as a judge of land values, although the land about which inquiry is made is not shown to be similar to that sought to be condemned. *Uhiacke v. Chicago &c. R. Co.* 67 Wis. 108, 29 N. W. 899.

<sup>75</sup> *Illinois &c. R. Co. v. Von Horn*, 18 Ill. 257; *Lafayette &c. R. Co. v. Winslow*, 66 Ill. 219; *Mc-*

offered, or it is waived.<sup>76</sup> The discretion exercised by the judge or presiding officer at the trial in accepting or rejecting a witness after learning what knowledge he claims and the sources of that knowledge, will only be interfered with in cases of palpable error.<sup>77</sup>

**§ 1334 (1038). Opinions of witnesses.**—Witnesses who are acquainted with the property sought to be condemned may usually give their opinions as to its value.<sup>78</sup> By some courts

Clean v. Chicago &c. R. Co., 67 Iowa 568, 25 N. W. 782; Sexton v. North Bridgewater, 116 Mass. 200; Sawyer v. Boston, 144 Mass. 470, 11 N. E. 711; Brown v. Corey, 43 Pa. St. 495; Snyder v. Western Union R. Co., 25 Wis. 60. But matters not competent can not be introduced to fortify the opinion of an expert, under the guise of reasons for his opinion, though they may be gone into on cross-examination to test and diminish the weight of his opinion. *Pier-son v. Boston &c. R. Co.*, 191 Mass. 223, 77 N. E. 769. Details as to particular sales or transactions should be given only upon cross-examination. *Central Pac. R. Co. v. Pearson*, 35 Cal. 247. See *Missouri &c. R. Co. v. Haines*, 10 Kans. 439.

<sup>76</sup> *Watts v. Derry*, 22 N. H. 498.

<sup>77</sup> *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544; *Boston &c. R. Co. v. Montgomery*, 119 Mass. 114; *Tucker v. Massachusetts Cent. R. Co.*, 118 Mass. 546. The determination as to his competency is for the court and largely in its discretion. *Potts v. Minneapolis &c. R. Co.*, 124 Minn. 413, 145 N. W. 161.

<sup>78</sup> *St. Louis &c. R. Co. v. An-*

*derson*, 39 Ark. 107; *Texas &c. R. Co. v. Kirby*, 44 Ark. 103; *Little Rock &c. R. Co. v. Woodruff*, 49 Ark. 381, 5 S. W. 792, 4 Am. St. 51; *Central Pacific R. Co. v. Pearson*, 35 Cal. 247; *Cincinnati &c. R. Co. v. Mims*, 71 Ga. 240; *Johnson v. Freeport &c. R. Co.*, 111 Ill. 413; *Chicago &c. R. Co. v. Blake*, 116 Ill. 163, 4 N. E. 488; *Indianapolis &c. R. Co. v. Pugh*, 85 Ind. 279; *Yost v. Conroy*, 92 Ind. 464, 47 Am. Rep. 156; *Winklemans v. Des Moines &c. R. Co.*, 62 Iowa 11, 17 N. W. 82; *McClellan v. Chicago &c. R. Co.*, 67 Iowa 568, 25 N. W. 782; *Kansas Central R. Co. v. Allen*, 24 Kans. 33; *Central Branch R. Co. v. Andrews*, 37 Kans. 162, 14 Pac. 509; *St. Louis &c. R. Co. v. Chapman*, 38 Kans. 307, 16 Pac. 695, 5 Am. St. 744; *Snow v. Boston &c. R. Co.*, 65 Maine 230; *Shattuck v. Stoneham &c. R. Co.*, 6 Allen (Mass.) 115; *Hawkins v. Fall River*, 119 Mass. 94; *Lehmiche v. St. Paul &c. R. Co.*, 19 Minn. 464; *Sherman v. St. Paul &c. R. Co.*, 30 Minn. 227, 15 N. W. 239; *Hosher v. Kansas City &c. R. Co.*, 60 Mo. 303; *Springfield &c. R. Co. v. Calkins*, 90 Mo. 538, 3 S. W. 82; *Republican Valley R. Co. v. Arnold*, 13 Nebr. 485, 14

witnesses are also permitted to give an opinion as to the amount of damage or benefit resulting to an estate from the construction and working of the railroad.<sup>79</sup> This practice is rejected by other courts because it calls upon witnesses to express an opinion upon the precise point which the issues present for the decision of the jury,<sup>80</sup> but they permit the witnesses to give an opinion as to the

N. W. 478; *Troy &c. R. Co. v. Northern T. Co.*, 16 Barb. (N. Y.) 100; *Utica &c. R. Co., Matter of*, 56 Barb. (N. Y.) 456; *Rumsey v. New York &c. R. Co.*, 133 N. Y. 79, 30 N. E. 654, 15 L. R. A. 618; *Cleveland &c. R. Co. v. Ball*, 5 Ohio St. 568; *Watson v. Pittsburg &c. R. Co.*, 37 Pa. St. 469; *Pennsylvania &c. R. Co. v. Bunnell*, 81 Pa. St. 414; *Pittsburg &c. R. Co. v. Robinson*, 95 Pa. St. 426; *Tingley v. Providence*, 8 R. I. 493; *Washburn v. Milwaukee &c. R. Co.*, 59 Wis. 364, 18 N. W. 328.

<sup>79</sup> *Texas &c. R. Co. v. Kirby*, 44 Ark. 103; *Jacksonville &c. R. Co. v. Caldwell*, 21 Ill. 75; *Cairo &c. R. Co. v. Woosley*, 85 Ill. 370; *Chicago v. McDonough*, 112 Ill. 85; *Snow v. Boston &c. R. Co.*, 65 Maine 230; *Shattuck v. Stoneham Branch R. Co.*, 6 Allen (Mass.) 115; *Brainard v. Boston &c. R. Co.*, 12 Gray (Mass.) 407; *Lehmiche v. St. Paul &c. R. Co.*, 19 Minn. 464; *Sherwood v. St. Paul &c. R. Co.*, 21 Minn. 127; *Sherman v. St. Paul &c. R. Co.*, 30 Minn. 227, 15 N. W. 239; *Nevada &c. R. Co. v. De Lissa*, 103 Mo. 125, 15 S. W. 366; *Utica &c. R. Co., Matter of*, 56 Barb. (N. Y.) 456; *Hine v. New York &c. R. Co.*, 36 Hun (N. Y.) 293; *Portland v. Kamm*, 10 Ore. 383; *Pittsburg &c. R. Co. v. Robinson*, 95 Pa. St. 426; *Railroad Co.*

*v. Foreman*, 24 W. Va. 662; *Snyder v. Western U. R. Co.*, 25 Wis. 60; *Diedrich v. Northwestern R. Co.*, 47 Wis. 662, 3 N. W. 749; *Washburn v. Milwaukee &c. R. Co.*, 59 Wis. 364, 18 N. W. 328. See contra, *New York &c. R. Co., Matter of*, 29 Hun (N. Y.) 609. And compare *Roberts v. Railway Co.*, 128 N. Y. 455, 28 N. E. 486, 13 L. R. A. 499; *Doyle v. Railway Co.*, 128 N. Y. 488, 28 N. E. 495; *Union Elevator Co. v. Kansas City &c. Co.*, 135 Mo. 353, 36 S. W. 1071.

<sup>80</sup> *Chicago &c. R. Co. v. Springfield &c. R. Co.*, 67 Ill. 142; *Cleveland &c. R. Co. v. Ball*, 5 Ohio St. 568; *Atlantic &c. R. Co. v. Campbell*, 4 Ohio St. 583, 64 Am. Dec. 607; *Baltimore &c. R. Co. v. Johnson*, 59 Ind. 247; *Ohio &c. R. Co. v. Nickless*, 71 Ind. 271. See also *Elliott Roads and Streets* (3rd ed.), § 291; 1 *Elliott Ev.* § 674; *Chicago &c. R. Co. v. Teese*, 42 Okla. 188, 140 Pac. 1166, 52 L. R. A. (N. S.) 167, and other cases cited in note to same effect as to damages for personal injury. In *Union Elevator Co. v. Kansas City &c. Co.*, 135 Mo. 353, 36 S. W. 1071, this is conceded to be the better rule, but it is held that a judgment should not be reversed merely because it was violated by a witness giving his opinion as to the amount of damages. Citing *Roberts v. Ry.*



value of the property before and after the taking.<sup>81</sup> In some of the states where no allowance is made for benefits in the condemnation of land for railroad purposes, this rule is also rejected and the courts only permit the witness to state the value of the land before the taking, and the nature and extent of particular injuries, leaving the jury to estimate the compensation due to the land-owners on account of them,<sup>82</sup> but this rule is open to the grave objections that it necessarily assumes that the jury is acquainted with the value of all kinds of property subject to condemnation, and that they can, unaided by the opinions of witnesses, correctly estimate the effect upon that value of every possible injury that can be inflicted.<sup>83</sup> In states where opinions as to

Co., 128 N. Y. 455, 28 N. E. 486; Doyle v. Railway Co., 128 N. Y. 488, 28 N. E. 495. See also Schmoe v. Cotton, 167 Ind. 364, 79 N. E. 184, citing the Missouri case.

<sup>81</sup> Snow v. Boston &c. R. Co., 65 Maine 230; Swan v. Middlesex Co., 101 Mass. 173; Curtis v. St. Paul &c. R. Co., 20 Minn. 28; Sherwood v. St. Paul &c. R. Co., 21 Minn. 127; Carter v. Thurston, 58 N. H. 104, 42 Am. Rep. 584; Houston &c. R. Co. v. Knapp, 51 Tex. 592; Farrand v. Chicago &c. R. Co., 21 Wis. 435; Diedrich v. Northwestern U. R. Co., 47 Wis. 662, 3 N. W. 749. See also Pittsburgh &c. R. Co. v. Robinson, 95 Pa. St. 426; Eberhart v. Chicago &c. R. Co., 70 Ill. 347; Yost v. Conroy, 92 Ind. 464, 47 Am. Rep. 156; Chicago &c. R. Co. v. Wyser Land Co., 163 Ind. 288, 290, 292, 69 N. E. 546; Kansas City &c. R. Co. v. Norcross, 137 Mo. 415, 38 S. W. 299; Atchison &c. R. Co. v. Boerner, 45 Nebr. 453, 63 N. W. 787.

<sup>82</sup> Some early cases in Indiana are apparently to this effect. Ev-

ansville &c. R. Co. v. Fitzpatrick, 10 Ind. 120; Baltimore &c. R. Co. v. Johnson, 59 Ind. 247; Baltimore &c. R. Co. v. Stoner, 59 Ind. 579. But these cases are criticised and limited in Yost v. Conroy, 92 Ind. 464, 47 Am. Rep. 156, and are contrary to other decisions in Indiana. There are some cases in other states that support the doctrine referred to. Montgomery &c. R. Co. v. Varner, 19 Ala. 185; Alabama &c. R. Co. v. Burkett, 42 Ala. 83; Prosser v. Wapelo County, 18 Iowa 327; Harrison v. Iowa Midland R. Co., 36 Iowa 323; Elizabethtown &c. R. Co. v. Helm, 8 Bush (Ky.) 681; Burlington &c. R. Co. v. Schluntz, 14 Nebr. 421, 16 N. W. 439; Troy &c. R. Co. v. Northern Turnp. Co., 16 Barb. (N. Y.) 100; Rochester &c. R. Co. v. Budlong, 6 How. Pr. (N. Y.) 467; Lincoln v. Saratoga &c. R. Co., 23 Wend. (N. Y.) 425.

<sup>83</sup> Yost v. Conroy, 92 Ind. 464, 47 Am. Rep. 156. In the case cited it was said: "Of what assistance to a jury composed of clergymen, merchants and bankers would be a

the amount of the damages are held admissible, witnesses may give their opinions as to particular matters affecting the value of the land such as the capacity of the land for valuable uses different from that to which it is devoted,<sup>84</sup> or the extent to which the property is damaged by any of the several items of injury that the jury are called upon to consider in estimating the owner's compensation.<sup>85</sup> But they are not permitted to give

description of the minutest accuracy, without some estimate of values by competent witnesses? Possibly, it would enable such a jury to form a crude conjecture; it could do but little more."

<sup>84</sup> *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544. In a suit to condemn land for a railroad right of way in possession and use of a traction company, evidence that the best use to which the land in its then condition was adapted was for railroad purposes, and of the value of the land for such purposes, was held admissible. It was also held in the same case that as it was claimed that land not taken was valuable as a factory site, evidence that the building of the road would be a benefit and not an injury to such factory site was admissible, though the witnesses were unable to estimate the benefit in money that the maintenance of the traction road should be taken into consideration in estimating damages and benefits to land not taken; that the defendants, on the same day the condemnation petition was filed, having subdivided the land, which was agricultural, and filed a plat for record, showing the railroad track, and the lots could only be bought and sold with the expectancy that

they would be along the car track, so as to render them accessible, the plat of such subdivision was properly admitted in evidence; and that the defendants having claimed that the taking of the land would deprive them of switch-track connections with a railroad, and in support thereof offered evidence that the railroad officials refused to connect a switch with the main line at a distance less than 3,000 feet west of a tunnel, no part of which could be on the railroad's right of way, the plaintiff was entitled to show in rebuttal that 15 years prior a switch had been placed on the right of way of the railroad company, connecting with the main line 1,762 feet west of the tunnel, for the purpose of shipping clay on a part of the land not taken. *Hartshorn v. Illinois Valley R. Co.*, 216 Ill. 392, 75 N. E. 122.

<sup>85</sup> *Selma &c. R. Co. v. Knapp*, 42 Ala. 480. *Rockford &c. R. Co. v. McKinley*, 64 Ill. 338; *Hayes v. Ottawa &c. R. Co.*, 54 Ill. 373; *Webber v. Eastern R. Co.*, 2 Metc. (Mass.) 147; *Tucker v. Massachusetts Cent. R. Co.*, 118 Mass. 546; *Winona &c. R. Co. v. Waldron*, 11 Minn. 515, 88 Am. Dec. 100 and note; *Pittsburg &c. R. Co. v. Rose*, 74 Pa. St. 362; *Milwaukee &c. R.*

conjectural opinions as to matters that are speculative in their character or which rest upon future possibilities.<sup>86</sup> The jury are not bound by the opinions of witnesses but may consider them in connection with all other facts in evidence.<sup>87</sup> It has been held that a witness who has testified for the land-owner and given an opinion that the remainder of the tract would be greatly depreciated in value by the road may be asked if he knew of any farm which was depreciated in value by reason of a railroad going across it like the one in question or that had sold for less on that account.<sup>88</sup>

**§ 1335 (1039). Power of commissioners to act upon their own knowledge—Evidence.**—Upon principle no award ought to stand which is made in a case where no evidence is heard and which is based solely upon the knowledge of the jurors or commissioners. We very much doubt whether the question of a citizen's right to compensation can be made to depend upon the judgment of jurors or commissioners acting upon their own knowledge or information, for in such cases there is no hearing. But some of the courts have indicated a different doctrine.<sup>89</sup> Other

Co. v. Eble, 4 Chand. (Wis.) 72. See ante, §§ 1261, 1262. A grazier may give his opinion as to the effect upon cattle of their being disturbed by the operation of a railroad through the pasture where they are kept. *Baltimore &c. R. Co. v. Thompson*, 10 Md. 76. The opinion of witnesses on the question of incidental damages and benefits to the property that do not attach to other property by the construction of the road has been held admissible. *Wray v. Knoxville &c. R. Co.*, 113 Tenn. 544, 82 S. W. 471.

<sup>86</sup> *Central Pac. R. Co. v. Pearson*, 35 Cal. 247; *Elizabethtown &c. R. Co. v. Helm*, 8 Bush (Ky.) 681; *Boston &c. R. Co. v. Old Colony &c. R. Co.*, 3 Allen (Mass.)

142; *Gardner v. Brookline*, 127 Mass. 358; *Fairbanks v. Fitchburg*, 110 Mass. 224; *Troy &c. R. Co. v. Northern T. Co.*, 16 Barb. (N. Y.) 100; *Northern Pac. R. Co. v. Union Lumber Co.*, 76 Wash. 563, 137 Pac. 306.

<sup>87</sup> *Green v. Chicago*, 97 Ill. 370; *Princeton v. Gieske*, 93 Ind. 102.

<sup>88</sup> *Eldorado &c. R. Co. v. Everett*, 225 Ill. 529, 80 N. E. 281; citing *Chicago &c. R. Co. v. Kelly*, 221 Ill. 498, 77 N. E. 916. See also the case first cited for evidence held admissible in rebuttal.

<sup>89</sup> *Columbia Delaware Bridge Co. v. Geisse*, 35 N. J. L. 474, 36 N. J. L. 537. The action of the commissioners in receiving ex parte communications from one of the parties in the absence of the

courts hold that they are at liberty to hear evidence if they choose, or to assess the damages from their own knowledge gained by a view of the premises.<sup>90</sup> In some states it is held that the jury or commissioners may base their assessment upon the knowledge gained by a view of the premises, even in opposition to the testimony which has been given before them.<sup>91</sup> The gen-

other party touching the merits of the controversy, has been held to vitiate their award. *Lennox v. Knox &c. R. Co.*, 62 Maine 322; *Harris v. Woodstock*, 27 Conn. 567. It was not error to instruct that, in connection with the testimony as to the damages, the jury may use and be guided by their own judgment in such matters. *Hoyt v. Chicago &c. R. Co.*, 117 Iowa 296, 90 N. W. 724.

<sup>90</sup> *St. Paul &c. R. Co. v. Covell*, 2 Dak. 483, 11 N. W. 106; *Pennsylvania R. Co. v. Keiffer*, 22 Pa. St. 356; *Rondout &c. R. Co., Matter of, v. Deyo*, 5 Lans. (N. Y.) 298; *Kramer v. Cleveland &c. R. Co.*, 5 Ohio St. 140. It has been held that the commissioners have no right to hear witnesses unless the statute so provides. *Clarksville &c. Turnp. Co. v. Atkinson*, 1 Sneed (Tenn.) 426; *Vanwickle v. Camden &c. R. Co.*, 14 N. J. L. 162; *Coster v. New Jersey R. &c. Co.*, 24 N. J. L. 730. In *Washington &c. R. Co. v. Switzer*, 26 Grat. (Va.) 661, it was held that the provision that commissioners should hear the parties made it their duty to hear the testimony of witnesses produced by the parties. It has been held that the jury may be charged that where there is conflict in the evidence they may resort to the evidence of their own

sense with a view to determine the truth. *Seattle &c. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. 864. See also *Blincoe v. Choctaw &c. R. Co.*, 16 Okla. 286, 83 Pac. 903.

<sup>91</sup> *Peoria &c. R. Co. v. Sawyer*, 71 Ill. 361; *Chicago &c. R. Co. v. Hopkins*, 90 Ill. 316; *Peoria &c. R. Co. v. Barnum*, 107 Ill. 160; *Omaha &c. R. Co. v. Walker*, 17 Nebr. 432, 23 N. W. 348; *Evansville &c. R. Co. v. Cochran*, 10 Ind. 560. Overruled in *Heady v. Vevay &c. Turnpike Co.*, 52 Ind. 117; *Kansas v. Butterfield*, 89 Mo. 646, 1 S. W. 831; *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. 415. They may take into account such facts as they have learned by viewing the property, in deciding whether the construction of the improvement will permanently depreciate or increase the market value of the property. *Culbertson &c. Co. v. Chicago*, 111 Ill. 651. See also *Baltimore v. Megary*, 122 Md. 20, 89 Atl. 331. Where the jury viewed the premises and the case was submitted to them without other evidence, it was held, on appeal, that the court could not disturb the verdict since the evidence upon which they acted was not in the record. *Peoria &c. R. Co. v. Barnum*, 107 Ill. 160. And even where other evidence was offered, it was held that

eral doctrine is that where the statute provides for the introduction of evidence, legal evidence only can be admitted,<sup>92</sup> but it has been said that the court will not set aside the award for technical errors in accepting or rejecting evidence where no substantial injustice has been done.<sup>93</sup> The parties are, however, entitled to a hearing,<sup>94</sup> and the denial to them of this right is sufficient cause for setting aside the award.<sup>95</sup>

not having a knowledge of what the jury learned from a view of the property, the supreme court could not disturb the verdict on the evidence. *Evansville &c. R. Co. v. Cochran*, 10 Ind. 560.

<sup>92</sup> *Rochester &c. R. Co. v. Budlong*, 6 How. Pr. (N. Y.) 467; *Central Pac. R. Co. v. Pearson*, 35 Cal. 247. *The New York Central R. Co., Matter of*, 15 Hun 63, 64 N. Y. 60. But, as elsewhere shown, the rules of evidence are not usually so strictly applied before commissioners as in ordinary civil actions in courts of general jurisdiction.

<sup>93</sup> *Michigan Air Line R. Co. v. Barnes*, 44 Mich. 222, 6 N. W. 651; *Port Huron &c. R. Co. v. Voorheis*, 50 Mich. 506, 15 N. W. 882; *California Pacific R. Co. v. Frisbie*, 41 Cal. 356. See also *Bennet v. Camden &c. R. Co.*, 14 N. J. L. 145; *New Jersey R. Co. v. Stuydam*, 17 N. J. L. 25; *Hannibal &c. R. Co. v. Muder*, 49 Mo. 165; *Kansas City &c. R. Co. v. Campbell*, 62 Mo. 585; *Virginia &c. R. Co. v. Elliott*, 5 Nev. 358; *Eastern R. Co. v. Concord &c. R. Co.*, 47 N. H. 108. In some cases this ruling is put upon the ground that as the jury are presumed to form their opinion largely from their own view of the premises, their report should not

be set aside for errors in the admission of evidence unless there is strong evidence that the parties' interest was prejudiced thereby. *Troy &c. R. Co. v. Lee*, 13 Barb. (N. Y.) 169; *Troy &c. R. Co. v. Northern Turnpike Co.*, 16 Barb. (N. Y.) 100; *Willing v. Baltimore R. Co.*, 5 Whart. (Pa.) 460; *Western Pac. R. Co. v. Reed*, 35 Cal. 621; *Chicago &c. R. Co. v. Hopkins*, 90 Ill. 316. For instances where the award was set aside for errors committed in receiving or rejecting testimony, see *New York &c. R. Co., Matter of*, 35 Hun (N. Y.) 260; *Goodwin v. Milton*, 25 N. H. 458.

<sup>94</sup> *Weimer v. Bunbury*, 30 Mich. 201; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Readington v. Dilley*, 24 N. J. L. 209; *Harness v. Chesapeake &c. Canal Co.*, 1 Md. Ch. 248; *Zimmerman v. Canfield*, 42 Ohio St. 463; *Gamble v. McCrady*, 75 N. Car. 509.

<sup>95</sup> *Washington &c. R. Co. v. Switzer*, 26 Grat. (Va.) 661; *Central Pacific R. Co. v. Pearson*, 35 Cal. 247; *Jones v. Goffstown*, 39 N. H. 254; *Hawley &c.*, In re, 2 De G. & S. 33. Where the owner has been prevented by accident or mistake from being present at the hearing, and the award is clearly unjust to him, a rehearing should

§ 1336 (1040). **View.**—Where the statute provides that the commissioners shall view the premises, the general rule is that a view is an essential part of the proceedings.<sup>96</sup> If the statute is silent on the subject the court may grant a view or not, in its discretion.<sup>97</sup> It is the theory in many jurisdictions, where there is nothing in the statute to the contrary, seems that the object of the view is to enable the jury the better to understand and apply the evidence, and so to more intelligently and

be granted unless such owner has been guilty of laches, by which his rights have been forfeited. *New York &c. R. Co., Matter of*, 63 *How. Pr. (N. Y.)* 265; *New York Central &c. R. Co., Matter of*, 64 *N. Y.* 60; *New York &c. R. Co., Matter of*, 93 *N. Y.* 385, 29 *Hun (N. Y.)* 602; *Bourgeois v. Mills*, 60 *Tex.* 76.

<sup>96</sup> *Western Pacific R. Co. v. Reed*, 35 *Cal.* 621; *Galena &c. R. Co. v. Haslam*, 73 *Ill.* 494; *Kankakee &c. R. Co. v. Straut*, 102 *Ill.* 666; *New York &c. R. Co., Matter of*, 33 *Hun (N. Y.)* 148; *Charleston &c. R. Co. v. Comstock*, 36 *W. Va.* 263, 15 *S. E.* 69. In *Northern Pac. R. Co. v. Union Lumber Co.*, 76 *Wash.* 563, 137 *Pac.* 306, it is held that where, after a view, a juror is discharged by consent, and another juror selected, the court did not err in refusing a view by the new juror. Under the New York statute, it was held that a view must be had and the report must show the fact. *Albany &c. R. Co. v. Lansing*, 16 *Barb. (N. Y.)* 68. See generally *Fort Street &c. R. v. Backus*, 92 *Mich.* 33, 52 *N. W.* 790; *Gurney v. Minneapolis &c. R. Co.*, 41 *Minn.* 223, 43 *N. W.* 2; *Mitchell v. Illinois &c. R. Co.*, 85

*Ill.* 566; *Grand Rapids &c. R. Co. v. Chesebro*, 74 *Mich.* 466, 42 *N. W.* 66; *Brakken v. Minneapolis &c. R. Co.*, 29 *Minn.* 41, 11 *N. W.* 124. Photographic view has been held sufficient where an actual inspection of the property was impracticable. *Omaha &c. R. Co. v. Beeson*, 36 *Nebr.* 361, 54 *N. W.* 557.

<sup>97</sup> *King v. Iowa &c. R. Co.*, 34 *Iowa* 458; *Clayton &c. R. Co.*, 67 *Iowa* 238, 25 *N. W.* 150; *Galena &c. R. Co. v. Haslam*, 73 *Ill.* 494; *Coughlen v. Chicago &c. R. Co.*, 36 *Kans.* 422, 13 *Pac.* 813, 30 *Am. & Eng. Cas.* 330; *Harper v. Lexington &c. R. Co.*, 2 *Dana (Ky.)* 227; *Snow v. Boston &c. R. Co.*, 65 *Maine* 230; *Dearborn v. Boston &c. R. Co.*, 24 *N. H.* 179; *Hopkins v. Atlantic &c. R. Co.*, 36 *N. H.* 9, 72 *Am. Dec.* 287; *Traut v. New York &c. R. Co. (Pa.)*, 22 *W. N. C.* 540, 15 *Atl.* 678; *Bellingham &c. R. Co. v. Strand*, 4 *Wash.* 311, 30 *Pac.* 144, 51 *Am. & Eng. R. Cas.* 608. See also *Chicago &c. R. Co. v. Curless*, 27 *Ind. App.* 306, 60 *N. E.* 467; *Chicago &c. R. Co. v. Winslow*, 27 *Ind. App.* 316, 60 *N. E.* 466; *Chicago &c. R. Co. v. Loer*, 27 *Ind. App.* 245, 60 *N. E.* 319.

fairly perform their duties,<sup>98</sup> but some of the courts hold that the jury may act on their own judgment formed from an inspection of the premises.<sup>99</sup> While the jury may resort to their own general knowledge of the elements which affect the assessment, in order to determine the relative weight of conflicting testimony, their assessment must be supported by the testimony, or it can not stand.<sup>1</sup> The provision of the Colorado statute that the jury in condemnation proceedings may go on the premises

<sup>98</sup> *Laflin v. Chicago &c. R. Co.*, 33 Fed. 415; *Atchison &c. R. Co. v. Schneider*, 127 Ill. 144, 20 N. E. 41, 2 L. R. A. 422; *Peoria &c. Co. v. Peoria &c. R. Co.*, 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373; *Jeffersonville &c. R. Co. v. Bowen*, 40 Ind. 545; *Close v. Samm*, 27 Iowa 503; *Guinn v. Iowa &c. R. Co.*, 131 Iowa 680, 109 N. W. 209; *Hoffman v. Bloomburg &c. R. Co.*, 143 Pa. St. 503, 22 Atl. 823; *Gorgas v. Philadelphia &c. R. Co.*, 144 Pa. St. 1, 22 Atl. 715; *Washburn v. Milwaukee &c. R. Co.*, 59 Wis. 364, 18 N. W. 328; *Munkwitz v. Chicago &c. R. Co.*, 64 Wis. 403, 25 N. W. 438; *Seefeld v. Chicago &c. R. Co.*, 67 Wis. 96, 29 N. W. 904. See *Chicago &c. R. Co. v. Parsons*, 51 Kans. 408, 32 Pac. 1083; *Topeka v. Martineau*, 42 Kans. 387, 22 Pac. 419, 5 L. R. A. 775; *Seefeld v. Chicago &c. R. Co.*, 67 Wis. 96, 29 N. W. 904.

<sup>99</sup> *Toledo &c. R. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271; *Remy v. Municipality*, 12 La. Ann. 500; *Newell v. Loeb*, 77 Wash. 182, 137 Pac. 811. See *Illinois &c. R. Co. v. Humiston*, 208 Ill. 100, 69 N. E. 880; *Groves &c. R. Co. v. Herman*, 206 Ill. 34, 69 N. E. 36; *Kiernan v. Chicago &c. R. Co.*, 123 Ill. 188, 14 N. E. 18; *Petzel v. Chicago &c.*

*R. Co.*, 103 Ill. App. 210; *Harper v. Lexington &c. R. Co.*, 2 Dana (Ky.) 227; *Parks v. Boston*, 15 Pick. (Mass.) 198, 209. In *Chicago &c. R. Co. v. Scott*, 225 Ill. 352, 80 N. E. 204, it seems to be held that they not only may but should consider knowledge gained by the view. See generally 2 Elliott Ev. § 1243.

<sup>1</sup> *Washburn v. Milwaukee &c. R. Co.*, 59 Wis. 364, 18 N. W. 328; *Peoria Gaslight &c. Co. v. Peoria &c. R. Co.*, 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373; *Chicago &c. R. Co. v. Parsons*, 51 Kans. 408, 32 Pac. 1083; *Hoffman v. Bloomburg &c. R. Co.*, 143 Pa. St. 503, 22 Atl. 823; *Seattle &c. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. 864. An award, which is clearly against the evidence, will be set aside. *Fitchburg R. Co. v. Eastern R. Co.*, 6 Allen (Mass.) 98; *Wilson v. Rockford &c. R. Co.*, 59 Ill. 273. But an award will not, as a rule, be set aside where the evidence is conflicting. *Western &c. R. Co. v. Reed*, 35 Cal. 621; *Virginia &c. R. Co. v. Henry*, 8 Nev. 165; *McReynolds v. Burlington &c. R. Co.*, 106 Ill. 152; *Omaha &c. R. Co. v. Walker*, 17 Nebr. 432, 23 N. W. 348.

sought to be condemned in charge of a sworn bailiff is strictly construed and it is held error to appoint guides to aid the jury.<sup>2</sup>

**§ 1337 (1040a). Instructions.**—The rules relating to instructions to juries are generally the same here as elsewhere. The instructions must be confined to the issues involved and should not call the attention of the jury to outside matters.<sup>3</sup> Thus, it has been held that a reference should not be made in the instruction to the fact that the land was being taken against the will of the owner.<sup>4</sup> They must be applicable to the evidence adduced,<sup>5</sup> and must not be upon the weight to be attached to the evidence—since this latter matter is one solely for the jury.<sup>6</sup> Neither should questions of law be submitted to the jury, since these are questions for the court.<sup>7</sup> Instructions having a tend-

<sup>2</sup> *Colorado Fuel & Co. v. Four Mile R. Co.*, 29 Colo. 90, 66 Pac. 902.

<sup>3</sup> *Chicago & C. R. Co. v. Atterbury*, 156 Ill. 281, 40 N. E. 826; *Chicago & C. R. Co. v. Patterson*, 26 Ind. App. 295, 59 N. E. 688; *Chicago & C. R. Co. v. Winslow*, 27 Ind. App. 316, 60 N. E. 466. Where the statute does not require the court to instruct appraisers it is held that the refusal to give requested instructions to them is not reversible error. *Bedford & C. Co. v. Chicago & C. R. Co.*, 175 Ind. 303, 94 N. E. 326.

<sup>4</sup> *Illinois & C. R. Co. v. Easterbrook*, 211 Ill. 624, 71 N. E. 1116.

<sup>5</sup> *Chicago & C. R. Co. v. Cospers*, 43 Kans. 261, 22 Pac. 634; *Fitz v. Nantasket Beach R. Co.*, 148 Mass. 35, 18 N. E. 592. An instruction that if the jury believed, from all the evidence, that they had, from personal examination of the premises, arrived at a more accurate judgment of the value and damages than was shown by the evi-

dence, they might determine the value and damages at an amount approved by their judgment formed from the personal examination, though it might differ from the amount testified to was not objectionable as authorizing the jury to fix the compensation without regard to the testimony. *Guyer v. Davenport & C. R. Co.*, 196 Ill. 370, 63 N. E. 732.

<sup>6</sup> *Cleveland & C. R. Co. v. Polecat Drainage Dist.*, 213 Ill. 83, 72 N. E. 684. Where a witness as to value has given his opinion, and has also stated that he would give the price named for the property, an instruction leaving the impression upon the jury that the estimate of the witness was entitled to great weight because of his apparent willingness to purchase is error. *Friday v. Pennsylvania R. Co.*, 204 Pa. St. 405, 54 Atl. 339.

<sup>7</sup> *Trotter v. St. Louis & C. R. Co.*, 180 Ill. 471, 54 N. E. 487; *Elgin & C. R. Co. v. Fletcher*, 128 Ill. 619, 21 N. E. 577.



ency to mislead the jury should not be given.<sup>8</sup> An instruction should not be argumentative. An instruction held objectionable on this ground told the jury that they should not assess damages on the basis of what the owner would take for his property, or for what sum he or they would be willing to let the railroad go across the lands, but must keep in mind the actual fair cash market value as the only proper element of damage; and that it was the jury's duty to try the case fairly, and render a verdict on a fair consideration of the evidence, even though the manner in which the lands will be cut up might excite their sympathy.<sup>9</sup> An instruction already given in substance and with sufficient fullness need not be repeated.<sup>10</sup> Thus, where the court has properly and fully charged the jury as to the elements and measure of damages it is not error to refuse a charge that the jury should not take into consideration any speculative uses of the lands taken or those not taken.<sup>11</sup> The court should not express an opinion as to the amount of damages to be awarded, as that would amount to an invasion of the province of the jury.<sup>12</sup> Legal terms used in the instructions should be explained to the jury.<sup>13</sup> Instructions are generally regarded as sufficient if construed together they present proper rules for the guidance of the jury.<sup>14</sup>

<sup>8</sup> *Fifer v. Ritter*, 159 Ind. 8, 64 N. E. 463; *Chicago &c. R. Co. v. Goff*, 158 Ill. 453, 41 N. E. 1112; *Guyer v. Davenport &c. R. Co.*, 196 Ill. 370, 63 N. E. 732.

<sup>9</sup> *Jacksonville &c. R. Co. v. Wilhite*, 209 Ill. 84, 70 N. E. 583.

<sup>10</sup> *Centralia &c. R. Co. v. Rixman*, 121 Ill. 214, 12 N. E. 685; *Chicago &c. R. Co. v. Patterson*, 26 Ind. App. 295, 59 N. E. 688; *Kansas City R. Co. v. McElroy*, 161 Mo. 584, 61 S. W. 871.

<sup>11</sup> *Seattle &c. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. 864.

<sup>12</sup> *Weyer v. Chicago &c. R. Co.*, 68 Wis. 180, 31 N. W. 710; *Schuyl-*

*kill &c. R. Co. v. Stocker*, 128 Pa. St. 233, 18 Atl. 399.

<sup>13</sup> *Kansas City &c. R. Co. v. Dawley*, 50 Mo. App. 480 (consequential damages). It is not erroneous to instruct the jury to assess damages according to the "cash market value," instead of the "fair cash market value," for the two terms are substantially synonymous. *Conness v. Indiana &c. R. Co.*, 193 Ill. 464, 62 N. E. 221.

<sup>14</sup> *Cook v. Chicago &c. R. Co.*, 83 Iowa 278, 49 N. W. 92; *Detroit &c. R. Co. v. Hall*, 133 Mich. 302, 94 N. W. 1066; *Diamond &c. Steamers v. Davenport &c. R. Co.*, 115 Iowa 480, 88 N. W. 959; *Union*

§ 1338 (1041). **Report of commissioners.**—In many of the states the report must be confirmed by the court by which the commissioners were appointed,<sup>15</sup> and it has been held that even though the statute does not expressly so provide, the report of a tribunal appointed by a court in proceedings under the right of eminent domain, may be accepted or rejected by the court, as justice may require.<sup>16</sup> A report may be set aside for fraud or misconduct of the commissioners, even though the statute

Traction Co. v. Pfeil, 39 Ind. App. 51, 78 N. E. 1052. See also as to instructions, Wiegand v. Siddons, 41 App. D. C. 130; Central Georgia &c. Co. v. Cornwell, 141 Ga. 643, 81 S. E. 882; Peoria &c. Traction Co. v. Vance, 225 Ill. 270, 80 N. E. 134; Bray v. Tardy, 182 Ind. 98, 105 N. E. 772 (as to opinion of witnesses on value); Hubbell v. Des Moines, 166 Iowa 581, 147 N. W. 908 (as to meaning of market value); David v. Louisville &c. R. Co., 158 Ky. 721, 166 S. W. 230; American &c. Co. v. St. Louis &c. R. Co., 202 Mo. 656, 101 S. W. 576; Newell v. Loeb, 77 Wash. 182, 137 Pac. 811.

<sup>15</sup> Where confirmation of the report was not asked until three years after it was made, the court refused to confirm it and held it to be invalid. Stearns v. Deerfield, 51 N. H. 372. Where several tracts of lands owned by different persons are included in one proceeding under a statute permitting it damages should be assessed to each owner, and it is erroneous to award damages in gross and direct payment to treasurer to be distributed. Convers v. Atchison &c. R. Co., 142 U. S. 671, 12 Sup. Ct. 351, 35 L. ed. 1153. Citing Bowman v. Venice &c. R. Co., 102

Ill. 459; Johnson v. Freeport &c. R. Co., 116 Ill. 521, 6 N. E. 211; Suver v. Chicago &c. R. Co., 123 Ill. 293, 14 N. E. 12.

<sup>16</sup> Hingham &c. Turnp. Co. v. Norfolk Co., 6 Allen (Mass.) 353; Pueblo &c. R. Co. v. Rudd, 5 Colo. 270; State v. MacDonald, 26 Minn. 445, 4 N. W. 1107; Troy &c. R. Co. v. Northern Turnp. Co., 16 Barb. (N. Y.) 100; Bennet v. Camden &c. R. Co., 14 N. J. L. 145. Where the tribunal proceeded upon erroneous principles the report should be set aside. New York &c. R. Co., Matter of, 33 Hun 639, 98 N. Y. 447, 102 N. Y. 704; Van Wickle v. Camden &c. R. Co., 14 N. J. L. 162; Swayze v. New Jersey Midland R. Co., 36 N. J. L. 295; Beckett v. Midland R. Co., L. R. 1 C. P. 241. If the damages awarded are so grossly excessive or so palpably inadequate as to lead to the irresistible conclusion that the commissioners or the jury were swayed by prejudice or passion the award will be set aside. Van Wickle v. Camden &c. R. Co., 14 N. J. L. 162; Mutual Union Tel. Co. v. Katkamp, 103 Ill. 420; New Orleans &c. R. Co. v. Zeringue, 23 La. Ann. 524; Rheiner v. Stillwater R. &c. Co., 29 Minn. 147, 12 N. W. 449; Kansas City &c. R. Co.

provides that it shall be final and conclusive.<sup>17</sup> The report of the commissioners must be in writing, and in some states should set forth facts showing their jurisdiction of the matter to which their finding relates.<sup>18</sup> The report should, of course, be duly

*v. Campbell*, 62 Mo. 585; Commissioners of Central Park, *In re*, 51 Barb. (N. Y.) 277; *In re* 161st St., 159 App. Div. 662, 144 N. Y. S. 717 (but not unless grossly excessive or inadequate nor ordinarily for error in excluding evidence); *Clarksville &c. Turnp. Co. v. Atkinson*, 1 Sneed (Tenn.) 426. See *Houston &c. R. Co. v. Milburn*, 34 Tex. 224. But ordinarily the testimony of witnesses called to impeach the report as to the value of the property should be given less weight than the official report of the commissioners. *Eastern R. Co. v. Concord &c. R. Co.*, 47 N. H. 108. And where the evidence is conflicting the award will not be disturbed if any portion of it taken alone would sustain the verdict. *Kansas v. Kansas City &c. R. Co.*, 84 Mo. 410; *Texas &c. R. Co. v. Eddy*, 42 Ark. 527; *Little Rock Junction R. Co. v. Woodruff*, 49 Ark. 381, 5 S. W. 792, 4 Am. St. 51; *Western Pac. R. Co. v. Reed*, 35 Cal. 621; *Selma &c. R. Co. v. Gammage*, 63 Ga. 604; *Illinois &c. R. Co. v. Von Horn*, 18 Ill. 257; *Chicago &c. R. Co. v. Blake*, 116 Ill. 163, 4 N. E. 488; *Kyle v. Miller*, 108 Ind. 90, 8 N. E. 721; *Colvill v. St. Paul &c. R. Co.*, 19 Minn. 283; *Hastings &c. R. Co. v. Ingalls*, 15 Nebr. 123, 16 N. W. 762; *Virginia &c. R. Co. v. Elliott*, 5 Nev. 358; *Railroad Co. v. Gesner*, 20 Pa. St.

240. And it is frequently said that courts will not disturb the findings of the commissioners unless they appear to have acted arbitrarily or on a fundamentally wrong basis. *In re Eighth Ave.*, 77 Wash. 570, 138 Pac. 10.

<sup>17</sup> *Central Pacific R. Co. v. Pearson*, 35 Cal. 247; *Thompson v. Conway*, 53 N. H. 622; *New York &c. R. Co., In re*, 5 Hun (N. Y.) 105; *Prospect Park &c. R. Co., In re*, 24 Hun (N. Y.) 199; *Buffalo &c. R. Co., Matter of*, 32 Hun (N. Y.) 289; *New York &c. R. Co., In re*, 64 N. Y. 60. See *Staten Island R. Co., In re*, 41 Hun (N. Y.) 392, 104 N. Y. 680; *In re Harmon etc. Sts.*, 146 N. Y. S. 297; *Rock Island &c. R. Co. v. Leisy &c. Co.*, 174 Ill. 547, 51 N. E. 572; *Kansas City &c. R. Co. v. Smith*, 51 La. Ann. 1079, 25 So. 955; *Chapin, Matter of*, 84 Hun (N. Y.) 490, 32 N. Y. S. 361. It is held that it is not illegal for commissioners to make an agreement with the company whose duty it is to pay for the services of commissioners for a fair compensation. *State v. Dover &c. R. Co.*, 43 N. J. L. 528, 14 Am. & Eng. R. Cas. 87. But we suppose that such an agreement is to be carefully scrutinized and that it must be shown to be entirely fair and reasonable.

<sup>18</sup> *State v. Yanger*, 29 N. J. L. 384.

signed.<sup>19</sup> The property sought to be appropriated should be described with reasonable certainty.<sup>20</sup> It may be said generally that matters required by the statute to be set forth must appear in the report,<sup>21</sup> and that a failure to find upon any question which

<sup>19</sup> *Quayle v. Missouri &c. R. Co.*, 63 Mo. 465; *Rochester &c. R. Co. v. Beckwith*, 10 How. Pr. (N. Y.) 168. In *Hanes v. North Carolina &c. R. Co.*, 109 N. Car. 409, 13 S. E. 896, it was held that a provision requiring the report to be under seal was merely directory.

<sup>20</sup> *Hunt v. Smith*, 9 Kans. 137; *Smith v. Connelly's Heirs*, 1 T. B. Mon. (Ky.) 58; *Morgan's Appeal*, 39 Mich. 675; *Missouri &c. R. Co. v. Carter*, 85 Mo. 448, 28 Am. & Eng. R. Cas. 249; *Kansas City &c. R. Co. v. Story*, 96 Mo. 611, 10 S. W. 203; *Cory v. Chicago &c. R. Co.*, 100 Mo. 282, 13 S. W. 346; *Chicago &c. R. Co. v. Randolph &c. Co.*, 103 Mo. 451, 15 S. W. 437; *St. Louis &c. R. Co. v. Fowler*, 113 Mo. 458, 20 S. W. 1069; *Northern &c. R. Co. v. Concord &c. R. Co.*, 27 N. H. 183; *State v. Hudson &c. R. Co.*, 38 N. J. L. 548; *New York &c. R. Co., Matter of*, 21 How. Pr. (N. Y.) 434; *Strang v. Beloit &c. R. Co.*, 16 Wis. 635. See also *Reitenbaugh v. Chester Valley R. Co.*, 21 Pa. St. 100; *New Jersey &c. R. Co. v. Suydam*, 17 N. J. L. 25. Where the statute required the report to contain a description of the property, such a description is indispensable. *Vail v. Morris &c. R. Co.*, 21 N. J. L. 189; *Missouri Pac. R. Co. v. Carter*, 85 Mo. 448; *Chesapeake &c. Canal Co. v. Union Bank*, 4 Cranch C. C. 75. A description of a cer-

tain number of feet on each side of the center line of a railroad, as located, staked, and marked, was held sufficient. *Lower v. Chicago &c. R. Co.*, 59 Iowa 563, 13 N. W. 718. The quantity of land is sufficiently shown by stating the dimensions, so that the quantity can be computed. *Pennsylvania R. Co. v. Bruner*, 55 Pa. St. 318. The description must be such that a person conversant with such matters can locate the part taken or it will be void for uncertainty. But it is sufficient if the description can be gathered from the whole report. *Northern R. Co. v. Concord &c. R. Co.*, 27 N. H. 183; *St. Paul &c. R. Co. v. Matthews*, 16 Minn. 341. It has been held sufficient to refer to a description in the warrant or petition. *Ohio River R. Co. v. Harness*, 24 W. Va. 511; *Chesapeake &c. Canal Co. v. Binney*, 4 Cranch C. C. 68.

<sup>21</sup> *Central Pacific R. Co. v. Pearson*, 35 Cal. 247; *Leavenworth &c. R. Co. v. Meyer*, 50 Kans. 25, 31 Pac. 700; *Pierce v. County Comrs.*, 63 Maine 252; *Missouri Pac. R. Co. v. Carter*, 85 Mo. 448; *O'Hara v. Pennsylvania R. Co.*, 25 Pa. St. 445; *Lewis v. St. Paul &c. R. Co.*, 5 S. Dak. 148, 58 N. W. 580, 57 Am. & Eng. R. Cas. 612; *Parker v. Fort Worth &c. R. Co.*, 84 Tex. 333, 19 S. W. 518. See *Omaha &c. R. Co. v. Menk*, 4 Nebr. 21.

the statute requires the commissioners to pass upon is usually sufficient ground for setting the report aside;<sup>22</sup> but if no objection or motion is made to set aside the report, such an omission may be regarded as a mere irregularity not sufficient to defeat or require the proceedings to be dismissed.<sup>23</sup> Where several pieces of property are taken or damaged, or the interests of several owners are separately affected, the report should contain an explicit finding as to each tract and each party,<sup>24</sup> awarding damages to each owner by name.<sup>25</sup> But where several persons have joint interests in one tract, a single award may be made covering the interest of all.<sup>26</sup> Objections to the report

<sup>22</sup> *Martin v. Rushton*, 42 Ala. 289; *Damrell v. Board of Supervisors*, 40 Cal. 154; *Pueblo &c. R. Co. v. Rudd*, 5 Colo. 270; *Bryant v. Glidden*, 36 Maine 36; *New York &c. R. Co., Matter of*, 35 Hun (N. Y.) 232; *Philadelphia &c. R. Co. v. Cake*, 95 Pa. St. 139.

<sup>23</sup> *Pittsburgh &c. R. Co. v. Wolcott*, 162 Ind. 399, 69 N. E. 451. See also *State v. Parker*, 53 N. J. L. 183, 20 Atl. 1074; *Gillett v. McGonigal*, 80 Wis. 158, 49 N. W. 814.

<sup>24</sup> *Chicago &c. R. Co. v. Sanford*, 23 Mich. 418; *Fitzpatrick v. Pennsylvania R. Co.*, 10 Phila. (Pa.) 107; *Dolphin v. Pedley*, 27 Wis. 469; *Sharp v. Johnson*, 4 Hill (N. Y.) 92, 40 Am. Dec. 259. Where the jury is simply required to ascertain the land-owner's damages, a general award is sufficient, without stating the items of injury. *Michigan &c. R. Co. v. Barnes*, 44 Mich. 222, 6 N. W. 651; *Ohio &c. R. Co. v. Wallace*, 14 Pa. St. 245. See *Illinois &c. R. Co. v. Mayrand*, 93 Ill. 591. A substantial compliance with the statute as to stating the items of damages is sufficient where they are required

to be given. *California Pac. R. Co. v. Frisbie*, 41 Cal. 356. Damages should be awarded separately for each estate or interest in a tract of land in which several persons hold distinct estates. *Harris v. Howes*, 75 Maine 436; *Rentz v. Detroit*, 48 Mich. 544, 12 N. W. 911; *Chesapeake &c. Canal Co. v. Hoyer*, 2 Grat. (Va.) 511.

<sup>25</sup> *Rusch v. Milwaukee &c. R. Co.*, 54 Wis. 136, 11 N. W. 253; *Hononstine v. Vaughan*, 7 Blkf. (Ind.) 520; *State v. Brands*, 45 N. J. L. 332. An award to "the estate of A" is bad. *Neal v. Knox &c. R. Co.*, 61 Maine 298; *State v. Fisher*, 43 N. J. L. 377. See also *Adams v. Rulon*, 50 N. J. L. 526, 14 Atl. 881. If the name is unknown the award should so state. *Commonwealth v. Great Berrington*, 6 Mass. 492.

<sup>26</sup> *Pittsburgh &c. R. Co. v. Hall*, 25 Pa. St. 336; *East Saginaw &c. R. Co. v. Benham*, 28 Mich. 459. But see *Ruppert v. Chicago &c. R. Co.*, 43 Iowa 490. A single owner of several lots or tracts of land may be awarded damages in gross for all. *Sherwood v. St. Paul &c.*

which do not go to the jurisdiction of the tribunal, may be waived, and a failure to offer such objections at the time and in the manner<sup>27</sup> prescribed by statute is such a waiver. Objections for lack of jurisdiction, however, may generally be made at any time.<sup>28</sup>

R. Co., 21 Minn. 122; Kankakee &c. R. Co. v. Chester, 62 Ill. 235. In some states, it is held that the interests of tenants in common should be assessed at a gross sum. Southern Pac. R. Co. v. Wilson, 49 Cal. 396; Chicago &c. R. Co. v. Hurst, 30 Iowa 73. By the statutes of some states, tenants in common are allowed to proceed either jointly or severally to recover damages for injuries done to their real estate. Hibbard v. Foster, 24 Vt. 542; Webber v. Merrill, 34 N. H. 202; Hobbs v. Hatch, 48 Maine 55.

<sup>27</sup> Application of Cooper &c., Matter of, 93 N. Y. 507; Chesapeake &c. R. Co. v. Pack, 6 W. Va. 397; Thayer v. Burger, 100 Ind. 262; Morgan Civil Township v. Hunt, 104 Ind. 590, 4 N. E. 299; Clear Lake Water Co., Matter of, 48 Cal. 586. See also Bryant v. Knox &c. R. Co., 61 Maine 300; Mattheis v. Fremont &c. R. Co., 53 Nebr. 681, 74 N. W. 30; One Hundred and Sixty-Third St., In re, 131 N. Y. 569, 30 N. E. 66. Where the parties agree to a confirmation of the report before the expiration of the time allowed for filing objections, they will be considered as having waived all right to afterward offer objections. Kensington &c. Turnp. Co., In re, 97 Pa. St. 260. The acceptance by the property owner of the damages

awarded is a waiver of irregularities and defects in the proceedings. Quincy &c. R. Co. v. Kellogg, 54 Mo. 334; Troy &c. R. Co. v. Potter, 42 Vt. 265, 1 Am. Rep. 325; Kile v. Yellowhead, 80 Ill. 208; Karber v. Nellis, 22 Wis. 215; Hawley v. Harrall, 19 Conn. 142. The occupation by the corporation of the land condemned estops it to object to the validity of the proceedings. Wilmington &c. R. Co. v. Condon, 8 Gill. & J. (Md.) 443. And the payment of the damages awarded has been held to estop the corporation to object to the report or the proceedings. Marquette &c. R. Co. v. Probate Judge, 53 Mich. 217, 18 N. W. 788. The fact that the commissioner's report understated the amount of land taken by a fraction of an acre was held not to invalidate their report, where damages were assessed for injuries to the whole tract. Morgan v. Chicago &c. R. Co., 39 Mich. 675.

<sup>28</sup> Wilkinson v. Mayo, 3 Hen. & Mun. (Va.) 565; Hughes v. Sellers, 34 Ind. 337. Upon motion to confirm the commissioners' report, the supreme court of New York has power to set aside a default entered at the hearing before commissioners and order a new hearing for any sufficient cause for which the commissioners might have set the default aside. In the

**§ 1339 (1042). Report of commissioners—Requisites of—Illustrative cases.**—The report, award or verdict should be reasonably certain and explicit in its statements of what was done and decided,<sup>29</sup> that is, it should state all material matters with such certainty as will enable the parties to fully understand the decision, but it is not necessary to state all that was done in full detail. It is not necessary, unless required by statute, to itemize the damages.<sup>30</sup> Where the matter of the liability for the expenses of a crossing is fixed by statute the commissioners have no power to determine which of the companies is to bear the expense.<sup>31</sup> The report should show that the commissioners

matter of New York &c. R. Co., 93 N. Y. 385. The commissioners have no authority to condemn land not covered by the description in the petition, and an assessment of damages for land not embraced in such description is void for lack of jurisdiction. *Spofford v. Bucksport &c. R. Co.*, 66 Maine 26. Proceedings were had to condemn land, which were regular except that the commissioners awarded a gross sum to all of six lot owners who held in severalty, without specifying the sum to which each was entitled. The company paid the money into court, and nothing further was done in the proceeding. It was held that the condemnation proceeding being ended, so that it was no longer possible to correct it at the instance of either party, it must be held to be void and wholly without effect upon the rights of either party. *Rusch v. Milwaukee &c. R. Co.*, 54 Wis. 136, 11 N. W. 253.

<sup>29</sup> *Reitenbaugh v. Chester Valley R. Co.*, 21 Pa. St. 100; *Connecticut River R. Co. v. Clapp*, 1 Cush. (Mass.) 559. See *Illinois &c. R.*

*Co. v. Maryland*, 93 Ill. 591; *Connecticut &c. R. Co. v. Clapp*, 1 Cush. (Mass.) 559.

<sup>30</sup> *American &c. R. Co. v. Huntington &c. R. Co.*, 130 Ind. 98, 29 N. E. 566; *Michigan &c. R. Co. v. Barnes*, 44 Mich. 222, 6 N. W. 651; *Port Huron &c. R. Co. v. Voorheis*, 50 Mich. 506, 15 N. W. 882; *Flint &c. R. Co. v. Detroit &c. R. Co.*, 64 Mich. 350, 31 N. W. 281; *Packard v. Bergen &c. Co.*, 54 N. J. L. 553, 25 Atl. 506; *Campbell, Matter of*, 1 N. Y. S. 768; *Wilmington &c. R. Co. v. Smith*, 99 N. Car. 131, 5 S. E. 237. But there may be cases where items should be separately stated. *Chesapeake &c. R. Co. v. Hoyer*, 2 Grat. (Va.) 511; *Sanford v. Chicago &c. R. Co.*, 2 Mich. N. P. 132 (Supp.). See generally *Sherwood v. St. Paul &c. R. Co.*, 21 Minn. 127; *Albany &c. R. Co. v. Dayton*, 10 Abb. Pr. (N. Y.) N. S. 182; *Pittsburgh &c. R. Co. v. Hall*, 25 Pa. St. 336; *Pennsylvania R. Co. v. Bruner*, 55 Pa. St. 318.

<sup>31</sup> *Wabash R. Co. v. Ft. Wayne &c. Traction Co.*, 161 Ind. 295, 67 N. E. 674.

met at the appointed time and place.<sup>32</sup> An award, report or verdict in the alternative or upon condition is insufficient.<sup>33</sup> The commissioners or jury have no authority to award damages in anything else than money.<sup>34</sup> If the question whether the proposed taking is necessary for public use is submitted by statute to the commissioners their failure to find upon this question will make their report invalid.<sup>35</sup> Where the report is silent as to what property, if any, will be benefited, there is a presumption that there are no benefits to be assessed.<sup>36</sup> The finding must be in substantial compliance with the requirements of the statute,<sup>37</sup> but ordinarily a literal compliance is not essential, and a clearly immaterial deviation will not invalidate the report.<sup>38</sup>

<sup>32</sup> *Central Pac. R. Co. v. Pearson*, 35 Cal. 247. See also *Virginia &c. R. Co. v. Lovejoy*, 8 Nev. 100.

<sup>33</sup> *Chesapeake &c. R. Co. v. Halstead*, 7 W. Va. 301; *New Orleans Pac. R. Co. v. Murrell*, 34 La. Ann. 536; *Toledo &c. R. Co. v. Munson*, 57 Mich. 42, 23 N. W. 455. Some cases hold that the verdict may contain conditions requiring the company to remove buildings, etc. *Dwight v. Springfield*, 6 Gray (Mass.) 442; *Omaha R. Co. v. Menk*, 4 Nebr. 21. And others hold that by agreement of the parties a verdict imposing conditions may be rendered. *Hill v. Mohawk R. Co.*, 7 N. Y. 152; *Central &c. R. Co. v. Holler*, 7 Ohio St. 220; *Chesapeake R. Co. v. Patton*, 6 W. Va. 147; *Chicago &c. R. Co. v. Melville*, 66 Ill. 329.

<sup>34</sup> *New Orleans Pacific R. Co. v. Murrell*, 34 La. Ann. 536; *Chesapeake &c. R. Co. v. Halstead*, 7 W. Va. 301; *Pennsylvania &c. R. Co. v. Reichert*, 58 Md. 261. The performance of other acts by the petitioners, such as making cross-

ings, building fences, constructing culverts, etc., can not be prescribed as a partial compensation for the land-owner's damages. *Toledo &c. R. Co. v. Munson*, 57 Mich. 42, 23 N. W. 455; *Chicago &c. R. Co. v. Melville*, 66 Ill. 329. See *Hill v. Mohawk &c. R. Co.*, 7 N. Y. 152; *Chesapeake &c. R. Co. v. Patton*, 6 W. Va. 147; *Central Ohio &c. R. Co. v. Holler*, 7 Ohio St. 220.

<sup>35</sup> *Bass v. Elliott*, 105 Ind. 517, 5 N. E. 663; *Mansfield &c. R. Co. v. Clark*, 23 Mich. 519; *Truax v. Sterling*, 74 Mich. 160, 41 N. W. 885. If a finding is made the court is usually bound by such finding and must give judgment accordingly. *Wilmington &c. R. Co. v. Dominguez*, 50 Cal. 505.

<sup>36</sup> *Terre Haute &c. R. Co. v. Flora*, 29 Ind. App. 442, 64 N. E. 648.

<sup>37</sup> *Hunter v. Newport*, 5 R. I. 325; *Cushing v. Gay*, 23 Maine 9; *McClary v. Hartwell*, 25 Mich. 139.

<sup>38</sup> Technical errors which do not prejudice the substantial interests of the parties will be disregarded.



**§ 1340 (1043). Time within which report must be made.—**

The general rule is that if a limited time is allowed to the commissioners by statute in which to make their report, it must be made within the time, or it will be ineffective.<sup>39</sup> In New Jersey, where the statute requires the justice appointing the commissioners to fix the date for the filing of their report, it is held that this provision is mandatory and that an order omitting to fix the date is fatally defective.<sup>40</sup> It has been held that the parties can not extend the time by agreement, but this we regard as a very doubtful decision, for we believe that it is competent for the parties to agree to an extension of time.<sup>41</sup> Where the time for filing the report is fixed by the court, it may be extended by an order made before the expiration of that time.<sup>42</sup> The statutes of many of the states require the report to be recorded and it has been held that under such a statute the report will have no binding force until this is done.<sup>43</sup>

New York &c. Co., *In re*, 61 Hun 625, 15 N. Y. S. 909; *Pacific &c. R. Co. v. Porter*, 74 Cal. 261, 15 Pac. 774, 33 Am. & Eng. R. Cas. 167; *Hunt v. Smith*, 9 Kans. 137; *Detroit &c. R. Co. v. Crane*, 50 Mich. 182, 15 N. W. 73; *Troy &c. R. Co. v. Lee*, 13 Barb. (N. Y.) 169; *New York &c. R. Co., Matter of*, 27 Hun (N. Y.) 116; *Oregon &c. R. Co. v. Bridwell*, 11 Ore. 282, 3 Pac. 684. Presumption is in favor of discharge of duty. *Orange &c. R. Co. v. Craver*, 32 Fla. 28, 13 So. 444; *New Orleans &c. Co. v. Frank*, 39 La. Ann. 707, 2 So. 310, 30 Am. & Eng. R. Cas. 275. But fraud or misconduct may, of course, be shown. *Orange &c. v. Craver*, 32 Fla. 28, 13 So. 444; *Marquette &c. R. Co. v. Probate Judge*, 53 Mich. 217, 18 N. W. 788; *Ortman v. Union &c. R. Co.*, 32 Kans. 419, 4 Pac. 858, 17 Am. & Eng. R. Cas. 136; *Cadmus v. Central &c. R. Co.*, 31 N. J. L. 179.

<sup>39</sup> *Anderson v. Pemberton*, 89 Mo. 61, 1 S. W. 216; *Metzler v. Hugde's Road*, 62 Pa. St. 151; *Claybaugh v. Baltimore &c. R. Co.*, 108 Ind. 262, 9 N. E. 100.

<sup>40</sup> *Doughty v. Atlantic City &c. Traction Co.*, 71 N. J. L. 131, 58 Atl. 101.

<sup>41</sup> *In re Belfast*, 53 Maine 431.

<sup>42</sup> *McMullen v. State*, 105 Ind. 334, 4 N. E. 903. But after the time has elapsed the court has no authority to make an order extending the time for filing the commissioners' report. *Road in Salem Township, In re*, 103 Pa. St. 250; *Baldwin and Snowden Road, 3 Grant's (Pa.) Cas.* 62. Where the report was left in the proper office within the time limited, but the officer failed to mark it filed, it was held to be valid. *Reed v. Acton*, 120 Mass. 130.

<sup>43</sup> *Burns v. Multnomah R. Co.*, 8 Sawyer (U. S.) 543.

§ 1341 (1044). **Objections to report.**—The appropriate mode of objecting to a report is by a written motion or petition stating the specific grounds of objection. Where the objections appear upon the face of the report there is neither necessity nor reason for resorting to extrinsic evidence. Objections based upon matters not apparent upon the face of the record may, in most jurisdictions, be proved by affidavits,<sup>44</sup> or by oral evidence,<sup>45</sup> at the discretion of the court.<sup>46</sup> It has been held proper to receive the

<sup>44</sup> *New Jersey &c. R. Co. v. Suydam*, 17 N. J. L. 25; *Marquette &c. R. Co. v. Probate Judge*, 53 Mich. 217, 18 N. W. 788. Where the evidence is part of the report objections may be founded on the evidence. *Western &c. R. Co. v. Reed*, 35 Cal. 621. See generally *Washington &c. Co. v. Switzer*, 26 Grat. (Va.) 661; *Southern &c. R. Co. v. Wilson*, 49 Cal. 396. Time of objecting to report, see *Washington &c. R. Co. v. Switzer*, 26 Grat. (Va.) 661; *Baltimore &c. R. Co. v. Canton Co.*, 70 Md. 405, 17 Atl. 394; *Chicago &c. R. Co. v. Eubanks*, 32 Mo. App. 184; *Tracy v. Elizabethtown &c. R. Co.*, 80 Ky. 259; *Harper v. Lexington &c. R. Co.*, 2 Dana (Ky.) 227; *Burlington &c. v. Dobson*, 17 Nebr. 450, 23 N. W. 353. The objections must be presented to the court having control of the proceedings. *Burr v. Bucksport &c. R. Co.*, 64 Maine 130.

<sup>45</sup> *Clarksville &c. Turnp. Co. v. Atkinson*, 1 Sneed. (Tenn.) 425; *St. Louis &c. R. Co. v. Almeroth*, 62 Mo. 343; *Sullivan v. Lafayette Co.*, 61 Miss. 271; *Chesapeake &c. Canal Co. v. Mason*, 4 Cranch C. C. 123. *Contra*, *Rondout &c. R. Co. v. Field*, 38 How. Pr. (N. Y.) 187. It has been held that affidavits of commissioners are admis-

sible to impeach their report. *Marquette &c. R. Co. v. Probate Judge*, 53 Mich. 217, 18 N. W. 788, 14 Am. & Eng. R. Cas. 355. But see *Rochester &c. R. Co. v. Beckwith*, 10 How. Pr. (N. Y.) 168. A report is generally held to be prima facie correct and the burden is on the party who assails it. *Crawford v. Valley R. Co.*, 25 Grat. (Va.) 467.

<sup>46</sup> *Marquette &c. R. Co. v. Probate Judge*, 53 Mich. 217, 18 N. W. 788. In a Pennsylvania case the fact that "since the report of the viewers" it had altered its route through the land of some of the property-holders was held to be no ground for an exception by the company to so much of the report as assessed damages to them, since under the Pennsylvania statute, the location of its line by the company was an appropriation of the land; and after the assessment of the damages, the right thereto was vested in the owners, and could not be divested by a subsequent change of route. *Beale v. Pennsylvania R. Co.*, 86 Pa. St. 509. As to what evidence will authorize an order setting aside a report see, *Coster v. New Jersey &c. R. Co.*, 23 N. J. L. 227; *North Hudson &c. R. Co. v. Booraem*, 28 N. J. Eq. 450.

affidavits or testimony of the commissioners either to impeach or support their report.<sup>47</sup> Exceptions to the award, under an Indiana statute, raise only the question as to the amount of damages, but all questions of damages may be presented under the general objection that the damages awarded are too low.<sup>48</sup>

**§ 1342 (1045). Confirmation or rejection of report—Modification.**—The rule sustained by the weight of authority is that the court must confirm or reject the report as a whole,<sup>49</sup> but under some statutes it has been held proper to amend or modify the report in minor particulars, and confirm it as amended,<sup>50</sup> or to recommit it for correction and amendment.<sup>51</sup> Where the prop-

<sup>47</sup> *Marquette &c. R. Co. v. Probate Judge*, 53 Mich. 217; *New Jersey &c. R. Co. v. Suydam*, 17 N. J. L. 25; *Canal Bank v. Albany*, 9 Wend. (N. Y.) 244; *Newport Highway*, 48 N. H. 433.

<sup>48</sup> *Evansville &c. R. Co. v. Herdink*, 174 Ind. 537, 92 N. E. 548.

<sup>49</sup> *Winchester v. Hinsdale*, 12 Conn. 88; Application for Widen-  
ing Roffignac Street, 4 Rob. (La.)  
357; *Claiborne St.*, Matter of, 4  
La. Ann. 7; *Inhabitants of Bruns-  
wick, Appellants*, 37 Maine 446;  
*St. Louis &c. R. Co. v. Richardson*,  
45 Mo. 466; *Mississippi River  
Bridge Co. v. Ring*, 58 Mo. 491;  
*Missouri Pacific R. Co. v. Wern-  
wag*, 35 Mo. App. 449; *Rochester  
Water Works Co. v. Wood*, 60  
Barb. (N. Y.) 137, 41 How. Pr.  
53; *Hanes v. North Carolina R.  
Co.*, 109 N. Car. 490, 13 S. E. 896;  
*Herr's Mill Road*, 14 S. & R. (Pa.)  
204; *Road in Benzinger Township*.  
In re, 115 Pa. St. 436, 10 Atl. 35.  
See *Central Pac. R. Co. v. Pear-  
son*, 35 Cal. 247; *Louisiana West-  
ern R. Co. v. Crossman*, 111 La.  
611, 35 So. 784; *Northern &c. R.*

*Co. v. Concord &c. R. Co.*, 27 N.  
H. 183; *New York &c. R. Co.*,  
Matter of, 64 N. Y. 60; *New York  
&c. R. Co.*, Matter of, 93 N. Y.  
385, 14 Am. & Eng. R. Cas. 402;  
Matter of *Simmons*, 141 App. Div.  
120, 125 N. Y. S. 697.

<sup>50</sup> *St. Louis v. Busch*, 252 Mo.  
209, 158 S. W. 309 (clerical amend-  
ment); *New York Cent. &c. R. Co.*,  
Matter of, 35 Hun (N. Y.) 306;  
*Florence &c. R. Co. v. Pember*, 45  
Kans. 625, 26 Pac. 1. See *Hanni-  
bal Bridge Co. v. Schaubacker*, 49  
Mo. 555; *Stockton &c. R. Co. v.*  
*Galgiani*, 49 Cal. 139; *State v.*  
*Gibbs*, 44 N. J. L. 169; *In re Wash-  
ington St.*, 19 R. I. 159, 160, 33  
Atl. 516; *Greenville &c. R. Co. v.*  
*Nunnamaker*, 4 Rich. L. (S. Car.)  
107.

<sup>51</sup> *Pueblo &c. R. Co. v. Rudd*, 5  
Colo. 270; *Louisiana Western R.  
Co. v. Crossman*, 111 La. Ann. 611,  
35 So. 784; *King's Co. El. R. Co.*,  
In re, 58 Hun 608, 12 N. Y. S. 198.  
See also *Wilcox v. Menden*, 57  
Conn. 120, 17 Atl. 366; *Louisville  
&c. R. Co. v. Postal Tel. &c. Co.*,  
68 Miss. 806, 10 So. 74; *St. Louis*

erty of several owners is included in a single assessment of damages but the tracts are assessed separately, it is held that the court may confirm the report as to part of such tracts and reject it as to others.<sup>52</sup> The practice upon setting aside a commissioner's report is governed by the statute, and varies in the different states. But ordinarily the report is recommitted to the same or to other commissioners for review or correction.<sup>53</sup> The order confirming the award should be definite and certain,<sup>54</sup> and must conform to the provisions of the statute by which confirmation is required.<sup>55</sup> Where the court acts in its judicial

v. Busch, 252 Mo. 209, 158 S. W. 309, Ann. Cas. 1915A, 719, and note reviewing these and other cases on the general subject.

<sup>52</sup> Anthony v. County Comrs., 14 Pick. (Mass.) 189. Where the statute provided that the condemning company or any defendant could move to set aside the proceedings as to any tract of land, it was held that a motion to set aside the report as to an undivided half interest in the lands taken could not be entertained. Southern Pac. R. Co. v. Wilson, 49 Cal. 396. See Beale v. Pennsylvania R. Co., 86 Penn. St. 509.

<sup>53</sup> See McArthur v. Morgan, 49 Conn. 347; Coleman v. Andrews, 48 Maine 562; George's Creek &c. Co. v. New Central Coal Co., 40 Md. 425; Hannibal &c. R. Co. v. Rowland, 29 Mo. 337; Stinson v. Dunbarton, 46 N. H. 385; State v. Crusier, 14 N. J. L. 401; Commissioners of Central Park, In re, 61 Barb. (N. Y.) 40; Potts' Appeal, 15 Pa. St. 414.

<sup>54</sup> Portland &c. R. Co. v. County Comrs., 65 Maine 292; Yeamans v. County Comrs., 16 Gray (Mass.) 36. See also New York &c. R. Co.

v. New York &c. R. Co., 52 Conn. 274.

<sup>55</sup> Reynolds v. Reynolds, 15 Conn. 83; Indianapolis &c. R. Co. v. Smythe, 45 Ind. 322; Terre Haute &c. R. Co. v. Crawford, 100 Ind. 550; Snoddy v. Pettis County, 45 Mo. 361; State v. Dover, 10 N. H. 394; State v. Cincinnati &c. R. Co., 17 Ohio St. 103; Oregonian &c. Co. v. Hill, 9 Ore. 377; Fort Worth &c. R. Co. v. Lamphear, 1 Tex. App. Civ. Cas. 127. See generally Wagner v. New York &c. R. Co., 38 Ohio St. 32, 10 Am. & Eng. R. Cas. 380; Reynolds, Ex parte, 52 Ark. 330, 12 S. W. 570, 44 Am. & Eng. R. Cas. 60; St. Louis &c. R. Co. v. Wilder, 17 Kans. 239; Kansas City &c. R. Co. v. Kennedy, 49 Kans. 19, 30 Pac. 126; Provolt v. Chicago &c. R. Co., 69 Mo. 633; State v. Lubke, 15 Mo. App. 152; Dietrichs v. Lincoln &c. R. Co., 12 Nebr. 225, 14 N. W. 718; Drath v. Burlington &c. R. Co., 15 Nebr. 367, 18 N. W. 717; Oregon &c. R. Co. v. Bridwell, 11 Ore. 282, 3 Pac. 684; Ennis v. Wood &c. R. Co., 12 R. I. 73. Form of judgment. Peoria &c. R. Co. v. Peoria &c. R. Co., 66 Ill. 174.

capacity in confirming the report, it has the same authority to set aside the order of confirmation during the term at which it was made that it has to set aside its other judgments.<sup>56</sup> The award by the commissioners is generally regarded as an adjudication of damages by a competent tribunal, and at the expiration of the time allowed for appeal it is, to a certain extent at least, in the nature of a judgment.<sup>57</sup>

§ 1343 (1046). **Misconduct of jurors or commissioners.**—Improper behavior on the part of the commissioners, such as receiving entertainment at the expense of one of the parties,<sup>58</sup> or accepting favors at his hands,<sup>59</sup> is sufficient to vitiate their award. But an improper motive or a tendency toward an improper influence must be shown.<sup>60</sup> The fact that the commissioners agreed with the condemning company as to the amount of their compensation is not cause for setting aside their award, where no definite compensation is fixed by law, and the agreement was openly made after the award had been filed, and the sum agreed upon as compensation was not excessive.<sup>61</sup> An agreement between the commissioners to make a verdict for the quotient to be obtained by dividing the sum of their estimates

<sup>56</sup> New York Central &c. R. Co., Matter of, 64 N. Y. 60; Reiff v. Conner, 10 Ark. 241.

<sup>57</sup> Stauffer v. Cincinnati &c. R. Co., 33 Ind. App. 356, 70 N. E. 543.

<sup>58</sup> Central Pacific R. Co. v. Pearson, 35 Cal. 247; Petition for a Highway, 48 N. H. 433; Buffalo &c. R. Co., Matter of, 32 Hun (N. Y.) 289. It is held, however, that where there is no improper motive, or where the entertainment was furnished with the consent of the opposing party, the award will stand. Beardsley v. Washington, 39 Conn. 265; State v. Dover &c. R. Co., 43 N. J. L. 528; Staten Island R. Co., In re, 41 Hun (N. Y.) 392. See generally New York

&c. R. Co., In re, 64 N. Y. 60; New York &c. R. Co., In re, 5 Hun (N. Y.) 105; Douglass v. Byrnes, 63 Fed. 16.

<sup>59</sup> New York &c. R. Co. v. Townsend, 36 Hun (N. Y.) 630.

<sup>60</sup> Hayward v. Bath, 40 N. H. 100. Where the counsel for one of the parties sent a paper to the commissioners, on which were certain computations which he had given orally at the hearing, this was held insufficient cause for setting aside the award. New York &c. R. Co. v. Church, 31 Hun (N. Y.), 440.

<sup>61</sup> State v. Dover &c. R. Co., 43 N. J. L. 528, Matter of Staten Island R. T. Co., 41 Hun (N. Y.) 392.

of the damages by the number of commissioners will invalidate a report based on the result of such a proceeding.<sup>62</sup> The report may be set aside for gross errors of the commissioners in the principles upon which they acted in making the assessment or in calculating the values.<sup>63</sup> And it has been held that it may be set aside as to one person or tract without affecting others.<sup>64</sup>

**§ 1344 (1046a). Judgment.**—As already stated, the procedure varies considerably in different jurisdictions, and this is true in some respects even as to the nature and scope of the judgment. In this section we shall consider some of the holdings in various jurisdictions, but some of them would not be followed in every jurisdiction. Since the proceeding, in many jurisdictions at least, is one simply for the purpose of ascertaining and fixing judicially the amount of damages, the court, on confirming the report, should not render a personal judgment unless there is a special statutory provision authorizing such a decree or judgment. The judgment should be in the nature of an award.<sup>65</sup> The rule is the same on appeal. "The object of appellate proceedings is simply to correct the assessment of the commission-

<sup>62</sup> *Kansas City &c. R. Co. v. Campbell*, 62 Mo. 585; *Donner v. Palmer*, 23 Cal. 40. See *Marquette &c. R. Co. v. Probate Judge*, 53 Mich. 217, 18 N. W. 788; *Forbes v. Howard*, 4 R. I. 364.

<sup>63</sup> *St. Joseph v. Crowther*, 142 Mo. 155, 43 S. W. 786; *Van Wickle v. Camden &c. R. Co.*, 14 N. J. L. 162; *Coster v. New Jersey R. Co.*, 24 N. J. L. 730; *Swayze v. New Jersey &c. R. Co.*, 36 N. J. L. 295; *New York &c. R. Co., In re*, 33 Hun (N. Y.) 639, 98 N. Y. 447; *Reitenbaugh v. Chester R. Co.*, 21 Pa. St. 100; *Chesapeake &c. R. Co. v. Pack*, 6 W. Va. 397. The mere fact that there is a mistake in the amount of the damages awarded is not sufficient cause for setting aside the award. Such objection

must be remedied by an appeal. *Seal v. Northern &c. R. Co.*, 1 Pears. (Pa.) 108.

<sup>64</sup> *Stubbings v. Evanston*, 136 Ill. 37, 26 N. E. 577, 11 L. R. A. 839, 29 Am. St. 300; *McKee v. St. Louis*, 17 Mo. 184.

<sup>65</sup> *St. Louis &c. R. Co. v. Wilder*, 17 Kans. 239; *Lawrence &c. R. Co. v. Moore*, 24 Kans. 323; *Kansas City &c. R. Co. v. Kennedy*, 49 Kans. 19, 30 Pac. 126; *Florence &c. R. Co. v. Lilley*, 3 Kans. App. 588, 43 Pac. 857; *Louisville &c. R. Co. v. Ryan*, 64 Miss. 399, 8 So. 173; *Chesapeake &c. R. Co. v. Bradford*, 6 W. Va. 220. But see *Curtis v. St. Paul &c. R. Co.*, 21 Minn. 497; *Robbins v. St. Paul &c. R. Co.*, 24 Minn. 191.

ers. The judgment does not pass the title to the land, nor to the right of way. It simply determines the amount which the railway company shall pay to the owners, or to the county treasurer for their use, in order to secure the right of way. It is in the nature of an award of damages, such as is made by condemnation commissioners, except perhaps that as to costs it may be in the form of an ordinary personal judgment.<sup>66</sup> Neither is it necessary for the judgment to require the execution of a deed to the railroad company for the land condemned. The title is acquired under the statute.<sup>67</sup> The judgment should, in effect at least, be one appropriating the right of way to the company on the payment of the damages assessed.<sup>68</sup> Where it specifically refers to and affirms the report of the commissioners, it is not necessary for it to recite the names of the land-owners who are named in the report.<sup>69</sup> The judgment should provide in a proper case for the release of mortgages on the payment of the damages assessed.<sup>70</sup> The judgment should conform to the relief prayed for. Relief in excess of that demanded can not be granted. Land different from that described can not be taken.<sup>71</sup> On appeal the property owner can not recover more damages than he claims.<sup>72</sup> It has been held in a proceeding to acquire the right to construct a railroad track along a street that it is not necessary that the petition should show the number of tracks proposed to be laid in the street. But where the intention to lay more than one track is not asserted, and the map shows the

<sup>66</sup> *St. Louis &c. R. Co. v. Wilder*, 17 Kans. 239.

<sup>67</sup> *Indianapolis &c. R. Co. v. Smythe*, 45 Ind. 322.

<sup>68</sup> *Oregon &c. R. Co. v. Bridwell*, 11 Ore. 282, 3 Pac. 684. Payment of award in condemnation proceedings in the manner provided by statute of money sufficient to satisfy the constitutional guaranty of a just compensation is said in a recent case to be all that is necessary in order to acquire the rights sought to be obtained and

discharge the judgment. *Stolze v. Milwaukee &c. R. Co.*, 113 Wis. 44, 88 N. W. 919, 99 Am. St. 833.

<sup>69</sup> *Thompson v. Chicago &c. R. Co.*, 110 Mo. 147, 19 S. W. 77.

<sup>70</sup> *Woolsey v. New York Ele. R. Co.*, 134 N. Y. 323, 30 N. E. 387, 31 N. E. 891.

<sup>71</sup> *Brown v. Rome &c. R. Co.*, 86 Ala. 206, 5 So. 195; *Chicago &c. R. Co. v. Chicago*, 132 Ill. 372, 23 N. E. 1036.

<sup>72</sup> *Houston &c. R. Co. v. Milburn*, 34 Tex. 224.

location of only one track, no more can be laid.<sup>73</sup> The land taken should be definitely described in the judgment.<sup>74</sup> Coming now to the sufficiency of the record to support the judgment many of the cases require that the notice required to be served should affirmatively appear in the report since this is a jurisdictional fact.<sup>75</sup> It should show, under most statutes at least, as a condition precedent to the proceeding that the parties could not agree upon the compensation to be paid.<sup>76</sup> It has been held unnecessary that it should affirmatively appear of record that the appraisers or commissioners were qualified to serve as

. <sup>73</sup> Bay City Belt Line R. Co. v. Hitchcock, 90 Mich. 533, 51 N. W. 808.

<sup>74</sup> Fore v. Hoke, 48 Mo. App. 254; Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329, 332 (must be described at least so it can be made certain in the record proper); Ft. Worth &c. R. Co. v. Lamphear, 1 White & W. Tex. App. Civ. Cas. Ct. § 308; Galena v. Pound, 22 Ill. 399; New York &c. R. Co. v. New York &c. R. Co., 52 Conn. 274. In a recent case an order was entered on the record books of the county court, pending trial of condemnation proceedings by a railroad company, whereby plaintiff proposed to construct and maintain certain crossings, and the order provided that the proposition should be made a part of the judgment. Subsequently a judgment was entered, assessing damages at a specified sum, but the judgment did not mention the order. Afterwards the land-owners agreed with the successor of such railroad company that on payment of the damages awarded in the condemnation proceedings the owners would

transfer the benefit of the judgment to the railroad and make a deed to the right of way, which was done. The court held that the railroad company must make the crossings referred to in the order; and that contentions that the order was a mere proposition, never accepted, and that the land-owners were estopped by the contract and acceptance of the damages from requiring anything not specified in the judgment of condemnation, were without merit. Louisville &c. R. Co. v. Sale, 29 Ky. L. 425, 93 S. W. 613.

<sup>75</sup> Ross v. North Providence, 10 R. I. 461; Vogt v. Bexar Co., 5 Tex. Civ. App. 272, 23 S. W. 1044; Junction City &c. R. Co. v. Silver, 27 Kans. 741.

<sup>76</sup> Kansas City &c. R. Co. v. Campbell, 62 Mo. 585. Compare, however, as to what is sufficient to show this, Hyatsville v. Washington &c. R. Co., 122 Md. 660, 90 Atl. 515; McKenzie v. Imperial Irr. Co. (Tex. Civ. App.), 166 S. W. 495. And see Evansville &c. Ry. Co. v. Evansville Terminal Ry., 175 Ind. 21, 93 N. E. 282.



such.<sup>77</sup> Where the judgment has been rendered by a competent court it is not open to collateral attack except for want of jurisdiction.<sup>78</sup> Thus, in a collateral proceeding, a party can not raise the question as to the right of the plaintiff to condemn;<sup>79</sup> or as to the qualifications or competency of the commissioners;<sup>80</sup> or that the method adopted by the commissioners in their computation was irregular;<sup>81</sup> or that there was a misjoinder of parties defendant in the petition;<sup>82</sup> or that the description of the lands in the petition was defective;<sup>83</sup> or that the parties seeking condemnation were not legally incorporated.<sup>84</sup> The judgment until set aside or reversed is a final adjudication of the controversy.<sup>85</sup> It is without effect, however, as to persons who should have been but were not made parties to the proceeding.<sup>86</sup> Thus a judgment condemning land will not affect a tenant thereon who is not made a party,<sup>87</sup> and, on the other hand, it is not binding

<sup>77</sup> *American &c. Co. v. Huntington &c. R. Co.*, 130 Ind. 98, 29 N. E. 566; *Gay v. Caldwell*, 3 Ky. 63.

<sup>78</sup> *Secombe v. Milwaukee &c. R. Co.*, 90 U. S. 108, 23 L. ed. 67; *Chicago &c. R. Co. v. Springfield &c. R. Co.*, 67 Ill. 142; *Townsend v. Chicago &c. R. Co.*, 91 Ill. 545; *South Chicago &c. R. Co. v. Chicago*, 196 Ill. 490, 63 N. E. 1046; *Brown v. Philadelphia &c. R. Co.*, 58 Md. 539; *Thompson v. Chicago &c. R. Co.*, 110 Mo. 147, 19 S. W. 77; *Sedalia v. Missouri &c. R. Co.*, 17 Mo. App. 105; *Allen v. Utica &c. R. Co.*, 15 Hun (N. Y.) 80; *Weinckie v. New York &c. R. Co.*, 61 Hun 619, 15 N. Y. S. 689; *Davidson v. Texas &c. R. Co.*, 29 Tex. Civ. App. 54, 67 S. W. 1093; *Drouin v. Boston &c. R. Co.*, 74 Vt. 343, 52 Atl. 957.

<sup>79</sup> *Foltz v. St. Louis &c. R. Co.*, 60 Fed. 316; *Chesapeake &c. R. Co. v. Washington &c. R. Co.*, 99 Va. 715, 40 S. E. 20.

<sup>80</sup> *Huling v. Kay Valley R. &c.*

*Co.*, 130 U. S. 559, 9 Sup. Ct. 603, 32 L. ed. 1045; *Cage v. Trager*, 60 Miss. 563; *Gulf &c. R. Co. v. Ft. Worth &c. R. Co.*, 86 Tex. 537, 26 S. W. 54. See also *Pettit v. Comrs. of Wicomico County*, 123 Md. 128, 90 Atl. 993.

<sup>81</sup> *Union Depot R. Co. v. Frederick*, 117 Mo. 138, 21 S. W. 1118, 1130, 26 S. W. 350.

<sup>82</sup> *Thompson v. Chicago &c. R. Co.*, 110 Mo. 147, 19 S. W. 77.

<sup>83</sup> *St. Joseph &c. Co. v. Cincinnati &c. R. Co.*, 109 Ind. 172, 9 N. E. 727; *Fremont &c. R. Co. v. Mattheis*, 39 Nebr. 98, 57 N. W. 987.

<sup>84</sup> *Chicago &c. R. Co. v. Chicago &c. R. Co.*, 112 Ill. 589.

<sup>85</sup> *Pennsylvania &c. R. Co. v. Gorsuch*, 84 Pa. St. 411; *Spokane Valley Power Co. v. Northern Pac. R. Co.*, 99 Wash. 557, 169 Pac. 991.

<sup>86</sup> *National R. Co. v. Easton &c. R. Co.*, 36 N. J. L. 181.

<sup>87</sup> *Baltimore &c. R. Co. v. Parrette*, 55 Fed. 50.

on the owner of the ground rent where the proceeding is against a tenant only.<sup>88</sup> Where the proceeding for condemnation is settled by the parties and a consent decree is entered against the railroad company conferring an easement on the right of way as described, the decree has the same effect as a deed to convey the right of way.<sup>89</sup>

§ 1345 (1047). **Waiver of objections.**—The doctrine of waiver applies to proceedings under the power of eminent domain, and the general rule is that if a party has knowledge of the facts and an opportunity to present them he must avail himself of the opportunity or he will be regarded as having waived the objections. Defects in a notice may be waived,<sup>90</sup> and so may defects in petitions.<sup>91</sup> The authorities which hold that defects in notices and petitions may be waived by failure to seasonably interpose objections clearly support the conclusion that objections to the report or to any of the proceedings will be regarded as waived unless opportunely and appropriately made.<sup>92</sup> So,

<sup>88</sup> Voegtly v. Pittsburgh &c. R. Co., 2 Grant Cas. (Pa.) 243.

<sup>89</sup> Chicago &c. R. Co. v. Snyder, 120 Iowa 532, 95 N. W. 183.

<sup>90</sup> Windsor v. Field, 1 Conn. 279; Swinney v. Fort Wayne &c. R. Co., 59 Ind. 205, 219; Atchison &c. R. Co. v. Patch, 28 Kans. 470; Barre &c. Co. v. Appleton, 2 Pick. (Mass.) 430; East Saginaw &c. R. Co. v. Benham, 28 Mich. 459; Langford v. County Commissioners, 16 Minn. 375; Rheiner v. Union &c. R. Co., 31 Minn. 289, 17 N. W. 623, 14 Am. & Eng. R. Cas. 373; Minneapolis &c. R. Co. v. Kanna, 32 Minn. 174; Parish v. Gilmanton, 11 N. H. 293; Cruger v. Hudson River Co., 12 N. Y. 190; Tingley v. Providence, 9 R. I. 388; Onken v. Riley, 65 Tex. 468; Damp v.

Dame, 29 Wis. 419; Seifert v. Brooks, 34 Wis. 443. See also Wiegand v. Siddon, 41 App. D. C. 130; St. Louis &c. R. Co. v. Donovan, 149 Mo. 93, 50 S. W. 286; Kirkwood v. Cronin, 259 Mo. 207, 168 S. W. 674.

<sup>91</sup> Wells v. Rhodes, 114 Ind. 467, 16 N. E. 830; Palmer v. Highway Comr., 49 Mich. 45, 12 N. W. 903; Bacheler v. New Hampton, 60 N. H. 207.

<sup>92</sup> See upon the general subject, Chowan &c. R. Co. v. Parker, 105 N. Car. 246, 11 S. E. 328; Norfolk &c. R. Co. v. Ely, 101 N. Car. 8, 7 S. E. 476; Chicago &c. R. Co. v. Randolph &c., 103 Mo. 451, 15 S. W. 437; Mansfield &c. R. Co. v. Clark, 23 Mich. 519; Gage v. Chicago, 141 Ill. 642, 31 N. E. 163.

defects and irregularities in other proceedings before the trial<sup>93</sup> and in the award itself<sup>94</sup> may be waived.

**§ 1346 (1055). Company a trespasser where proceedings are void.**—It is held in a number of cases that unless it has pursued the statutory method for acquiring property, a railroad company which takes possession of property without the consent of the land-owner is a trespasser.<sup>95</sup> But in our opinion the company should not be regarded as a naked trespasser where it acts in good faith and enters into possession under color and claim of right. Where there is good faith and color of right the company ought, as we believe, to be held to pay just compensation and damages, but should not be compelled to lose the improvements it has made.<sup>96</sup> As we have elsewhere shown, the adjudged cases declare that a company that enters, without right, may be ousted by an action of ejectment,<sup>97</sup> but we think this rule

<sup>93</sup> *Whitely v. Mississippi &c. Co.*, 38 Minn. 523, 38 N. W. 753; *Lieberman v. Chicago &c. R. Co.*, 141 Ill. 140, 30 N. E. 544; *Cooper, Matter of*, 93 N. Y. 507.

<sup>94</sup> *Mattheis v. Fremont &c. R. Co.*, 53 Nebr. 681, 74 N. W. 30; *Morning Side Park, In re*, 10 Abb. Pr. N. S. (N. Y.) 338; *Twombly v. Chicago &c. R. Co.* (Tex. Civ. App.), 31 S. W. 81; *Chatterton v. Parrott*, 46 Mich. 432, 9 N. W. 482. And so as to qualifications of commissioners or appraisers. *Tide-water R. Co. v. Cowan*, 106 Va. 817, 56 S. E. 819.

<sup>95</sup> *Ewing v. St. Louis*, 5 Wall. (U. S.) 413, 18 L. ed. 657; *Smith v. Chicago &c. R. Co.*, 67 Ill. 191; *Peoria &c. R. Co. v. Schertz*, 84 Ill. 135; *Memphis &c. R. Co. v. Parsons Town Co.*, 26 Kans. 503; *Harris v. Marblehead*, 10 Gray (Mass.) 40; *Blaisdell v. Winthrop*, 118 Mass. 138; *Kanne v. Minneap-*

*olis &c. R. Co.*, 33 Minn. 419, 23 N. W. 854; *Illinois Central R. Co. v. Hoskins*, 80 Miss. 730, 32 So. 150, 92 Am. St. 612; *Ells v. Pacific R. Co.*, 51 Mo. 200; *Moses v. St. Louis Sectional Dock Co.*, 84 Mo. 242; *Hull v. Chicago &c. R. Co.*, 21 Nebr. 371, 32 N. W. 162; *Adams v. Saratoga &c. R. Co.*, 10 N. Y. 328; *Bothe v. Dayton &c. R. Co.*, 37 Ohio St. 147.

<sup>96</sup> Ante, §§ 1269, 1270, 1351.

<sup>97</sup> *Jones v. New Orleans &c. R. Co.*, 70 Ala. 227; *Smith v. Inge*, 80 Ala. 283; *Robinson v. Pittsburgh R. Co.*, 57 Cal. 417; *Graham v. Columbus &c. R. Co.*, 27 Ind. 260, 89 Am. Dec. 498; *Cox v. Louisville &c. R. Co.*, 48 Ind. 178; *Daniels v. Chicago &c. R. Co.*, 35 Iowa 129, 14 Am. Rep. 490; *Conger v. Burlington &c. R. Co.*, 41 Iowa 419; *St. Joseph &c. R. Co. v. Callender*, 13 Kans. 496; *Harrington v. St. Paul &c. R. Co.*, 17 Minn. 215;

does not apply where there is an estoppel or unexcused acquiescence, but that there should be full compensation for the property taken and the injury inflicted.<sup>98</sup> Where the entry is without right the land-owner is entitled to full compensation for the loss suffered by him, and, according to the weight of authority, may, if there is no element of estoppel, proceed against the company as a trespasser.<sup>99</sup> It seems to us that where there is good faith and color of right, the company may, on payment or tender

*Walker v. Chicago &c. R. Co.*, 57 Mo. 275; *Flynn v. Beaverhead County*, 49 Mont. 347, 141 Pac. 673; *Stewart v. Camden &c. R. Co.*, 33 N. J. L. 115; *Lozier v. New York Cent. R. Co.*, 42 Barb. (N. Y.) 465; *Baker v. Long Island R. Co.*, 1 How. Pr. (N. Y.) 214; *McClinton v. Pittsburgh &c. R. Co.*, 66 Pa. St. 404; *Justice v. Nesquehoning Valley R. Co.*, 87 Pa. St. 28; *Wilmington &c. R. Co. v. High*, 89 Pa. St. 282; *Galveston &c. R. Co. v. Pfeuffer*, 56 Tex. 66; *Gilman v. Sheboygan R. Co.*, 40 Wis. 653; *Rusch v. Milwaukee &c. R. Co.*, 54 Wis. 136, 11 N. W. 253. In states where the compensation is not required to precede the taking, a mere entry is held not to be a trespass. *Louisville &c. R. Co. v. Quinn*, 14 Lea (Tenn.) 65; *Turrell v. Norman*, 19 Barb. (N. Y.) 263. But if compensation is not made within a reasonable time the corporation may be held liable as a trespasser ab initio. *Cushman v. Smith*, 34 Maine 247. Where the owner consented to an entry in reliance upon a promise of the company to make compensation, it was held that, upon its failure to fulfill this promise, the land-owner could sue in trespass. *Evansville &c. R. Co. v. Grady*, 6 Bush (Ky.)

144. If the consent of the owner was upon condition, all conditions must be shown to have been fulfilled before the land-owner will be enjoined from prosecuting an action of trespass for the damages done by the construction of the railroad and operation of its trains across his land. *Baltimore &c. R. Co. v. Algire*, 65 Md. 337, 4 Atl. 293. Where a land-owner has expressly forbidden a railroad company to enter upon her land, mere acquiescence on her part in the subsequent construction of the road across her land will not estop her to sue in trespass for damages. *Currie v. Natchez &c. R. Co.*, 61 Miss. 725, 62 Miss. 506.

<sup>98</sup> Ante, §§ 1350, 1351. See also *Rivard v. Missouri Pac. R. Co.*, 257 Mo. 135, 165 S. W. 763.

<sup>99</sup> *Jones v. New Orleans &c. R. Co.*, 70 Ala. 227; *Whitehead v. Arkansas Central R. Co.*, 28 Ark. 460; *Potter v. Ames*, 43 Cal. 75; *Hooker v. New Haven &c. R. Co.*, 14 Conn. 146, 36 Am. Dec. 477; *Capers v. Augusta &c. R. Co.*, 76 Ga. 90; *Taylor v. Marcy*, 25 Ill. 518; *President &c. Crawfordsville &c. R. Co. v. Wright*, 5 Ind. 252; *Anderson &c. R. Co. v. Kernodle*, 54 Ind. 314; *Henry v. Dubuque &c. R. Co.*, 10 Iowa 540; *Birge v. Chi-*

of full compensation, hold the land in cases where it has constructed its road, but that in order to give it this right, payment or tender should be made within a reasonable time.

cago &c. R. Co., 65 Iowa 440, 21 N. W. 767; Atchison &c. R. Co. v. Weaver, 10 Kans. 344; Storer v. Hobbs, 52 Maine 144; Baltimore &c. R. Co. v. Boyd, 63 Md. 325; Wamesit &c. Co. v. Allen, 120 Mass. 352; Murray v. Fitchburg R. Co., 130 Mass. 99; Warren v. Spencer Water Co., 143 Mass. 9, 8 N. E. 606; Prescott v. Patterson, 44 Mich. 525, 7 N. W. 237; Hursh v. First Division St. Paul &c. R. Co., 17 Minn. 439; Schroeder v. De Graff, 28 Minn. 299; Memphis &c. R. Co. v. Payne, 37 Miss. 700; Mueller v. St. Louis &c. R. Co.,

31 Mo. 262; Smart v. Portsmouth &c. R. Co., 20 N. H. 233; Eaton v. Boston &c. R. Co., 51 N. H. 504, 12 Am. Rep. 147; Terpening v. Smith, 46 Barb. (N. Y.) 208; Blodgett v. Utica &c. R. Co., 64 Barb. (N. Y.) 580; Secomb v. Milwaukee &c. R. Co., 49 How. Pr. (N. Y.) 75; Piercy v. Johnson City, 130 Tenn. 231, 169 S. W. 765; Buffalo Bayou &c. R. Co. v. Ferris, 26 Tex. 588; Loop v. Chamberlain, 20 Wis. 135; Rusch v. Milwaukee &c. R. Co., 54 Wis. 136, 11 N. W. 253; Ramsden v. Manchester &c. R. Co., 1 Exch. 723.

## CHAPTER XLI.

### REMEDIES OF LAND-OWNERS

Sec.	Sec.
1350. Remedies to enforce payment of compensation.	1357. Remedies of land-owner—Damages.
1351. Remedies of land-owner—Generally.	1358. Remedies of land-owner—Taking or injury in excess of that condemned.
1352. Remedies of land-owner—Injunction.	1359. Remedies of land-owner—Right of company to conveyance.
1353. Remedies of land-owner—Limitation of action.	1360. Effect of tender of payment by company.
1354. Remedies of land-owner—Parties to proceedings.	1361. Acceptance of damages—Estoppel.
1355. Remedies of land-owner—Pleading.	
1356. Remedies of land-owner—Evidence.	

§ 1350 (1048). Remedies to enforce payment of compensation.—Where payment of compensation is required to precede the taking and the corporation has obtained or is attempting to take possession of the land before payment has actually been made, its further occupation of the land may be enjoined until the damages are paid,<sup>1</sup> unless the owner has, by acquiescence

<sup>1</sup> Cowan v. Southern R. Co., 118 Ala. 554, 23 So. 754; Young v. Harrison, 6 Ga. 130; Gammage v. Georgia Southern R. Co., 65 Ga. 614; Ft. Wayne v. Ft. Wayne &c. R. Co., 149 Ind. 25, 48 N. E. 342; Richards v. Des Moines &c. R. Co., 18 Iowa 259; Irish v. Burlington &c. R. Co., 44 Iowa 380; Harness v. Chesapeake &c. Canal Co., 1 Md. Ch. 248; Elwell v. Eastern R. Co., 124 Mass. 160; Lohman v. St. Paul &c. R. Co., 18 Minn. 174; Stewart v. Raymond R. Co., 7 S. & M. (Miss.)

568; Evans v. Missouri &c. R. Co., 64 Mo. 453; Provolt v. Chicago &c. R. Co., 69 Mo. 633; Ray v. Atchison &c. R. Co., 4 Nebr. 439; Freeholders of Monmouth Co. v. Red Bank &c. Co., 18 N. J. Eq. 91; White v. Nashville &c. R. Co., 7 Heisk. (Tenn.) 518; Kendall v. Missisquoi &c. R. Co., 55 Vt. 438; Kittell v. Missisquoi R. Co., 56 Vt. 96; Sturtevant v. Milwaukee &c. R. Co., 11 Wis. 63; Gilman v. Sheboygan &c. R. Co., 40 Wis. 653; Stolze v. Milwaukee &c. R. Co.,

in the occupancy of his land until the rights of the public have intervened,<sup>2</sup> estopped himself to enjoin its further occupation.<sup>3</sup> Under the qualification or limitation just stated, where a railroad company entered into possession and built its road with the consent or acquiescence of the owner and the holder of an outstanding option to purchase, the remedy, if any, against the company was held to be an action for damages.<sup>4</sup> In states which permit the corporation to acquire title to land before the damages are paid, but which do not authorize the issuing of an execution upon the judgment awarding damages it is generally held that the award may be enforced by an independent suit.<sup>5</sup> Where the company neglects to have the damages assessed for lands of which it has taken possession, the English courts hold that a bill in equity may be filed by the land-owner to compel

113 Wis. 44, 88 N. W. 919, 90 Am. St. 833. A vendee or lessee of the company may be enjoined from using the land until compensation is made. *Ray v. Atchison &c. R. Co.*, 4 Nebr. 439; *Gilman v. Sheboygan &c. R. Co.*, 40 Wis. 653; *Hibbs v. Chicago &c. R. Co.*, 39 Iowa 340; *Kittell v. Missisquoi R. Co.*, 56 Vt. 96; *Provolt v. Chicago &c. R. Co.*, 69 Mo. 633. See also *Knoxville R. &c. Co. v. O'Fallen*, 130 Tenn. 270, 170 S. W. 55.

<sup>2</sup> Where the land was taken without the consent of the owner, the public can acquire no rights therein until payment has been made therefor. *Evans v. Missouri &c. R. Co.*, 64 Mo. 453; *Stretton v. Great Western &c. R. Co.*, 40 L. J. Eq. 50; *Zimmerman v. Kansas City &c. R. Co.*, 144 Fed. 622.

<sup>3</sup> *Remshart v. Savannah &c. R. Co.*, 54 Ga. 579; *Griffin v. Augusta &c. R. Co.*, 70 Ga. 164; *Reisner v. Strong*, 24 Kans. 410; *Mooers v. Kennebec &c. R. Co.*, 58 Maine

279; *Forward v. Hampshire &c. Canal Co.*, 22 Pick. (Mass.) 462; *Ross v. Elizabethtown &c. R. Co.*, 2 N. J. Eq. 422; *Hentz v. Long Island &c. R. Co.*, 13 Barb. (N. Y.) 646; *Goodin v. Cincinnati &c. R. Co.*, 18 Ohio St. 169, 98 Am. Dec. 95; *Pettibone v. LaCrosse &c. R. Co.*, 14 Wis. 443; *Wood v. Charing Cross &c. R. Co.*, 33 Beav. (Eng.) 290. See also *Midland R. Co. v. Smith*, 135 Ind. 348, 35 N. E. 284.

<sup>4</sup> *Eastern Oregon Land Co. v. Des Chutes R. Co.*, 213 Fed. 897. See also *Kamper v. Chicago*, 215 Fed. 706.

<sup>5</sup> In states in which the law requires security to be given before land is taken, the security may be proceeded against to recover the award. And in Pennsylvania it has been held that the land-owner can not claim any rights in the land as against a mortgagee of the railroad company, but must look to the personal responsibility of the company and the sureties

it to do so.<sup>6</sup> It has been held that property taken in invitum is taken subject to an obligation to make compensation therefor, and that this obligation constitutes a vendor's lien upon the land taken, and can be enforced as such in a court of equity.<sup>7</sup> And in states where this view is held as well as in those whose courts hold that no title passes until compensation is made,<sup>8</sup> it is also held that those holding under the condemning company by mortgage, lease or otherwise, take the lands subject to the right of the owner to enforce payment of his damages.<sup>9</sup> In many

on its bond. *Fries v. Southern Pennsylvania R. Co.*, 85 Pa. St. 73. A suit may be brought directly on the award, although a bond was given to secure its payment. The bond is simply an additional security and does not destroy nor suspend other remedies. *Fisher v. Warwick R. Co.*, 12 R. I. 287.

<sup>6</sup> *Adams v. London and Blackwall R. Co.*, 18 L. J. Ch. N. S. 357; *Inge v. Birmingham &c. R. Co.*, 3 DeG. McN. & G. 658; *Mason v. Stokes Bay Pier &c. R. Co.*, 32 L. J. Ch. 110. And see *Adams v. London &c. Blackwall R. Co.*, 2 McN. & G. 118; *Hedges v. Metropolitan R. Co.*, 28 Beav. (Eng.) 109; *Red River Bridge Co. v. Clarksville*, 1 Sneed (Tenn.) 176, 60 Am. Dec. 143.

<sup>7</sup> *Mims v. Macon &c. R. Co.*, 3 Ga. 333; *Provolt v. Chicago &c. R. Co.*, 69 Mo. 633; *Walker v. Ware &c. R. Co.*, 35 L. J. Eq. 94; *Dayton &c. R. Co. v. Lewton*, 20 Ohio St. 401, 55 Am. Dec. 464; *Gillison v. Savannah &c. R. Co.*, 7 S. Car. 173; *Kendall v. Missisquoi &c. R. Co.*, 55 Vt. 438; *Southern R. Co. v. Gregg*, 101 Va. 308, 43 S. E. 570; *Earl St. Germans v. Crystal Palace R. Co.*, L. R. 11 Eq. Cas. 568.

<sup>8</sup> This doctrine obtains in all

states in which compensation is required to precede the taking, and also in others in which the constitution simply requires that compensation shall be made. *Gilman v. Sheboygan &c. R. Co.*, 40 Wis. 653; *Western Pennsylvania R. Co. v. Johnston*, 59 Pa. St. 290; *Buffalo &c. R. Co. v. Harvey*, 107 Pa. St. 319; *Hatry v. Painesville &c. R. Co.*, 1 Ohio Cir. Ct. 426; *Kittell v. Missisquoi R. Co.*, 56 Vt. 96; *Bridgman v. St. Johnsbury &c. R. Co.*, 58 Vt. 198, 2 Atl. 467; *White v. Nashville &c. R. Co.*, 7 Heisk. (Tenn.) 518. See also *Zimmerman v. Kansas City &c. R. Co.*, 144 Fed. 622. And see as to effect of appeal and when title passes and to what period it relates back. *Cleveland &c. R. Co. v. Nowlin*, 163 Ind. 497, 72 N. E. 257; *Terre Haute &c. R. Co. v. Indianapolis Traction Co.*, 167 Ind. 193, 78 N. E. 661. And see generally *Kennedy v. Indianapolis*, 103 U. S. 599, 26 L. ed. 550; *Perkins v. Maine Cent. R. Co.*, 72 Maine 95; ante, § 1247.

<sup>9</sup> In some of the states, it is held that the acceptance and use by the grantee of a corporation of lands for which the corporation has failed to make compensation as required by law, renders the grantee personally liable for the payment



of the states a suit at common law may be maintained upon the implied promise to pay a just compensation for the lands taken.<sup>10</sup> And for any taking or injury for which the statute does not provide a remedy, the land-owner may sue at common law.<sup>11</sup> Some of the courts hold that even though the original taking

of such compensation. *Western Pennsylvania R. Co. v. Johnston*, 59 Pa. St. 290; *Buffalo &c. R. Co. v. Harvey*, 107 Pa. St. 319; *Gilman v. Sheboygan &c. R. Co.*, 37 Wis. 317; *Lake Erie &c. R. Co. v. Griffin*, 92 Ind. 487. But the new corporation may refuse to accept property to which the old corporation has failed to acquire title, and may proceed to condemn in its own name. *Adams v. St. Johnsbury &c. R. Co.*, 57 Vt. 240.

<sup>10</sup> *Boise Valley Constr. Co. v. Kroeger*, 17 Idaho 384, 105 Pac. 1070, 28 L. R. A. (N. S.) 968 (quoting text), and to the same effect are the following cases; *Bentonville R. Co. v. Baker*, 45 Ark. 252; *Rome v. Perkins*, 30 Ga. 154; *Donald v. St. Louis &c. R. Co.*, 52 Iowa 411, 3 N. W. 462; *Wichita &c. R. Co. v. Fechheimer*, 36 Kans. 45, 12 Pac. 362; *Bailey v. New Orleans*, 19 La. Ann. 271; *Allen v. Wabash &c. R. Co.*, 84 Mo. 646; *Welsh v. Chicago &c. R. Co.*, 19 Mo. App. 127; *Gulf Coast &c. R. Co. v. Donahoo*, 59 Tex. 128; *International &c. R. Co. v. Benitos*, 59 Tex. 326. See also *Southern R. Co. v. Hood*, 126 Ala. 312, 28 So. 662, 85 Am. St. 32; *Chicago &c. R. Co. v. Jones*, 103 Ind. 386, 6 N. E. 8, 55 Am. Rep. 756; *Brown v. Chicago &c. R. Co.*, 64 Nebr. 62, 89 N. W. 405; *Southern R. Co. v. Gregg*, 101 Va. 308,

43 S. E. 570; *Zimmerman v. Kansas City &c. R. Co.*, 144 Fed. 622. *Mandamus* was held proper in *State v. Grand Island &c. R. Co.*, 31 Nebr. 209, 47 N. W. 857. And see as to issuing execution, *State v. Withrow (Mo.)*, 24 S. W. 638. Where an express promise to pay is made in order to induce the land-owner to discontinue proceedings for the assessment of damages such promise may be made the basis of an action. *Plott v. Western N. Car. R. Co.*, 65 N. Car. 74.

<sup>11</sup> *Indiana Central R. Co. v. Boden*, 10 Ind. 96; *Cogswell v. Essex Mill Corp.*, 6 Pick. (Mass.) 94. See also *Archer v. Board*, 128 Fed. 125. Where consequential damage results to property which is not taken within the meaning of the statute for assessment of damages, but for which the constitution requires that compensation shall be made the land-owner may recover damages in a common law action. *Burlington &c. R. Co. v. Reinhackle*, 15 Nebr. 279, 18 N. W. 69, 48 Am. Rep. 342; *Railroad Co. v. Hambleton*, 40 Ohio St. 496; *Protzman v. Indianapolis &c. R. Co.*, 9 Ind. 467, 68 Am. Dec. 650; *Johnson v. Parkersburg*, 16 W. Va. 402, 37 Am. Rep. 779; *Taylor v. Metropolitan El. R. Co.*, 50 N. Y. Supr. Ct. 311; *Grafton v. Baltimore &c. R. Co.*, 21 Fed. 309.

was wrongful, the land-owner may affirm the taking and sue for compensation,<sup>12</sup> and a recovery in such a suit vests the right to the lands in the defendant.<sup>13</sup> It is generally held, however, that where the statute authorizing a railroad company to take

<sup>12</sup> *Evansville &c. R. Co. v. Nye*, 113 Ind. 223, 15 N. E. 261; *Indiana &c. R. Co. v. Allen*, 113 Ind. 581, 15 N. E. 446. But see *Anthony v. Granger*, 22 R. I. 359, 47 Atl. 1091. Or he may sue in trespass, in which case in some jurisdictions the recovery is limited to the damages accrued when the action was brought, and another suit may be prosecuted for a continuance of the trespass. *Carl v. Sheboygan &c. R. Co.*, 46 Wis. 625, 1 N. W. 295; *Gulf &c. R. Co. v. Helsley*, 62 Tex. 593; *Uline v. New York Central &c. Co.*, 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661; *Dickson v. Chicago &c. R. Co.*, 71 Mo. 575; *Ford v. Santa Cruz R. Co.*, 59 Cal. 290.

<sup>13</sup> *Gulf Coast &c. R. Co. v. Donahoo*, 59 Tex. 128; *Wichita &c. R. Co. v. Fechheimer*, 36 Kans. 45, 12 Pac. 362; *Jamison v. Springfield*, 53 Mo. 224. All damages, past, present and future, shall be included in the verdict in such an action. *Stodghill v. Chicago &c. R. Co.*, 53 Iowa 341, 5 N. W. 495; *Chicago &c. R. Co. v. Maher*, 91 Ill. 312; *Chicago &c. R. Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341 and note; *Van Orsdol v. Burlington &c. R. Co.*, 56 Iowa 470, 9 N. W. 379; *Miller v. Keokuk R. Co.*, 63 Iowa 680, 16 N. E. 567; *Kansas Pac. R. Co. v. Muhlman*, 17 Kans. 224; *Central Branch R. Co. v. Andrews*, 26 Kans. 702; *Elizabethtown &c. R.*

*Co. v. Combs*, 10 Bush. (Ky.) 382, 19 Am. Rep. 67; *Jeffersonville &c. R. Co. v. Esterle*, 13 Bush. (Ky.) 667; *Fowle v. New Haven &c. Co.*, 112 Mass. 334, 17 Am. Rep. 106; *Baldwin v. Chicago &c. R. Co.*, 35 Minn. 354, 29 N. W. 5; *Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177; *Texas &c. R. Co. v. Long*, 1 Tex. App. Civ. Cas. 281. See also *Zimmerman v. Kansas City &c. R. Co.*, 144 Fed. 622, where it is said that the property owner "had a right to waive the trespass and commence his action in the district court, the same as he might have done had formal proceedings been taken by the railroad company and he had been dissatisfied with the award of the commissioners 'to recover compensation for all the damages which he sustained by reason of the permanent taking and appropriation of the right of way by the railroad company.' *Central Branch &c. R. Co. v. Andrews*, 26 Kans. 702, 710; *Cohen v. St. Louis &c. R. Co.*, 34 Kans. 158, 8 Pac. 138, 55 Am. Rep. 242; *Wichita &c. R. Co. v. Fechheimer*, 36 Kans. 45, 12 Pac. 362; *United States v. Great Falls. Mfg. Co.*, 112 U. S. 645, 5 Sup. Ct. 306, 28 L. ed. 846." The court also held that such judgment was conclusive against a successor company which purchased the railroad under foreclosure proceedings and that it could only hold the land subject to the condition of

the lands and other property of private individuals provides a mode by which the owner may enforce payment of his damages, this remedy is exclusive of all others.<sup>14</sup> The general rule is that if the statute authorizes the company alone to have the damages assessed under its provisions, or makes it the duty of the company so to do, a land-owner may bring an action for any damages that are not presented to the commissioners for assessment

paying such judgment. Citing *Pfeifer v. Sheboygan &c. R. Co.*, 18 Wis. 155, 86 Am. Dec. 751; *Chicago &c. R. Co. v. Galey*, 141 Ind. 360, 39 N. E. 925; *Rio Grande &c. Ry. Co. v. Ortiz*, 75 Tex. 602, 12 S. W. 1129; *Oregon v. Memphis &c. R. Co.*, 51 Ark. 235, 11 S. W. 96; *Drury v. Midland R. Co.*, 127 Mass. 571; *Bridgman v. St. Johnsbury &c. R. Co.*, 58 Vt. 198, 2 Atl. 467.

<sup>14</sup> *Cairo &c. R. Co. v. Turner*, 31 Ark. 494, 25 Am. Rep. 564; *Johnson v. St. Louis &c. R. Co.*, 32 Ark. 758; *Ohio &c. R. Co. v. Thillman*, 143 Ill. 127, 32 N. E. 529, 36 Am. St. 359; *Lafayette &c. R. Co. v. Smith*, 6 Ind. 249; *Levison v. Junction R. Co.*, 7 Ind. 597; *Mason v. Kennebec &c. R. Co.*, 31 Maine 215; *Williams v. Camden &c. R. Co.*, 79 Maine 543, 11 Atl. 600; *Hazen v. Essex Co.*, 12 Cush. (Mass.) 475; *Stevens v. Proprietors Middlesex Canal*, 12 Mass. 466; *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394, 8 N. E. 119; *Brown v. Beatty*, 34 Miss. 227, 69 Am. Dec. 389; *Aldrich v. Cheshire R. Co.*, 21 N. H. 359, 53 Am. Dec. 212; *Hurniker v. Contoocook Valley R. Co.*, 29 N. H. 146; *Allen v. Wilmington &c. R. Co.*, 102 N. Car. 381, 9 S. E. 4; *Land v. Wilmington &c. R. Co.*, 107 N. Car. 72, 12

S. E. 125; *Hueston v. Eaton &c. R. Co.*, 4 Ohio St. 685. *Little Miami &c. R. Co. v. Whitacre*, 8 Ohio St. 590; *Knori v. Germantown R. Co.*, 5 Wharton (Pa.) 256; *Cumberland Valley R. Co. v. McLanahan*, 59 Pa. St. 23; *Fehr v. Schuylkill Nav. Co.*, 69 Pa. St. 161; *McLaughlin v. Charlotte &c. R. Co.*, 5 Rich. L. (S. Car.) 583; *Colcough v. Nashville &c. Co.*, 2 Head (Tenn.) 171; *Mitchell v. Franklin &c. Turnp. Co.*, 3 Humph. (Tenn.) 456. See also *Black Hills &c. Ry. Co. v. Tacoma &c. Co.*, 129 Fed. 312. But where there is no remedy provided by statute or the injury is caused by negligence the common law remedy may be invoked. *Indiana &c. R. Co. v. Boden*, 10 Ind. 96; *Hall v. Pickering*, 40 Maine 548; *Drady v. Des Moines &c. R. Co.*, 57 Iowa 393, 10 N. W. 754, 14 Am. & Eng. R. Cas. 130; *Atlantic &c. R. Co. v. Fuller*, 48 Ga. 423; *Kansas &c. R. Co. v. Hopkins*, 18 Kans. 494. See *Cohen v. St. Louis &c. R. Co.*, 34 Kans. 158, 8 Pac. 138, 55 Am. Rep. 242; *Grand Rapids &c. R. Co. v. Heisel*, 47 Mich. 393, 11 N. W. 212; *Ohio &c. R. Co. v. Wachter*, 123 Ill. 440, 15 N. E. 279, 5 Am. St. 532 and note, 34 Am. & Eng. R. Cas. 194; *St. Louis &c. R. Co. v. Brown*, 34 Ill. App. 552.

within a reasonable time.<sup>15</sup> Under the constitution of many of the states the corporation is required to procure an assessment of the damages, and to pay or tender the same before it acquires any rights in the land taken by condemnation other than those of a mere trespasser. But where the land-owner waives the condition precedent and permits the corporation to construct its road under a parol license, the rule is that he can afterward only maintain an action for the damages that should have been awarded.<sup>16</sup>

**§ 1351 (1049). Remedies of land-owner — Generally.** — The general rule is that where the remedy by appeal from the proceedings is provided all questions which could be litigated on such appeal must be so litigated,<sup>17</sup> but there are many questions

<sup>15</sup> *Cairo &c. R. Co. v. Trout*, 32 Ark. 17; *Bentonville R. Co. v. Baker*, 45 Ark. 252; *Denslow v. New Haven &c. R. Co.*, 16 Conn. 98; *Eward v. Lawrenceburgh &c. R. Co.*, 7 Ind. 711; *Kansas Pacific R. Co. v. Streeter*, 8 Kans. 133; *Nichols v. Somerset &c. R. Co.*, 43 Maine 356; *Gowen v. Penobscot R. Co.*, 44 Maine 140; *Pettibone v. LaCrosse &c. R. Co.*, 14 Wis. 443; *Sherman v. Milwaukee &c. R. Co.*, 40 Wis. 645. And where damage is done for which the statute fails to provide an assessment of compensation the land-owner may be allowed his common law remedy. *Williams v. Camden &c. R. Co.*, 79 Maine 543, 11 Atl. 600; *Clapp v. Manter*, 78 Maine 358, 5 Atl. 773; *Dean v. Colt*, 99 Mass. 480; *Halsey v. Lehigh Valley R. Co.*, 45 N. J. L. 26; *Cator v. Board of Works &c.*, 34 L. J. Q. B. 74; *Imperial Gas-Light &c. Co. v. Broad-bent*, 7 H. L. Cases, 600.

<sup>16</sup> *Conger v. Burlington &c. R.*

*Co.*, 41 Iowa 419; *Baltimore &c. R. Co. v. Algire*, 63 Md. 319, 65 Md. 337, 3 Atl. 293; *Sherman v. Milwaukee &c. R. Co.*, 40 Wis. 645. Where it was alleged that a land-owner had waived his equitable lien on land taken for a railroad right of way by permitting the company to construct its line on the land before payment of the award, such waiver was complete when the line was constructed, and was not affected by mere lapse of time. *Southern R. Co. v. Gregg*, 101 Va. 308, 43 S. E. 570. See ante, §§ 1174, 1285.

<sup>17</sup> An injunction will not be granted to restrain the railroad company from taking possession of land by authority of proceedings that were erroneous. Such errors must be corrected by an appeal or writ of certiorari. *Phifer v. Carolina Central R. Co.*, 72 N. Car. 433; *Brown v. Beatty*, 34 Miss. 227, 69 Am. Dec. 389; *Tharp v. Witham*, 65 Iowa 566, 22 N. W.

which do not arise on appeal. It may be said, generally, that in the absence of a statute controlling the procedure that one whose lands are trespassed upon by a railroad company has a right in a proper case to sue for possession, or to enjoin the continuance of the use of the land by the railroad company, or for damages, or to institute condemnation proceedings.<sup>18</sup> One or more of these remedies is open to him and in some instances he may have an election. Thus an action for ejectment may be maintained where the railroad company obtains possession pending an appeal by depositing the damages awarded by the commissioners, but fails to pay an additional sum awarded by the jury on appeal,<sup>19</sup> for that matter is not involved in the appeal from

677. This doctrine has been applied where condemnation proceedings of which the land-owner was duly notified resulted in no damages at all being awarded to him. *Powell v. Clelland*, 82 Ind. 24; *Frevert v. Finrock*, 31 Ohio St. 621. The remedy by appeal or certiorari will be considered in the next chapter.

<sup>18</sup> *Clark v. Wabash R. Co.* 132 Iowa 11, 109 N. W. 309. See generally *Hughey v. Walker*, 71 Ark. 644, 73 S. W. 1093; *McKennon v. St. Louis &c. R. Co.*, 69 Ark. 104, 61 S. W. 383 (statutory remedy exclusive and precludes ejectment); *Mitchell v. Chicago &c. R. Co.*, 265 Ill. 300, 106 N. E. 833; *Illinois &c. R. Co. v. Hoskins*, 80 Miss. 730, 32 So. 150, 92 Am. St. 612; *Andrews v. Delhi &c. Tel. Co.*, 66 App. Div. 616, 73 N. Y. S. 1129, affirming 36 Misc. 23, 72 N. Y. S. 50; *Peck v. Schenectady R. Co.*, 67 App. Div. 359, 73 N. Y. S. 794, judgment modified in 170 N. Y. 298, 63 N. E. 357 (injunction to restrain unauthorized occupation of street); *St. Louis &c. R. Co. v.*

*Grayson Co.*, 31 Tex. Civ. App. 611, 73 S. W. 64. In North Carolina it is held that where land is taken by a railroad company under a statute authorizing it to acquire a right of way, and providing for the assessment of compensation by application to the clerk of the superior court and the appointment of commissioners therefor, the compensation can not be recovered by an action of ejectment. *Dargan v. Carolina &c. R. Co.*, 131 N. Car. 623, 42 S. E. 979. It is rather broadly held by the supreme court of Utah that a party whose property is about to be specially damaged in any substantial degree for public use has the same rights and is given the same remedies for the protection of his property from the threatened injury as would be accorded him if his property was actually taken and appropriated for public use. *Stockdale v. Rio Grande &c. R. Co.*, 28 Utah 201, 77 Pac. 849.

<sup>19</sup> *Lake Erie &c. R. Co. v. Kinsey*, 87 Ind. 514; *Levering v. Philadelphia &c. R. Co.*, 8 W. & S.

the proceeding, or in any other case where the company entered without the owner's consent and holds possession without right.<sup>20</sup> In some cases the owner's consent has been held to be immaterial, where it was given in return for promises which the railroad company has failed to fulfill,<sup>21</sup> but many cases hold that where a land-owner consents to the construction of valuable public works on his land, he is estopped to sue for the recovery

(Pa.) 459; *St. Joseph &c. R. Co. v. Callender*, 13 Kans. 496; *White v. Wabash &c. R. Co.*, 64 Iowa 281, 20 N. W. 436; *Kanne v. Minneapolis &c. R. Co.*, 30 Minn. 423, 15 N. W. 871. Where the company abandons the proceedings pending an appeal, and after it has obtained possession, an action of ejectment will lie. *Kiecher v. Killbuck Turnp. Co.*, 33 Ind. 333.

<sup>20</sup> See *McKennon v. St. Louis &c. R. Co.*, 69 Ark. 104, 61 S. W. 383; *White v. Wabash &c. R. Co.*, 64 Iowa 281, 20 N. W. 436; *Buckwalter v. Atchison &c. R. Co.*, 64 Kans. 403, 67 Pac. 831; *Pfaender v. Chicago &c. R. Co.*, 86 Minn. 218, 90 N. W. 393; *Illinois Cent. R. Co. v. Hoskins*, 80 Miss. 730, 32 So. 150, 92 Am. St. 612; *Owen v. St. Paul &c. R. Co.*, 12 Wash. 313, 41 Pac. 44; *Kuhl v. Chicago &c. R. Co.*, 101 Wis. 42, 77 N. W. 155. The owner of the full equitable title is not bound by proceedings against the holder of the naked legal title. *Kansas Pac. R. Co. v. McBratney*, 12 Kans. 1. A railroad company holding under a lease may be ejected upon the expiration or forfeiture of the lease. *Green v. Missouri &c. R. Co.*, 82 Mo. 653; *Horton v. New York Central &c. R. Co.*, 12 Abb. N. C. (N. Y.) 30. See *Bradley v.*

*Missouri Pac. R. Co.*, 91 Mo. 493, 4 S. W. 427. In *Connelsville &c. Co. v. Baltimore &c. R. Co.*, 216 Pa. 309, 65 Atl. 669, it is held that where a railroad company takes land without compensation it can not acquire title by adverse possession, and that the land-owner may maintain ejectment, but that an execution under a judgment in his favor will be stayed to allow condemnation proceedings. See also *Covert v. Pittsburg &c. R. Co.*, 204 Pa. St. 341, 54 Atl. 170; *Oliver v. Pittsburg &c. R. Co.*, 131 Pa. St. 408, 19 Atl. 47, 17 Am. St. 814.

<sup>21</sup> *Hooper v. Columbus &c. R. Co.*, 78 Ala. 213; *Philadelphia &c. R. Co. v. Cooper*, 105 Pa. St. 239. Some courts have held that execution on a judgment of ejectment against a railroad company for lands necessary in its operation should be stayed a reasonable time to enable the corporation to acquire the land by condemnation, and that a court of equity may interfere by injunction to compel such stay. *Pittsburg &c. R. Co. v. Jones*, 59 Pa. St. 433; *Justice v. Nesquehoning V. R. Co.*, 87 Pa. St. 28; *Pittsburg &c. R. Co. v. Bruce*, 102 Pa. St. 23; *Conger v. Burlington &c. R. Co.*, 41 Iowa 419.

of the land, and is limited to a proceeding to recover damages.<sup>22</sup> The fact that the property has passed into the hands of another company than that by which the wrongful entry was made does not preclude the land-owner from recovering in ejectment, where he has not estopped himself by acquiescence, since the second company can acquire no rights in the land superior to those of

<sup>22</sup> *Evansville &c. R. Co. v. Nye*, 113 Ind. 223, 15 N. E. 261; *Indiana &c. R. Co. v. McBroom*, 114 Ind. 198, 15 N. E. 831; *Provolt v. Chicago &c. R. Co.*, 57 Mo. 256; *Kanaga v. St. Louis &c. R. Co.*, 76 Mo. 207; *New York &c. R. Co. v. Stanley*, 34 N. J. Eq. 55; *Paterson &c. R. Co. v. Kamlah*, 42 N. J. Eq. 93, 4 Atl. 444; *Tompkins v. Augusta &c. R. Co.*, 21 S. Car. 420; *Texas &c. R. Co. v. Jarrell*, 60 Tex. 267; *McAulay v. Western Vt. R. Co.*, 33 Vt. 311, 78 Am. Dec. 627; *Taylor v. Chicago &c. R. Co.*, 63 Wis. 327, 24 N. W. 84. See *Robinson v. Pittsburg R. Co.*, 57 Cal. 417; *Crescent Canal Co. v. Montgomery*, 143 Cal. 248, 76 Pac. 1032, 65 L. R. A. 940; *Bibber-White Co. v. White River &c. R. Co.*, 131 Fed. 995; *Charleston &c. R. Co. v. Hughes*, 105 Ga. 1, 30 S. E. 972; 979 (citing text); *Jacobs v. Kansas City &c. R. Co.*, 134 La. 389, 64 So. 150 (value of land but not the land itself); *Second St. Imp. Co. v. Kansas City &c. Ry. Co.*, 255 Mo. 519, 164 S. W. 515 (same); *Rivard v. Missouri Pac. Ry. Co.*, 257 Mo. 135, 165 S. W. 763 (same). If the owner, with full knowledge of the taking, makes no objection, but permits the railroad company to locate its road across his land, and to expend large sums of money in the construction thereof, he will be estopped to eject it for non-payment of compensation. *New Orleans &c. R. Co. v. Jones*, 68 Ala. 48; *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. ed. 873; *Bravard v. Cincinnati &c. R. Co.*, 115 Ind. 1, 17 N. E. 183; *Strickler v. Midland R. Co.*, 125 Ind. 412, 25 N. E. 455; *Buckwalter v. Atchison &c. R. Co.*, 64 Kans. 403, 67 Pac. 831; *St. Julian v. Morgan's La. &c. R. Co.*, 35 La. Ann. 924; *McAulay v. Western Vt. R. Co.*, 33 Vt. 311, 78 Am. Dec. 627. But see *Walker v. Chicago &c. R. Co.*, 57 Mo. 275; *Crosby v. Dracut*, 109 Mass. 206. The fact that a railroad company is actually occupying a right of way across land and constructing or operating its road thereon, is constructive notice of its rights therein, sufficient to bind a subsequent purchaser of the land. *Indiana &c. R. Co. v. McBroom*, 114 Ind. 198, 15 N. E. 831; *Detroit &c. R. Co. v. Brown*, 37 Mich. 533. Where the defendant answered claiming title to all the land sued for and disclaiming title to no part thereof, it was held immaterial that the evidence showed it to be in possession of only a small part thereof. *Colorado Central R. Co. v. Smith*, 5 Colo. 160. Acceptance by the land-owner of the damages deposited pending an appeal, will

its grantor.<sup>23</sup> Nor does the fact that title is held subject to an easement deprive the land-owner of his action. Ejectment may be maintained in a proper case by the owner of the fee against a railroad company which lays its tracks in a street in which his interest has not been condemned, and the fact that the public authorities granted the company permission to use the street for its purpose is no defense to the action.<sup>24</sup> Any one having a vested interest in land unlawfully taken by a railroad company is entitled to sue in trespass. A lessee,<sup>25</sup> or a mortgagee holding

estop him to prosecute an action of ejectment to recover the land, even though the proceedings are reversed on appeal. *St. Paul & C. R. Co. v. Karnes*, 101 Ill. 402.

<sup>23</sup> *Lake Erie & C. R. Co. v. Griffin*, 92 Ind. 487; *Gilman v. Sheboygan & C. R. Co.*, 37 Wis. 317; *Pfeifer v. Sheboygan & C. R. Co.*, 18 Wis. 155, 86 Am. Dec. 751. See also *Zimmerman v. Kansas City & C. R. Co.*, 144 Fed. 622. Where the receiver of an insolvent railroad corporation unlawfully appropriates land to the use of the corporation, and, after the discharge of the receiver, the corporation resumes control of the railroad, and retains possession of and uses the land, the owner can maintain an action to recover and for damages. *Bloomfield & C. R. Co. v. Van Slike*, 107 Ind. 480, 8 N. E. 269. Where an execution, issued on a judgment for damages for land condemned by a railroad was returned "no property found," but the company entered upon the land and constructed its road without objection from the owner, and afterward leased it to another company, it was held that the land-owner could not maintain an action to recover the land from the les-

see company without notice to quit. *Chicago & C. R. Co. v. Knox College*, 34 Ill. 195.

<sup>24</sup> *Lozier v. New York & C. R. Co.*, 42 Barb. (N. Y.) 465; *Carpenter v. Oswego & C. R. Co.*, 24 N. Y. 655; *Wager v. Troy Union R. Co.*, 25 N. Y. 526; *Weyl v. Sonoma V. R. Co.*, 69 Cal. 202, 10 Pac. 510. But in *Edwardsville R. Co. v. Sawyer*, 92 Ill. 377, it was held that its occupation of a public street is a matter between the railroad company and the public authorities, and can not be questioned by the land-owner in ejectment. (Compare with this case, however, the recent case of *Mitchell v. Chicago & Ry. Co.*, 265 Ill. 300, 106 N. E. 833.) See also *Montgomery v. Santa Ana & C. R. Co.*, 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654, 43 Am. St. 89. Where possession is taken without payment or tender of compensation, as required by the constitution, ejectment will lie even though the wrongdoer is a municipal corporation, where there is no consent or element of estoppel. *Flynn v. Beaverhead County*, 49 Mont. 347, 141 Pac. 673.

<sup>25</sup> *Pennsylvania R. Co. v. Eby*, 107 Pa. St. 166; *Baltimore & C. R. Co. v. Thompson*, 10 Md. 76.



the legal title,<sup>26</sup> may maintain trespass for an injury to his rights although the railroad company has acquired title from the owner of the fee. Where the railroad encroaches upon land adjoining that which it has condemned,<sup>27</sup> or occupies a street or highway without making compensation,<sup>28</sup> it is liable in trespass to the owner of the fee in such land.<sup>29</sup> Where the railroad company took possession of lands under proceedings which were subsequently declared void for want of proper notice, and immediately after the first judgment was set aside it proceeded to condemn the lands in a lawful manner, it was held that the railroad company was not liable to the land-owner in a suit for trespass for the damage done prior to the second judgment of condemnation, but that the assessment of damages covered all injuries to the defendant's possession.<sup>30</sup> It is held that where the entry

<sup>26</sup> *Wilson v. European &c., R. Co.*, 61 Maine 358.

<sup>27</sup> *Brigham v. Agricultural Branch R. Co.*, 1 Allen (Mass.) 316; *Hazen v. Boston &c. R. Co.*, 2 Gray (Mass.) 574; *Eaton v. European &c. R. Co.*, 59 Maine 520, 8 Am. Rep. 430. See *New Orleans &c. R. Co. v. Brown*, 64 Miss. 479, 1 So. 687; *Second St. Imp. Co. v. Kansas City &c. R. Co.*, 255 Mo. 519, 164 S. W. 515.

<sup>28</sup> *Indianapolis &c. R. Co. v. Hartley*, 67 Ill. 439; *Starr v. Camden &c. R. Co.*, 24 N. J. L. 592; *Trustees v. Auburn &c. R. Co.*, 3 Hill (N. Y.) 567; *Mahon v. New York Central &c. R. Co.*, 24 N. Y. 658; *Sherman v. Milwaukee &c. R. Co.*, 40 Wis. 645; *Blesch v. Chicago &c. R. Co.*, 43 Wis. 183. See also *Fairchild v. Oakland &c. R. Co.*, 176 Cal. 629, 169 Pac. 388; *Horton v. Grand Rapids &c. R. Co.*, 199 Mich. 472, 165 N. W. 653 (holding it may be enjoined).

<sup>29</sup> See *Grand Rapids &c. R. Co. v. Heisel*, 47 Mich. 393, 11 N. W. 212; *Chicago v. Jackson*, 196 Ill. 496, 63 N. E. 1013, 1135, affirming 88 Ill. App. 130. But see reasoning of the court in *Edwardsville R. Co. v. Sawyer*, 92 Ill. 377.

<sup>30</sup> *Dunlap v. Toledo &c. R. Co.*, 50 Mich. 470, 15 N. W. 555. Where the railroad company took possession under an erroneous order permitting it to occupy the land before making compensation as required by the constitution, it was held that the entry was justifiable and did not subject the railroad company to an action for trespass. *Walker v. Likens*, 24 Mo. 298. Where the owner, at the time of the entry and construction of the railroad under authority of a void condemnation proceeding, sold the land to another in whose hands it was afterwards condemned, the land-owner was held entitled to recover from such pur-

of the railroad company was clearly wrongful, the fact that the lands were subsequently condemned is no bar to an action for the trespass, even though damages for the trespass were erroneously included in the award of compensation.<sup>31</sup> It has also been held that the measure of damages in an action of trespass against a railroad company for unlawfully constructing its road upon land belonging to another is his damages already accrued, and punitive damages in case the circumstances warrant it.<sup>32</sup>

**§ 1352 (1049a). Remedies of land-owner — Injunction.** — Injunction will usually lie where a railroad company or even a municipal corporation threatens and is about to take possession of real property which it has no power to condemn or without

chaser the compensation paid on such second condemnation, since the purchaser must be held to have taken the land subject to the damage already done at the time of his purchase. *McFadden v. Johnson*, 72 Pa. St. 335, 13 Am. Rep. 681.

<sup>31</sup> *Pierce v. Worcester &c. R. Co.*, 105 Mass. 199; *Harrington v. St. Paul &c. R. Co.*, 17 Minn. 215; *Central R. Co. v. Hetfield*, 29 N. J. L. 206. Damages arising from a former trespass are no part of the damages for which compensation must be made in proceedings to condemn land. *Proetz v. St. Paul &c. R. Co.*, 17 Minn. 163; *McClinton v. Pittsburg &c. R. Co.*, 66 Pa. St. 404; *Selma &c. R. Co. v. Keith*, 53 Ga. 178; *Missouri &c. R. Co. v. Ward*, 10 Kans. 352; *Blodgett v. Utica &c. R. Co.*, 64 Barb. (N. Y.) 580. And the fact that a recovery has been had for the trespass does not lessen the damages to which the land-owner is entitled in a suit to condemn the land. *Leber v.*

*Minneapolis &c. R. Co.*, 29 Minn. 256; *Oregon R. Co. v. Barlow*, 3 Ore. 311; *Blodgett v. Utica R. Co.*, 64 Barb. (N. Y.) 580; *Chicago &c. R. Co. v. Davis*, 86 Ill. 20. The mere pendency of a suit to condemn lands is no defense to an action for a former trespass. *Coburn v. Pacific Lumber Co.*, 46 Cal. 31. See also *Blackwell Lumber Co. v. Empire Mill Co.*, 29 Idaho 421, 160 Pac. 265; *Norfolk &c. R. Co. v. A. C. Allen & Son*, 122 Va. 603, 95 S. E. 406.

<sup>32</sup> *Anderson &c. R. Co. v. Kernodle*, 54 Ind. 314. A railroad company which takes possession of land after the owner has obtained possession thereto pursuant to a judgment in action of trespass *quare clausum fregit* against the company, is liable in an action of trespass for the second entry. *Illinois &c. R. Co. v. Cobb*, 82 Ill. 183. It is held that the value of the land itself can only be recovered by proceedings under the statute.

attempting to condemn it.<sup>33</sup> It is, indeed, often an appropriate remedy for the protection of the land-owner against wrongful proceedings conducted under color of the power of eminent domain. It may be said at the outset that injunction does not lie in cases where there is a right of appeal except where the proceedings are void. But where there is no adequate remedy at law and the proceedings are void for the reason that there was no jurisdiction, injunction is held by many of the courts to be an appropriate remedy. The rule sanctioned by authority is that even if the proceedings are void a complainant will not be granted an injunction unless he shows equity.<sup>34</sup> Where a railroad or other corporation threatens to take possession of lands and construct its road thereon without having perfected its right of entry in the manner provided by law, it may be restrained by injunction at the suit of the owner.<sup>35</sup> This relief

<sup>33</sup> *St. Louis &c. R. Co. v. Tulsa*, 213 Fed. 87; *Johnston v. Delaware &c. R. Co.*, 245 Pa. St. 338, 91 Atl. 618; *Roaring Springs Townsite Co. v. Paducah &c. Tel. Co.* (Tex. Civ. App.), 164 S. W. 50. See also *Atlanta &c. R. Co. v. Bradley*, 141 Ga. 740, 81 S. E. 1104.

<sup>34</sup> *Hamer v. Sears*, 81 Ga. 288, 6 S. E. 810; *Williams v. Hitzie*, 83 Ind. 303; *Woods v. Brown*, 93 Ind. 164, 47 Am. Rep. 369; *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124; *Lininger v. Glenn*, 33 Nebr. 187, 49 N. W. 1128; *Wilson v. Shipman*, 34 Nebr. 573, 52 N. W. 576, 33 Am. St. 660; *Stokes v. Knarr*, 11 Wis. 389; *White v. Hinton*, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66. Thus it has been held that the fact that a court in condemnation proceedings may make an erroneous ruling does not entitle the aggrieved party to an injunction, but the remedy is by appeal from the ruling if authorized

by statute, or, if not, by appeal from the final judgment. *Boyd v. Logansport. R. &c. Co.*, 161 Ind. 587, 69 N. E. 398. In *Roberts v. West Jersey &c. R. Co.*, 72 N. J. Eq. 326, 65 Atl. 460, it was held that an injunction should not be granted in a suit by an owner of property in a block through which an elevated railroad was about to be constructed, crossing and vacating a street on which complainant's property abutted, unless complainant, by the undisputed facts of the case, and according to the established law of the state, established his legal private right in that part of the street which would be vacated by the construction of the road. See also *Knoth v. Manhattan R. Co.*, 187 N. Y. 273, 79 N. E. 1015.

<sup>35</sup> *Atlantic &c. R. Co. v. Seaboard Air Line R. Co.*, 116 Ga. 412, 42 S. E. 761; *Bolton v. McShane*, 67 Iowa 207, 25 N. W. 135;

is frequently granted in states which require the payment of compensation to precede the taking of property where the corporation neglects or refuses to pay or deposit the just compensation as required by law.<sup>36</sup> And it is generally a proper remedy in cases where the corporation seeks to obtain possession of private property under color of eminent domain pro-

Chicago &c. Bridge Co. v. Pacific &c. Co., 36 Kans. 113, 12 Pac. 535; Piedmont &c. R. Co. v. Speelman, 67 Md. 260, 10 Atl. 77, 293; Frend v. Detroit &c. R. Co., 133 Mich. 413, 95 N. W. 559, 10 Det. Leg. N. 250; Lohman v. St. Paul &c. R. Co., 18 Minn. 174; Spurlock v. Doorman, 182 Mo. 242, 81 S. W. 412; Mettler v. Easton &c. R. Co., 25 N. J. Eq. 214; Wagner v. Railway Co., 38 Ohio St. 32; Warner v. Railroad Co., 39 Ohio St. 70; Schaaf v. Cleveland &c. R. Co., 66 Ohio St. 215, 64 N. E. 145; Jarden v. Philadelphia &c. R. Co., 3 Whart. (Pa.) 502; Riley v. Charleston Union Station Co., 67 S. Car. 84, 45 S. E. 149; Wilson v. D. W. Alderman &c. Co., 69 S. Car. 176, 48 S. E. 81; Field v. Carnarvon &c. R. Co., L. R. Eq. Cas. 190. Where the use of a street by a railway company is not an additional servitude, entitling abutters to compensation, it has been held that the latter can not maintain a bill to enjoin the operation of the railway on the ground that the company has transcended its authorized powers, since it is amenable for an excessive exercise of power only to the state. Rafferty v. Central Traction Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. 763 and note. See also Cincinnati &c. R. Co. v. Morgan Co., 143 Fed. 798.

<sup>36</sup> Northern Pac. R. Co. v. St. Paul &c. R. Co., 1 McCrary (U. S.) 302; Young v. Harrison, 6 Ga. 130; Chambers v. Cincinnati &c. R. Co., 69 Ga. 320; Shute v. Chicago &c. R. Co., 26 Ill. 436; Cobb v. Illinois &c. R. Co., 68 Ill. 233; Cox v. Louisville &c. R. Co., 48 Ind. 178; Gates v. Colfax Northern R. Co., 177 Iowa 690, 159 N. W. 456; Kirkendall v. Hunt, 4 Kans. 514; Western &c. R. Co. v. Owings, 15 Md. 199, 74 Am. Dec. 563; New Central Coal Co. v. George's Creek &c. Co., 37 Md. 537; Stewart v. Raymond R. Co., 7 S. & M. (Miss.) 568; Cameron v. Board &c., 47 Miss. 264; Ray v. Atchison &c. R. Co., 4 Nebr. 439; Ross v. Elizabethtown &c. R. Co., 2 N. J. Eq. 422; Redman v. Philadelphia &c. R. Co., 33 N. J. Eq. 165; Verona, Appeal of, 108 Pa. St. 83; Parker v. East Tennessee &c. R. Co., 13 Lea (Tenn.) 669; Mason City &c. Co. v. Mason, 23 W. Va. 211; Shepardson v. Milwaukee &c. R. Co., 6 Wis. 605; Bohlman v. Green Bay &c. R. Co., 30 Wis. 105; Bohlman v. Green Bay &c. R. Co., 40 Wis. 157. An injunction will issue to prevent the continued occupation of land wrongfully taken. Cox v. Louisville &c. R. Co., 48 Ind. 178; Gay v. New Orleans Pacific R. Co., 32 La. Ann. 277. Where a railroad company

ceedings which, for any reason, are void.<sup>37</sup> A property owner is entitled to protection in his property rights as against those who would devote to public use property not legally taken for that purpose, and should not be driven to an action at law<sup>38</sup> to

having the right under the statute to acquire a right of way over the track of another railroad company by condemnation, is about to cross the track of such other company without having acquired the right in any way, it is error for the court to provide, in a suit to restrain such crossing that the defendant company may cross the track of plaintiff upon condition that it put in a certain described system of switches. *Atlantic &c. R. Co. v. Seaboard Air Line R.*, 116 Ga. 412, 42 S. E. 761.

<sup>37</sup> *Frizell v. Rogers*, 82 Ill. 161; *Erwin v. Fulk*, 94 Ind. 235; *McMillan v. Baker*, 20 Kans. 50; *Piedmont &c. R. Co. v. Speelman*, 67 Md. 260, 10 Atl. 77, 293; *Lohman v. St. Paul &c. R. Co.*, 18 Minn. 174; *Rhine v. McKinney*, 53 Tex. 354; *Wren v. Walsh*, 57 Wis. 98, 14 N. W. 902. See also *Southern R. Co. v. Birmingham &c. R. Co.*, 131 Ala. 663, 29 So. 191; *St. Louis &c. R. Co. v. Southwestern Tel. &c. Co.*, 121 Fed. 276. Where the power of the corporation to condemn land has been exhausted, it will be enjoined from a subsequent entry upon other lands. *Moorhead v. Little Miami R. Co.*, 17 Ohio 340. In a proceeding by a land-owner to enjoin the construction of a railroad over his premises a decree ordering him to institute proceedings to have his damages ascertained is improper, as such proceedings must be instituted by

the railway corporation in the manner required by the statute providing for the exercises of eminent domain. *Russell v. Chicago &c. R. Co.*, 98 Ill. App. 347.

<sup>38</sup> *Western &c. R. Co. v. Owings*, 15 Md. 199, 74 Am. Dec. 563; *Browning v. Camden &c. R. Co.*, 4 N. J. Eq. 47; *Cobb v. Illinois &c. R. Co.*, 68 Ill. 233; *Pennsylvania R. Co.'s Appeal*, 115 Pa. St. 514, 5 Atl. 872; *Bolton v. McShane*, 67 Iowa 207, 25 N. W. 135. In many of the cases it is said that such an interference with his rights would work a great and irreparable injury to the property-owner, in that it is not a mere temporary and fugitive trespass, but is a permanent appropriation of the property. *Erwin v. Fulk*, 94 Ind. 235; *Carpenter v. Grisham*, 59 Mo. 247; *Bonaparte v. Camden &c. R. Co.*, 1 Bald. C. C. 205. But where, for any reason, it would be inequitable to enjoin a further occupation of the land, the owner will be left to his remedy at law. *Chesapeake &c. R. Co. v. Patton*, 5 W. Va. 234; *Nicholas v. Sutton*, 22 Ga. 369. And it has been held that where a railroad company had the right to condemn and had already taken possession, an injunction would not be granted to restrain the completion of the work, even though no proceedings to condemn had been commenced. *Lea v. Louisville &c. R. Co.*, 135 Tenn. 560, 188 S. W. 215.

obtain redress. Any property rights in lands,<sup>39</sup> bonds,<sup>40</sup> or water-courses,<sup>41</sup> or franchises,<sup>42</sup> may be protected by injunction

<sup>39</sup> *Sidener v. Norristown &c. Turnp. Co.*, 23 Ind. 623; *Mettler v. Easton &c. R. Co.*, 25 N. J. Eq. 214; *Bohlman v. Green Bay &c. R. Co.*, 30 Wis. 105; *Russell v. Chicago &c. R. Co.*, 205 Ill. 155, 68 N. E. 727. In those states in which it is held that an owner of abutting property is entitled to compensation for the construction of a railroad in the street in front of his property, it is also held that he may enjoin any interference with his right in the same manner that he could enjoin the occupation of his land. *Cox v. Louisville &c. R. Co.*, 48 Ind. 178; *Columbus &c. R. Co. v. Witherow*, 82 Ala. 190, 3 So. 23; *Rock Island &c. R. Co. v. Johnson*, 204 Ill. 488, 68 N. E. 549; *Schurmeier v. St. Paul &c. R. Co.*, 10 Minn. 82, 88 Am. Dec. 59; *Harrington v. St. Paul &c. R. Co.*, 17 Minn. 215; *Williams v. New York Central R. Co.*, 16 N. Y. 97, 69 Am. Dec. 651 and note; *Washington Cemetery Co. v. Prospect Park &c. R. Co.*, 68 N. Y. 591; *Henderson v. New York Central R. Co.*, 78 N. Y. 423; *Paige v. Schenectady R. Co.*, 77 App. Div. 571, 79 N. Y. S. 266; *Zook v. Pennsylvania R. Co.*, 206 Pa. 603, 50 Atl. 82; *Ford v. Chicago &c. R. Co.*, 14 Wis. 609, 80 Am. Dec. 791. So an abutting owner of the fee in a public street may enjoin a steam railroad company from constructing and operating its road in such street to the practical exclusion of the public, where no compensation for his interest has been made, though the

railroad company is acting under a city ordinance. *Pennsylvania Co. v. Bond*, 99 Ill. App. 535. An injunction will issue at the instance of an abutting owner to protect his own land to the center line of the road from the burden of street railroad tracks, though his neighbors on the opposite side have consented to the use of their lands by such company. *North Pennsylvania R. Co. v. Inland Traction Co.*, 205 Pa. 579, 55 Atl. 774. Where bill is brought to prevent a railroad company from laying a siding in a street in any other manner than in accordance with the established grade, the question of the power of the city to grant permission to construct such siding can not be considered. *Zook v. Pennsylvania R. Co.*, 206 Pa. 603, 56 Atl. 82.

<sup>40</sup> *Garwood v. New York &c. R. Co.*, 17 Hun. (N. Y.) 356; *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674.

<sup>41</sup> *Waterman v. Buck*, 58 Vt. 519; *Baltimore v. Warren &c. Co.*, 59 Md. 96; *Middleton v. Flat River Booming Co.*, 27 Mich. 533; *Holyoke &c. Co. v. Connecticut River Co.*, 22 Blatchf. (U. S.) 131. See also where injunction was awarded against discharge of water from roundhouse on to adjoining property. *Northern Cent. R. Co. v. Oldenburg*, 122 Md. 236, 89 Atl. 601.

<sup>42</sup> *Denver &c. R. Co. v. Denver City R. Co.*, 2 Colo. 673; *Enfield*

from the invasion under color of the eminent domain power. But where the corporation has taken possession in good faith, under an agreement with the owner, its further occupation of the land will not be enjoined for a subsequent violation of the agreement unless the owner's legal remedies are shown to be inadequate.<sup>43</sup> The injunction will not necessarily be refused on the sole ground that the company had commenced the construction of its line and had made large expenditures in the undertaking.<sup>44</sup> Some of the cases hold that an injunction will not be

Toll Bridge Co. v. Hartford &c. R. Co., 17 Conn. 40, 42 Am. Dec. 716 and note; Boston &c. R. Co. v. Salem &c. R. Co., 2 Gray (Mass.) 1; St. Louis &c. R. Co. v. Northwestern &c. R. Co., 69 Mo. 65; Gifford v. New Jersey R. Co., 10 N. J. Eq. 171; Hudson &c. Co. v. New York &c. R. Co., 9 Paige (N. Y.) 323. See also Michigan Cent. R. Co. v. State, 148 Mich. 151, 111 N. W. 735. One railroad will be enjoined from crossing another until the law authorizing such crossings has been complied with. Central Vermont R. Co. v. Woodstock R. Co., 50 Vt. 452; Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150. But see Grafton v. Buckhannon &c. R. Co., 56 W. Va. 458, 49 S. E. 532. A failure on its part to make compensation is sufficient reason for enjoining a railroad from crossing another railroad. Grand Rapids &c. R. Co. v. Grand Rapids &c. R. Co., 35 Mich. 265, 24 Am. Rep. 545 and note; Chicago &c. R. Co. v. Chicago &c. R. Co., 15 Ill. App. 587; Chicago &c. R. Co. v. Englewood &c. R. Co., 17 Ill. App. 141. A railroad company over whose tracks a city is attempting to condemn a street may resort to equity by filing a petition

alleging facts showing that an extension of a street will unnecessarily interfere with the reasonable use of the tracks and other property affected, and the court may restrain proceedings until the claim of the company has been judicially determined. Pittsburg &c. Ry. Co. v. Greenville, 69 Ohio St. 487, 60 N. E. 976. But a railroad company can not enjoin the construction of a street railroad on a public road which crosses its tracks and on which lands owned by it abut, where none of the rights or franchises of the railroad company are injured or invaded. North Pennsylvania R. Co. v. Inland Traction Co., 205 Pa. 579, 55 Atl. 774. See also Detroit &c. R. Co. v. Detroit, 91 Mich. 444, 52 N. W. 52.

<sup>43</sup> Coe v. Columbus &c. R. Co., 10 Ohio St. 372, 411; Provolt v. Chicago &c. R. Co., 69 Mo. 633; Irish v. Burlington &c. R. Co., 44 Iowa 380; Sturtevant v. Milwaukee &c. R. Co., 11 Wis. 63. See also Eastern Oregon Land Co. v. Des Chutes R. Co., 213 Fed. 897.

<sup>44</sup> Paige v. Schenectady R. Co., 77 App. Div. 571, 79 N. Y. S. 266. But see Hinnershitz v. United Traction Co., 199 Pa. 3, 48 Atl.

granted where the plaintiff's title to the land is in dispute.<sup>45</sup> And it will not be granted where the same question has been or can be passed upon in the condemnation proceedings, or, in general, where there is an adequate remedy at law.<sup>46</sup> So it has been said: "When, if the court acts, an important public work, designed to free public travel from peril, and to give greater security to human life, will be arrested and seriously delayed, nothing short of the threatened destruction of property of great value, by acts of wanton lawlessness, inflicting injuries which, if not prevented, must result in irreparable damage, will justify the court in issuing a command that the work shall stop."<sup>47</sup> It

874, where it is held that a refusal of a preliminary injunction against completion of an electric railway on a turnpike at suit of adjoining land-owners is warranted, though the railway company has acquired by eminent domain the right only as against the turnpike company to build the road, a considerable part of it having been built without objection.

<sup>45</sup> *Lanterman v. Blairstown R. Co.*, 28 N. J. Eq. 1; *Chesapeake &c. R. Co. v. Young*, 3 Md. 480. Where the railroad company entered in good faith by the consent of the supposed owner, its further occupation will not be enjoined at the suit of another who claims title to the land, but he must establish his title by suit for trespass or ejectment. *Erie R. Co. v. Delaware &c. R. Co.*, 21 N. J. Eq. 283; *Pickert v. Ridgefield Park R. Co.*, 25 N. J. Eq. 316; *Steele v. Tanana Mines R. Co.*, 2 Alaska 451.

<sup>46</sup> *Cooper v. Anniston &c. R. Co.*, 85 Ala. 106, 4 So. 689; *Illinois Cent. R. Co. v. Chicago*, 138 Ill. 453, 28 N. E. 740; *Smith v. Goodknight*, 121 Ind. 312, 23 N. E. 148; *Piedmont &c. R. Co. v. Spielman*, 67

Md. 260, 10 Atl. 77, 293; *St. Louis &c. R. Co. v. Southwestern &c. Co.*, 121 Fed. 276. And compare to same effect *Ellis v. Houston &c. R. Co.* (Tex. Civ. App.), 203 S. W. 172; *Irwin v. J. K. Lumber Co.*, 102 Wash. 99, 172 Pac. 911. See also for other cases in which it is held that injunction will not lie, *Detroit &c. R. Co. v. Detroit*, 91 Mich. 444, 52 N. W. 52; *Black Hills &c. R. Co. v. Tacoma Mills Co.*, 129 Fed. 312; *Chattanooga &c. R. Co. v. Jones*, 80 Ga. 264, 9 S. E. 1081; *Chicago &c. R. Co. v. Chicago*, 151 Ill. 348, 37 N. E. 842; *Boyd v. Logansport &c. Traction Co.*, 161 Ind. 587, 69 N. E. 398; *Van De Vere v. Kansas City*, 107 Mo. 83, 17 S. W. 695, 28 Am. St. 396; *Holly Shelter R. Co. v. Newton*, 133 N. Car. 132, 136, 45 S. E. 549; *Manson v. South Bound R. Co.*, 64 S. Car. 120, 41 S. E. 832; *Grafton v. Buckhannon &c. R. Co.*, 56 W. Va. 458, 49 S. E. 532.

<sup>47</sup> *Dodge v. Pennsylvania R. Co.*, 43 N. J. Eq. 351, 11 Atl. 751. See also *Roberts v. West Jersey &c. R. Co.*, 72 N. J. Eq. 326, 65 Atl. 460; *Brown v. Atlanta &c. Power Co.*, 113 Ga. 462, 39 S. E. 71.



has been held that a railroad company which enters upon the use and occupation of real property under a lease, with a view to its purchase when that can properly be effected, and constructs a portion of its line thereon, is entitled to an injunction restraining its lessors for a reasonable time from proceeding to dispossess the company from the land to enable it to condemn such land in proper proceedings.<sup>48</sup> Where land has been regularly condemned, an encroachment upon adjoining property not covered by the condemnation proceedings may be enjoined.<sup>49</sup>

**§ 1353 (1049b). Remedies of land-owner—Limitation of action.**—In the case of injury to property by the construction and operation of a railroad the statute of limitations runs from the date of the injury or cause which produced the injury.<sup>50</sup> The injury inflicted by a trespass on a land-owner's premises by a railroad company is generally regarded as permanent injury and accrues at the time of the commission of the trespass within

<sup>48</sup> Winslow v. Baltimore &c. R. Co., 188 U. S. 646, 23 Sup. Ct. 443, 47 L. ed. 635.

<sup>49</sup> Deere v. Cole, 118 Ill. 165, 8 N. E. 303; Sidener v. Norristown &c. Turnp. Co., 23 Ind. 623; State v. Armell, 8 Kans. 288; Shipley v. Western Maryland &c. R. Co., 99 Md. 115, 56 Atl. 968; Dolan v. New York &c. R. Co., 175 N. Y. 367, 67 N. E. 612; Siegel v. New York &c. R. Co., 62 App. Div. 290, 70 N. Y. S. 1088; Larney v. New York &c. R. Co., 62 App. Div. 311, 71 N. Y. S. 27. But this does not authorize a court to restrain the operation of the road inside the strip to which it is entitled. Larney v. New York &c. R. Co., 62 App. Div. 311, 71 N. Y. S. 27; Pape v. New York &c. R. Co., 74 App. Div. 175, 77 N. Y. S. 725. Or the land-owner may have his action for

damages. Eaton v. European &c. R. Co., 59 Maine 520, 8 Am. Rep. 430; New Orleans &c. R. Co. v. Brown, 64 Miss. 479, 1 So. 637.

<sup>50</sup> Illinois Cent. R. Co. v. Ferrell, 108 Ill. App. 659; Tietze v. International &c. R. Co., 35 Tex. Civ. App. 136, 80 S. W. 124. In Grossman v. Houston &c. R. Co., 99 Tex. 641, 92 S. W. 836, it was held that the cause of action for damages did not arise until a change of use by hauling freight and the substitution of heavier engines and trains. Action to compel removal of work and restoration of property to its original condition was held barred when not brought until fifteen years after the work was completed, in Kamper v. Chicago, 215 Fed. 706. See also Rivard v. Missouri Pac. R. Co., 257 Mo. 135, 165 S. W. 763.

the meaning of the statute.<sup>51</sup> In the case of a railroad constructed on permanent arches in the street so as to shut out light and air of the abutting owners, and interfere with the free use of the premises, it was held that since the damages caused by such a structure were completed with its erection, and capable of ascertainment in an action at that time, the action was barred if not commenced within the time limited by the statute.<sup>52</sup> In a recent case the question arose as to whether a claim against a village for damages caused by change of grade at a crossing could be maintained under the law relating to changes of grades of streets after the time limited by the railroad law relating to change at crossings and it was held that the railroad law governed and proceedings could not be maintained after the expiration of the time limited by that law.<sup>53</sup> The question as to which, if any, of several statutes of limitations should be applied is one that has caused considerable conflict among the decisions of the various courts, and about all that can be safely said in a general way is that the solution of the question depends not only on the particular statutes under consideration, but also upon the nature of the action or remedy sought and the view of the particular court as to its nature and basis or theory. In some cases it has been held that the land-owner's claim is governed by the statute or law applicable to adverse possession of

<sup>51</sup> *Highland Ave. &c. R. Co. v. Matthews*, 99 Ala. 24, 10 So. 267, 14 L. R. A. 462; *Williams v. Southern Pac. R. Co.*, 150 Cal. 624, 89 Pac. 599, citing *Frankle v. Jackson*, 30 Fed. 398; *Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6; *Jacksonville &c. R. Co. v. Lockwood*, 33 Fla. 573, 15 So. 327; *Chicago &c. Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341; *Doane v. Railroad Co.*, 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. 265; *Strickler v. Midland R. Co.*, 125 Ind. 412, 25 N. E. 455; *Stodgill v. Chicago &c. R. Co.*, 53 Iowa 341, 5 N. W. 495; *Chicago &c. R.*

*Co. v. O'Neill*, 58 Nebr. 239, 78 N. W. 521; *Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177; *Rosenthal v. Railroad Co.*, 79 Tex. 325, 15 S. W. 268.

<sup>52</sup> *De Geofroy v. Merchants Bridge Term. R. Co.*, 179 Mo. 698, 79 S. W. 386, 64 L. R. A. 959. For other illustrative cases, see *Louisville &c. R. Co. v. Wiggington*, 156 Ky. 400, 161 S. W. 209; *Egan v. Hotel &c. Co.*, 134 La. 740, 64 So. 698; *Rivard v. Missouri Pac. R. Co.*, 257 Mo. 135, 165 S. W. 763.

<sup>53</sup> *Melenbacker v. Salamanca*, 188 N. Y. 370, 80 N. E. 1090.

land.<sup>54</sup> In other cases it is held that the statute relating to trespass or injuries to land<sup>55</sup> should be applied; and in still others the general statute applicable to actions or matters not otherwise limited has been held to govern.<sup>56</sup> So, where the action is to recover compensation for property damaged by a taking under the eminent domain, some courts hold that there is an implied promise to pay such compensation and that the claim is governed by the statute of limitations applicable to actions upon contracts express or implied and not in writing.<sup>57</sup>

**§ 1354 (1049c). Remedies of land-owner—Parties to proceedings.**—As a general rule the action for an unauthorized appro-

<sup>54</sup> *Aylmore v. Seattle*, 100 Wash. 515, 171 Pac. 659, L. R. A. 1918E, 127 (where there was an actual taking and the court distinguished the case from an action for negligence or consequential damages or trespass); *Salt Lake Invest. Co. v. Oregon &c. R. Co.*, 46 Utah 203, 148 Pac. 439. See also *Organ v. Memphis &c. R. Co.*, 51 Ark. 235, 11 S. W. 96; *Kime v. Cass County*, 71 Nebr. 677, 99 N. W. 546, 101 N. W. 2; *Lehigh Val. R. Co. v. McFarlan*, 43 N. J. L. 605; *Faulk v. Missouri River &c. R. Co.*, 28 S. Dak. 1, 132 N. W. 233, Ann. Cas. 1913E, and note. In several of the cases cited it is held that a proceeding by the landowner to have compensation assessed is a special proceeding and not governed by the general statute of limitations relating to civil actions. See also *Gates v. Colfax Northern R. Co.*, 177 Iowa 690, 159 N. W. 456.

<sup>55</sup> *East Rome v. Lloyd*, 124 Ga. 852, 53 S. E. 103. See also *Pickett v. Toledo &c. R. Co.*, 131 Ind. 562, 31 N. E. 200; *Strickler v. Midland R. Co.*, 125 Ind. 412, 25 N. E. 455; *Southern Ind. R. Co. v. Brown*,

30 Ind. App. 684, 66 N. E. 915; *Standard Chemical Co. v. Illinois Cent. R. Co.*, 130 La. Ann. 147, 57 So. 782.

<sup>56</sup> *Shortle v. Terre Haute &c. R. Co.*, 131 Ind. 338, 30 N. E. 1084; *Shortle v. Louisville &c. R. Co.*, 130 Ind. 505, 30 N. E. 639. See also *Chicago &c. R. Co. v. McAuley*, 121 Ill. 160, 11 N. E. 67; *Atchison &c. R. Co. v. Lauterback*, 8 Kans. App. 15, 54 Pac. 11; *Romano v. Yazoo &c. R. Co.*, 87 Miss. 721, 40 So. 150; *De Geofroy v. Merchants &c. Terminal R. Co.*, 179 Mo. 698, 79 S. W. 386, 64 L. R. A. 959, 101 Am. St. 524.

<sup>57</sup> *Jacobs v. Seattle*, 100 Wash. 524, 171 Pac. 662, L. R. A. 1918E, 131. See also *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 5 Sup. Ct. 306, 28 L. ed. 846; *Robinson v. Southern Cal. R. Co.*, 129 Cal. 8, 61 Pac. 947; *Kuhl v. Chicago &c. R. Co.*, 101 Wis. 42, 77 N. W. 155. See also for a review of the cases upon the general subject of this section, notes in L. R. A. 1918E, 139, and Ann. Cas. 1913E, 1139.

priation can be commenced only by the person who owned the property at the time of its appropriation or injury, unless the statutes give that right to others.<sup>58</sup> Under this rule it has been held that the mortgagor and not the mortgagee must bring the action.<sup>59</sup> Similarly it is the holder of the legal title and not the cestui qui trust that must bring the action where a trust estate is involved.<sup>60</sup> Persons jointly interested in the same tract of land may maintain an action jointly,<sup>61</sup> but not persons owning

<sup>58</sup> *King v. Southern R. Co.*, 119 Fed. 1017; *Illinois Cent. R. Co. v. Ferrell*, 108 Ill. App. 659; *Illinois Cent. R. Co. v. Lockard*, 112 Ill. App. 423; *Drury v. Midland R. Co.*, 127 Mass. 571; *Clapp v. Boston*, 133 Mass. 367; *New Jersey Cent. R. Co. v. Hetfield*, 29 N. J. L. 206; *Shepard v. Manhattan R. Co.*, 169 N. Y. 160, 62 N. E. 151; *Pope v. Manhattan R. Co.*, 79 App. Div. 583, 80 N. Y. S. 316; *Child v. New York Elev. R. Co.*, 89 App. Div. 598, 85 N. Y. S. 604; *Texas Cent. R. Co. v. Merkel*, 32 Tex. 723; *Cane Belt R. Co. v. Ridgeway*, 38 Tex. Cix. App. 108, 85 S. W. 496; *Walton v. Green Bay R. Co.*, 70 Wis. 414, 36 N. W. 10. In *Phillips v. Postal Tel. & C. Co.*, 130 N. Car. 513, 41 S. E. 1022, 89 Am. St. 868, it is held that the landowner or his successor in interest may maintain an equitable action for assessment and recovery of permanent damages and compensation for the land taken and used. The action can be brought by the holder of a leasehold injured by the construction of an elevated railroad. *Storms v. Manhattan R. Co.*, 77 App. Div. 94, 79 N. Y. S. 60. But where at the time the lease is executed the railroad is in full operation, of

which fact the lessee is aware, he can not recover on account of the operation of the road. *Child v. New York Elev. R. Co.*, 89 App. Div. 598, 85 N. Y. S. 604. See also *Renner v. St. Louis & C. R. Co.*, 197 Ill. App. 11. The fact that the devisee has a right to maintain an action to enjoin the operation of an elevated railroad in front of his premises does not entitle him to recover damages that accrue during the life of his testator. *Hirsch v. Manhattan R. Co.*, 84 App. Div. 374, 82 N. Y. S. 754, 13 N. Y. Ann. Cas. 158.

<sup>59</sup> *Farnsworth v. Boston*, 126 Mass. 1; *Vaugh v. Wetherel*, 116 Mass. 138. But see ante, § 1310.

<sup>60</sup> *Reed v. Hanover Branch R. Co.*, 105 Mass. 303; *Davis v. Charles River Branch R. Co.*, 11 Cush. (Mass.) 506; *Anderson v. Rochester & C. R. Co.*, 9 How. Pr. (N. Y.) 553.

<sup>61</sup> *Moore v. Shaw*, 47 Maine 88; *Reed v. Hanover Branch R. Co.*, 105 Mass. 303; *Getz v. Philadelphia & C. R. Co.*, 105 Pa. St. 547; *Brown v. Arkansas Cent. R. Co.*, 72 Ark. 456, 81 S. W. 613 (widow and heirs of deceased person held under bond for deed).

separate and distinct parcels of land.<sup>62</sup> Coming now to parties defendant it is the railroad company appropriating the land for railroad purposes that is a necessary party defendant, though it has since leased its tracks to another company.<sup>63</sup> Other parties having a substantial interest in the premises but who have not been named in the complaint may be brought in to defend or may be allowed voluntarily to become parties.<sup>64</sup> And it has been held that a new corporation buying a railroad at a foreclosure sale may be brought in as a defendant though the land was purchased by its predecessor.<sup>65</sup>

**§ 1355 (1049d). Remedies of land-owner—Pleading.**—The petition or complaint in such proceeding should aver plaintiff's ownership of the land taken or injured,<sup>66</sup> and should describe the lands with sufficient precision to permit their definite location by appraisers.<sup>67</sup> It should set forth all facts showing the plaintiff's right to a recovery.<sup>68</sup> Special damages relied upon should be averred.<sup>69</sup> If the plaintiff desires to restrict the width of the right of way it has been held that he should allege that

<sup>62</sup> *Guerkink v. Petaluma*, 112 Cal. 306, 44 Pac. 570; *Chambers v. Lewis*, 9 Iowa 583; *Norfolk & C. R. Co. v. Smoot*, 81 Va. 495; *Younkin v. Milwaukee Light & C. Co.*, 112 Wis. 15, 87 N. W. 861.

<sup>63</sup> *Atchison & C. R. Co. v. Anderson*, 65 Kans. 202, 69 Pac. 158.

<sup>64</sup> *Davidson v. Boston & C. R. Co.*, 3 Cush. (Mass.) 91; *Hill v. Glendon & C. Mining Co.*, 113 N. Car. 259, 18 S. E. 171; *Abbott v. Upham*, 13 Metc. (Mass.) 172.

<sup>65</sup> *Drury v. Midland R. Co.*, 127 Mass. 571.

<sup>66</sup> *Pittsburgh & C. R. Co. v. Harper*, 11 Ind. App. 481, 37 N. E. 41. See also *Sudduth v. Central of Ga. R. Co.* 201 Ala. 56, 77 So. 350. See for petition held sufficient. *Murray County v. Wood*, 141 Ga. 561, 81 S. E. 856.

<sup>67</sup> *Indianapolis & C. R. Co. v. Newsom*, 54 Ind. 121; *Pittsburg & C. R. Co. v. Harper*, 11 Ind. App. 481, 37 N. E. 41; *Central R. Co. v. Merkel*, 32 Tex. 723 (should be described by metes and bounds). But though defectively described if the declaration sufficiently locates it as proved it is held that the variance is not fatal. *Wallace v. Chesapeake & C. R. Co.*, 73 W. Va. 347, 80 S. E. 499.

<sup>68</sup> *Neal v. Posey County*, 12 Ind. App. 533, 40 N. E. 708. See also as to what a bill to restrain a continuing trespass should allege, *Kamper v. Chicago*, 215 Fed. 706.

<sup>69</sup> *Wampach v. St. Paul & C. R. Co.*, 21 Minn. 364; *Bridgers v. Purcell*, 23 N. Car. 232. See also *Erlanger v. Cody*, 158 Ky. 625, 166 S. W. 202.

the full width appropriated is not necessary for the operation of the road.<sup>70</sup> Where there is no suggestion in the pleadings of either party as to the width of the right of way required or necessitated, it has been held that the courts will assume that it was intended to vest in the railroad company a right of way of the width fixed by the charter of the company.<sup>71</sup> It is not required, according to some decisions at least, that the plaintiff should negative the institution of condemnation proceedings.<sup>72</sup> Neither is it necessary that the pleading should allege a demand for damages and its refusal.<sup>73</sup> The rule as to amendment of pleadings is generally the same here as elsewhere. In a suit by the owner of property abutting on a street for an injunction restraining the erection of a railroad viaduct in the street, it appearing that the owner was entitled to damages if the allegations of the petition were true, it was held not error on the dissolution of the injunction to permit plaintiff to amend her petition so as to pray for the recovery of damages.<sup>74</sup> In an action of trespass against a railroad company it has been held that the answer may be either in the form of a denial,<sup>75</sup> or a justification.<sup>76</sup> Special defences under a statute or the charter of the railroad company must be specially pleaded.<sup>77</sup> And it has been held that defendant in ejectment can not show equitable title where none was pleaded in the answer.<sup>78</sup>

<sup>70</sup> *Beal v. Durham &c. R. Co.*, 136 N. Car. 298, 48 S. E. 674.

<sup>71</sup> *Beal v. Durham &c. R. Co.*, 136 N. Car. 298, 48 S. E. 674.

<sup>72</sup> *Hennessey v. St. Paul &c. R. Co.*, 30 Minn. 55, 14 N. W. 269; and in an action by an adjacent landowner for damages caused by operation of the road under an Indiana statute it has been held that the landowner must allege that the right of way was acquired by condemnation and not by purchase. *Fink v. Cleveland &c. R. Co.*, 181 Ind. 539, 105 N. E. 116; *Gray v. St. Paul &c. R. Co.*, 13 Minn. 315.

<sup>73</sup> *Chicago &c. R. Co. v. Patter-*

*son*, 26 Ind. App. 295, 59 N. E. 688 (also holding the complaint sufficient in other respects). See also *Pittsburgh &c. R. Co. v. Beck*, 152 Ind. 421, 424, 53 N. E. 439.

<sup>74</sup> *Camden &c. R. Co. v. Smiley*, 27 Ky. L. 134, 84 S. W. 523.

<sup>75</sup> *Pumpelly v. Green Bay &c. Canal Co.*, 13 Wall. (U. S.) 166, 20 L. ed. 557.

<sup>76</sup> *Crawfordsville &c. R. Co. v. Wright*, 5 Ind. 252.

<sup>77</sup> *Crawfordsville &c. R. Co. v. Wright*, 5 Ind. 252; *McKeoin v. Northern Pac. R. Co.*, 45 Fed. 464.

<sup>78</sup> *Pfaender v. Chicago &c. R. Co.*, 86 Minn. 218, 90 N. W. 393. But in some jurisdictions a gen-

§ 1356 (1049e). **Remedies of land-owner — Evidence.** — The law, it has been held, indulges a presumption that condemnation proceedings, under which defendant claims, were regular.<sup>79</sup> The property-owner has the burden of proof of all facts necessary to the relief he seeks.<sup>80</sup> Thus, he has the burden of proving that switches and turnouts laid in a street by a railroad company are not necessary where he makes that issue and the law allows the railroad company to lay such tracks.<sup>81</sup> The defendant on his part has been held to have the burden of proving all matters of defence specially pleaded by him.<sup>82</sup> The rules governing the admissibility of evidence generally in actions of this character are in general the same as in other civil actions and are not essentially different from the rules of evidence in condemnation proceedings, a subject which has already received attention.<sup>83</sup> In addition it may be said that plaintiff's title to the land claimed to be injured may be established by proof of adverse possession;<sup>84</sup> that it may be shown that damages claimed by defendant to have been paid were paid to one acting as an authorized agent of the plaintiff;<sup>85</sup> that the diminution in the value of the premises invaded may be shown by the loss of rent therefrom.<sup>86</sup> The defendant in injunction proceedings to enjoin the operation of an elevated railroad has been held entitled to show benefits resulting to plaintiff from the operation of the road, since the

eral denial would probably be sufficient to admit equitable as well as legal defenses.

<sup>79</sup> *Galena &c. R. Co. v. Pound*, 22 Ill. 399.

<sup>80</sup> *Schechter v. Denver &c. R. Co.*, 8 Colo. App. 25, 44 Pac. 761 (title to premises); *Jackson v. Dines*, 13 Colo. 90, 21 Pac. 918 (location of road); *Cook v. Chicago &c. R. Co.*, 83 Iowa 278, 49 N. W. 92 (actual damages); *New Albany v. Endres*, 143 Ind. 192, 42 N. E. 683 (nonpayment of damages).

<sup>81</sup> *Carson v. Central R. Co.*, 35 Cal. 325.

<sup>82</sup> *Pochila v. Calvert &c. R. Co.*, 31 Tex. Civ. App. 398, 72 S. W. 255 (special benefits from construction of road); *Hazen v. Boston &c. R. Co.*, 2 Gray (Mass.) 574 (trespass justified by authorized location on land). There must at least be some evidence supporting the special defense.

<sup>83</sup> *Ante*, §§ 1328-1334.

<sup>84</sup> *Lawrence R. Co. v. Cobb*, 35 Ohio St. 9.

<sup>85</sup> *Ragan v. Kansas City &c. R. Co.*, 111 Mo. 456, 20 S. W. 234.

<sup>86</sup> *Autenreith v. St. Louis &c. R. Co.*, 36 Mo. App. 254.

plaintiff is entitled to an injunction only in the case of a substantial injury suffered by him.<sup>87</sup> In an action for damages from the operation of an elevated railroad in front of a building it was held not error to exclude evidence to show that, if the building on the opposite side of the street from plaintiff's building, was raised as high as the law and ordinances of the city allowed, the elevated structure would not intercept the direct rays of the sun toward the building occupied by plaintiff.<sup>88</sup>

§ 1357 (1049f)., Remedies of land-owner — Damages. — The measure of damages where the appropriation is not made under condemnation proceedings is generally the same as that which prevails in condemnation cases,<sup>89</sup> a subject receiving extended consideration in the preceding chapter.<sup>90</sup> Here it may be said generally that a land-owner whose premises are entered by a railroad company without his consent and without condemnation proceedings is entitled to the value of the land when taken and the injury or diminution in value caused to the remainder.<sup>91</sup> Where a railroad is built in a street or highway fronting a land-owner's premises under like conditions as to consent and con-

<sup>87</sup> *Nette v. New York El. R. Co.*, 2 Misc. 62, 20 N. Y. S. 844. So it has been held that in an action for damages to land by the construction of a railroad terminal adjacent thereto the defendant could show under the general denial that the market value of the land for any use to which it might be put was as great after the construction as before. *Houston Belt &c. R. Co. v. Wilson* (Tex. Civ. App.), 165 S. W. 560.

<sup>88</sup> *Fifth Nat. Bank v. New York El. R. Co.*, 28 Fed. 231.

<sup>89</sup> *Davenport &c. R. Co. v. Sinnet*, 111 Ill. App. 75. See also *Houston Belt &c. R. Co. v. Wilson* (Tex. Civ. App.), 165 S. W. 560. And see as to measure of damages for injury to or destruction of

shade trees and the like, *Cleveland School Dis. v. Great Northern Ry. Co.*, 20 N. Dak. 124, 126 N. W. 995, 28 L. R. A. (N. S.) 757 and note. But where a railroad company wilfully and maliciously lays its track on an adjoining highway against the warning and protest of the land-owner in such a way as to injure his property it has been held that the company was not in a position to demand that the damages for this invasion should be assessed on the same basis as if it were done in the lawful exercise of the right of eminent domain. *Becker v. Lebanon &c. R. Co.*, 25 Pa. Sup. Ct. 367.

<sup>90</sup> Ante chap. XXXIX.

<sup>91</sup> *Southern &c. R. Co. v. Cowan*, 129 Ala. 577, 29 So. 985.



demnation, the measure of damages is the decrease of value of the premises caused by the construction, that is, the difference between the value of the property with the railroad track there and the value without it, not taking into account the benefit and injury received and sustained by the community in general.<sup>92</sup> The compensation is intended as a reasonable compensation for the uses for which the owner could have put the land,<sup>93</sup> without reference to the profits made by the operation of the road.<sup>94</sup> On this inquiry it has been held improper to ask the plaintiff whether he would ask a certain amount for the land, since the price that he would have accepted might depend on various contingencies; such as how badly he needed the money, whether the price was asked before or after the injury sued for, or whether it included the damages for such injury.<sup>95</sup> These damages have been held recoverable without reference to whether the road was negligently constructed or operated.<sup>96</sup> Exemplary damages are not recoverable where the entry was made by the railroad company in the belief that its possession of the land was rightful under condemnation proceedings.<sup>97</sup> In a case where a railroad company appropriated a portion of the highway and constructed a new road near to and parallel with the old one for the distance that the latter had been appropriated it was held that the measure of damages recoverable by the county for such an appropriation was the amount required to

<sup>92</sup> *Boyer & Lucas v. St. Louis &c. R. Co.*, 97 Tex. 107, 76 S. W. 441; *Illinois Cent. R. Co. v. Farrell*, 108 Ill. App. 659; *Klosterman v. Chesapeake &c. R. Co.*, 114 Ky. 426, 71 S. W. 6, 24 Ky. L. 1233; *Missouri &c. R. Co. v. Calkins* (Tex. Civ. App.), 79 S. W. 852. See also *Appel v. Chicago &c. R. Co.*, 34 S. Dak. 306, 148 N. W. 513.

<sup>93</sup> *Eastern Texas R. Co. v. Scurlock*, 97 Tex. 305, 75 S. W. 366 (injury to property as homesteads); *Illinois Cent. R. Co. v.*

*Hoskins*, 80 Miss. 730, 32 So. 150, 92 Am. St. 612.

<sup>94</sup> *Illinois Cent. R. Co. v. Hoskins*, 80 Miss. 730, 32 So. 150, 92 Am. St. 612.

<sup>95</sup> *Rice v. Norfolk &c. R. Co.*, 130 N. Car. 375, 41 S. E. 1031.

<sup>96</sup> *Chicago &c. R. Co. v. Payne*, 192 Ill. 239, 61 N. E. 467. See also *Houston &c. R. Co. v. Davis*, 45 Tex. Civ. App. 212, 100 S. W. 1013.

<sup>97</sup> *Illinois Cent. R. Co. v. Hoskins*, 80 Miss. 730, 32 So. 150, 92 Am. St. 612.

put the new road in as good condition as the old one was in when appropriated.<sup>98</sup>

§ 1358 (1049g). **Remedies of land-owner—Taking or injury in excess of that condemned.**—Where land is seized in excess of that condemned the land-owner generally has his remedy against the railroad company by injunction, ejectment or an action for damages.<sup>99</sup> Where the action is brought for a permanent injury to the freehold the owner has the burden of proving freehold title in himself.<sup>1</sup> In one case a railroad company was held liable for permanent injury to real property resulting from its causing dirt to be thrown over an embankment constructed by it along its track on a highway to protect a passway—the dirt marring the beauty of plaintiff's property, and destroying her use of the passway—though at the time the damage occurred the railroad had acquired a prescriptive right to the use of the highway; but it did not appear, however, that this right extended farther than the embankment.<sup>2</sup>

§ 1359 (1049h). **Remedies of land-owner—Right of company to conveyance.**—It has been held that an elevated railroad company on the recovery of damages against it by a lessee of abutting property is entitled, on payment of these damages, to a release from the lessee and a conveyance of the easement, not merely during the existing term, but during future renewals stipulated for in the lease.<sup>3</sup> But, as already shown in another

<sup>98</sup> *St. Louis &c. R. Co. v. Grayson Co.*, 31 Tex. Civ. App. 611, 73 S. W. 64.

<sup>99</sup> *McKennon v. St. Louis &c. R. Co.*, 69 Ark. 104, 61 S. W. 383; *Jacksonville &c. R. Co. v. Kidder*, 21 Ill. 131; *Bass v. Ft. Wayne*, 121 Ind. 389, 23 N. E. 259; *Ketcham v. New York &c. R. Co.*, 177 N. Y. 247, 69 N. E. 533. See also note to *Boise Val. Constr. Co. v. Kroeger*, 17 Idaho 384, 105 Pac. 1070, in 28 L. R. A. (N. S.) 968.

<sup>1</sup> *Waltemeyer v. Wisconsin &c. R. Co.*, 71 Iowa 626, 33 N. W. 140.

<sup>2</sup> *Tietze v. International &c. R. Co.*, 35 Tex. Civ. App. 136, 80 S. W. 124. See also *Houston &c. R. Co. v. Davis*, 45 Tex. Civ. App. 212, 100 S. W. 1013.

<sup>3</sup> *Storms v. Manhattan R. Co.*, 77 App. Div. 94, 79 N. Y. S. 60. See also *Reed v. Metropolitan El. R. Co.*, 18 N. Y. S. 811; *Woolsey v. New York El. R. Co.*, 134 N. Y. 323, 30 N. E. 387, 31 N. E. 891.

section, a conveyance where property is taken under the eminent domain is not ordinarily required.<sup>4</sup>

**§ 1360 (1051). Effect of tender of payment by company.**—The manner in which tender of payment is required to be made to the land-owner in condemnation proceedings is usually governed by statute, and not by common law rules.<sup>5</sup> Where the statute requires a tender before entering upon the land, a tender is, of course, essential, but if the damages have been ascertained by a judicial proceeding and a tender is made and refused, the company may lawfully enter into possession. A valid tender, made after the compensation has been fixed by a competent tribunal, is effective although the land-owner may refuse to accept it and appeal from the award or judgment.<sup>6</sup> In order to entitle the company to possession it must tender the entire amount assessed, and it is not sufficient to tender the sum the company claims to be the proper one.<sup>7</sup> It is held that the tender of the amount awarded must be made before the owner appeals,<sup>8</sup> but we think that a tender promptly made should be regarded as sufficient although the owner does appeal, unless the statute requires the tender to be made before an appeal is taken. In some jurisdictions the rule is that a tender of the amount awarded does not preclude the company from litigating the question of the amount on appeal.<sup>9</sup> The tender must be made in money,<sup>10</sup> and must be made in the mode prescribed by the

<sup>4</sup> Ante, § 1344.

<sup>5</sup> *Stolze v. Milwaukee &c. R. Co.*, 113 Wis. 44, 88 N. W. 919, 90 Am. St. 833.

<sup>6</sup> *Johnson v. Baltimore &c. R. Co.*, 45 N. J. Eq. 454, 17 Atl. 574, 39 Am. & Eng. R. Cas. 101; *Pomona &c. R. Co. v. Camden &c. Co. (N. J.)*, 20 Atl. 350, 44 Am. & Eng. R. Cas. 179; *Oliver v. Union &c. R. Co.*, 83 Ga. 257, 9 S. E. 1086. See also *Wabash R. Co. v. Ft. Wayne &c. Co.*, 161 Ind. 295, 67 N. E. 674; *Asher v. Louisville &c. R. Co.*, 87 Ky. 391, 8 S. W. 854.

<sup>7</sup> *Mettler v. Easton &c. R. Co.*, 25 N. J. Eq. 214.

<sup>8</sup> *Johnson v. Baltimore &c. R. Co.*, 45 N. J. Eq. 454, 17 Atl. 574, 39 Am. & Eng. R. Cas. 101.

<sup>9</sup> *Indianapolis &c. Co. v. Brower*, 12 Ind. 374. See *Baltimore &c. R. Co. v. Johnson*, 84 Ind. 420, 10 Am. & Eng. R. Cas. 408.

<sup>10</sup> Where a tender is relied upon, it must be a tender of money in order to be valid. *Isom v. Mississippi R. Co.*, 36 Miss. 300; *Alabama R. Co. v. Burkett*, 42 Ala. 83; *Jones v. Wills Valley R. Co.*,

statute. Where payment into court is required or a deposit is provided for the tender will be ineffective unless such requirements are complied with by the company.<sup>11</sup> The authorities declare that, under most of the constitutions, a statute which authorizes the condemning party to take possession pending the appeal upon depositing the sum awarded in court and that the sum shall not be paid to the land-owner until the appeal is determined is unconstitutional.<sup>12</sup>

30 Ga. 43; *Hayes v. Ottawa &c. R. Co.*, 54 Ill. 373; *Elizabethtown R. Co. v. Helm*, 8 Bush (Ky.) 681; *Henderson &c. R. Co. v. Dickerson*, 17 B. Mon. (Ky.) 173, 66 Am. Dec. 148; *New Orleans &c. R. Co. v. Lagarde*, 10 La. Ann. 150; *Brown v. Beatty*, 34 Miss. 227, 69 Am. Dec. 389; *Oregon Central R. Co. v. Wait*, 3 Ore. 91; *Woodfolk v. Nashville &c. R. Co.*, 2 Swan (Tenn.) 422; *Buffalo Bayou &c. R. Co. v. Ferris*, 26 Tex. 588; *Railroad Co. v. Halstead*, 7 W. Va. 301. A land-owner's right to insist on having his damages first assessed and paid is waived by acquiescence on his part in the construction and operation of the road across his land; and he can not thereafter maintain ejectment to recover the land, but is limited to his action for the value of the land. *McAulay v. Western &c. R. Co.*, 33 Vt. 311, 78 Am. Dec. 627; *Provolt v. Chicago R. Co.*, 57 Mo. 256; *Strickler v. Midland R. Co.*, 125 Ind. 412, 25 N. E. 455; *Smart v. Portsmouth R. Co.*, 20 N. H. 233.

<sup>11</sup> *Reynolds, Ex parte*, 52 Ark. 330, 12 S. W. 570; *St. Joseph &c. R. Co. v. Callender*, 13 Kans. 496; *Leavenworth &c. R. Co. v. Whitaker*, 42 Kans. 634, 22 Pac. 733; *Chicago &c. R. Co. v. Watkins*, 43

Kans. 50, 22 Pac. 985, 40 Am. & Eng. R. Cas. 499; *Republican Valley &c. R. Co. v. Fink*, 18 Nebr. 82, 24 N. W. 439; *Gulf &c. R. Co. v. Donahoo*, 59 Tex. 128; *Shepardson v. Milwaukee &c. R. Co.*, 6 Wis. 605; *Powers v. Bears*, 12 Wis. 214. See generally *Ackerman v. Huff*, 71 Tex. 317, 9 S. W. 236, 36 Am. & Eng. R. Cas. 589. A deposit on condition is not sufficient. *Kanne v. Minneapolis &c. R. Co.*, 30 Minn. 423, 15 N. W. 871. The deposit is held to be at the risk of the company. *Blackshire v. Atchison &c. R. Co.*, 13 Kans. 514; *Toledo &c. R. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271.

<sup>12</sup> *Consumers' Gas &c. Co. v. Harless*, 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505; *Meily v. Zurmehly*, 23 Ohio St. 627; *State v. Lubke*, 15 Mo. App. 152; *St. Louis &c. R. Co. v. Evans &c. B. Co.*, 85 Mo. 307; *New York &c. R. Co.*, Matter of, 98 N. Y. 12. But it is also held in the first case cited in this note that there is no such objection to the statute if it merely permits the condemning party to pay the assessed damages into court for the use of the landowner, and that such payment is equivalent to a tender, and confers a license to take possession even when

§ 1361 (1052). **Acceptance of damages—Estoppel.**—The land owner may be estopped from questioning the proceedings in condemnation cases by such acts or conduct as makes it inequitable for him to deny the validity of such proceedings. The rule that parties will not be permitted to occupy inconsistent positions applies to such cases. The acceptance, by the landowner, of the damages awarded generally estops him to question the award by appeal.<sup>13</sup> A right to payment or tender of damages

an appeal is prosecuted. See also *Baltimore &c. R. Co. v. Johnson*, 84 Ind. 420; *Reisner v. Atchison &c. R. Co.*, 27 Kans. 382.

<sup>13</sup> *Whittlesey v. Hartford &c. R. Co.*, 23 Conn. 421; *Hitchcock v. Danbury &c. R. Co.*, 25 Conn. 516; *Kile v. Yellowhead*, 80 Ill. 208; *St. Louis &c. R. Co. v. Karnes*, 101 Ill. 402; *Baltimore &c. R. Co. v. Johnson*, 84 Ind. 420; *Logan v. Vernon &c. R. Co.*, 90 Ind. 552; *Mississippi &c. R. Co. v. Byington*, 14 Iowa 572; *Marling v. Burlington &c. R. Co.*, 67 Iowa 331, 25 N. W. 268; *Challiss v. Atchison &c. R. Co.*, 16 Kans. 117; *Hatch v. Hawkes*, 126 Mass. 177; *Chatterton v. Parrott*, 46 Mich. 432, 9 N. W. 482; *Rentz v. Detroit*, 48 Mich. 544, 12 N. W. 694, 911; *Hunter v. Jones*, 13 Minn. 307; *Brooklyn Park Co. v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70; *Parks v. Dallas Terminal R. Co.*, 34 Tex. Civ. App. 341, 78 S. W. 533; *Drouin v. Boston &c. R. Co.*, 74 Vt. 343, 52 Atl. 957; *Burns v. Milwaukee &c. R. Co.*, 9 Wis. 450; *Moore v. Roberts*, 64 Wis. 538, 25 N. W. 564. See also *Chicago &c. R. Co. v. Kemper*, 256 Mo. 279, 166 S. W. 291; *Kansas City &c. R. Co. v. Second St. Imp. Co.*, 256 Mo. 386, 166 S. W. 296; *Felch v.*

*Gilman*, 22 Vt. 38; *McKain v. Mullen*, 65 W. Va. 558, 64 S. E. 829, 29 L. R. A. (N. S.) 1 and note, covering the general subject and reviewing many cases, also note in *Ann. Cas.* 1915D, 821; *Starrett v. Young*, 14 Wyo. 146, 82 Pac. 946. But see *Indianapolis Tract. Co. v. Ripley*, 175 Ind. 103, 93 N. E. 546; *Chicago Great Western R. Co. v. Kemper*, 256 Mo. 279, 166 S. W. 291, *Ann. Cas.* 1915D, 815 (estopped to question irregularities but not amount of award); *Low v. Concord R. Co.*, 63 N. H. 557, 3 Atl. 739; *Weyer v. Milwaukee &c. R. Co.*, 57 Wis. 329, 15 N. W. 481. And taking possession of the premises and paying the award has been held to estop the party condemning from denying the validity of the condemnation proceedings in a suit to recover the amount of the award. *Corwith v. Hyde Park*, 14 Ill. App. 635; *State v. Lubke*, 15 Mo. App. 152. See also *Missouri Pac. R. Co. v. Gruendel*, 3 Kans. App. 53, 44 Pac. 439. See *Rothan v. Railroad*, 113 Mo. 132, 20 S. W. 892; *St. Louis &c. Ry. Co. v. Clark*, 119 Mo. 357, 24 S. W. 157. Under some statutes the company may pay the award into court, take possession and still appeal. *Douglas v. Indianapolis &c. Co.*, 37 Ind.

may be waived by conduct as well as by express contract.<sup>14</sup> And a land-owner may estop himself by giving credit to the condemning party.<sup>15</sup> It is to be noted that there is a clear distinction between cases of conduct estopping a land-owner from claiming the land itself and cases of conduct estopping him from claiming compensation, for it by no means follows that one who does acts estopping him from claiming the land thereby estops himself from claiming compensation.<sup>16</sup>

App. 332, 76 N. E. 892; *St. Louis &c. R. Co. v. Aubuchon*, 199 Mo. 352, 97 S. W. 867.

<sup>14</sup> *Snyder v. Chicago &c. R. Co.*, 112 Mo. 527, 20 S. W. 885; *Manchester &c. R. Co. v. Keene*, 62 N. H. 81.

<sup>15</sup> *New Orleans &c. Co. v. Jones*, 68 Ala. 48, 2 Am. & Eng. R. Cas. 425. See *Payne v. Morgan's &c. R. Co.*, 43 La. Ann. 981, 10 So. 10; *Rio Grande &c. R. Co. v. Ortiz*, 75 Tex. 602, 12 S. W. 1129; North-

ern Pac. R. Co. v. *Burlington &c. Co.*, 4 Fed. 298.

<sup>16</sup> *Webster v. Kansas City &c. R. Co.*, 116 Mo. 114, 22 S. W. 474. Estoppel by pleadings. *Oregon &c. R. Co. v. Baily*, 3 Ore. 164; *Pennsylvania &c. R. Co. v. Bunnell*, 81 Pa. St. 414. See also as to the effect of the award as a bar to recovery of damages subsequently accruing, *Hinckley v. Seattle*, 74 Wash. 101, 132 Pac. 855, Ann. Cas. 1915A, 580, and note reviewing authorities.

## CHAPTER XLII.

### APPEAL AND CERTIORARI

Sec.	Sec.
1365. Appeal—When authorized.	1372. Trial de novo in intermediate court.
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§ 1365 (1053). **Appeal—When authorized.**—The right of appeal where the proceedings are conducted in a judicial tribunal is a statutory right.<sup>1</sup> The legislature may regulate the mode of taking and prosecuting appeals, and may deny an appeal, except in those states where a trial by jury is given in all cases by the constitution. In some states, where the original assessment is by a jury or judicial body, it is held that the appeal may be taken directly to the supreme court, but as a rule the case goes first

<sup>1</sup> *McCardle*, Ex parte, 7 Wall. (U. S.) 506, 19 L. ed. 264; *Houghton*, Appeal of, 42 Cal. 35; *La Croix v. County Commissioners*, 50 Conn. 321, 47 Am. Rep. 648; *Sims v. Hines*, 121 Ind. 534, 23 N. E. 515; *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889; *Kundinger v. Saginaw*, 59 Mich. 355, 26 N. W. 634; *Minneapolis v. Wilkin*, 30 Minn. 140, 14 N. W. 581; *State v. Slevin*, 16 Mo. App. 541; *State Reservation*, Matter of, 102 N. Y. 734, 7 N. E. 916; *Norfolk Southern &c. R. Co. v. Ely*, 95 N. Car. 77; *Luther v. Comrs. of Buncombe Coun-*

*ty*, 164 N. Car. 241, 80 S. E. 386; *Cake v. Philadelphia &c. R. Co.*, 87 Pa. St. 307; *Huntington Co. v. Kauffman*, 126 Pa. St. 305, 17 Atl. 595; *Chesapeake &c. Co. v. Hoye*, 2 Grat. (Va.) 511; *Hill v. Salem &c. Co.*, 1 Rob. (Va.) 263. See also, *Memphis &c. R. Co. v. Birmingham &c. R. Co.*, 96 Ala. 571, 11 So. 642, 18 L. R. A. 166; *Cockcroft's Appeal*, 60 Conn. 161, 22 Atl. 482; *Chappell v. Edmondson Ave. &c. R. Co.*, 83 Md. 512, 35 Atl. 19; *Great Northern R. Co. v. Fiske*, 54 Mont. 231, 169 Pac. 44 (and may be granted or withheld

into a trial court and is there tried.<sup>2</sup> In states where the proceedings originate in a court of superior jurisdiction, from all whose final orders judgments and decrees an appeal lies, an appeal from the judgment in such proceedings may be prosecuted to the proper appellate court.<sup>3</sup> In such cases appeal may be had from the final judgment in the case, but not, as a rule,

from either party or both, in the discretion of the legislature, so long as no constitutional provision is infringed). But there is some conflict of authority upon this point, for there are cases affirming that the right of appeal can not be denied. *Coon v. Mason Co.*, 22 Ill. 666. The right of appeal is favored and the courts generally so construe statutes as to give the right when it is possible to do so. *Howard v. Drainage Comrs.*, 126 Ill. 53, 18 N. E. 313; *Proprietors of, &c. Bridge v. New Hampton*, 47 N. H. 151; *Hamilton v. Fort Wayne*, 73 Ind. 1; *Yelton v. Addison*, 101 Ind. 58; *Lawrenceburg &c. Co. v. Smith*, 3 Ind. 253; *Elliott's Roads and Streets* (3rd ed.) § 412. See also *Atlantic Coast Line R. Co. v. South Bound R. Co.*, 57 S. Car. 317, 35 S. E. 553.

<sup>2</sup> *Dunlap v. Mt. Sterling*, 14 Ill. 251; *Hardy v. McKinney*, 107 Ind. 364, 8 N. E. 232; *Mississippi &c. Co. v. Rosseau*, 8 Iowa 373; *Blize v. Castlio*, 8 Mo. App. 290; *York Co. v. Fewell*, 21 S. Car. 106; *Miller v. Prairie Du Chien &c. R. Co.*, 34 Wis. 533. See generally *Cooper v. Anniston &c. R. Co.*, 85 Ala. 106, 4 So. 689, 36 Am. & Eng. R. Cas. 581; *Postal &c. Co. v. Alabama &c. R. Co.*, 92 Ala. 331, 9 So. 555; *Memphis &c. R. Co. v. Hopkins*, 108 Ala. 159, 18 So. 845;

*Georgia Cent. R. Co. v. Alabama &c. R. Co.*, 130 Ala. 559, 30 So. 566. Such an appeal is generally held to lie where the appeal from the award of the commissioners is docketed in the superior court as a civil action. *St. Louis &c. R. Co. v. Evans &c. Co.*, 85 Mo. 307; *San Francisco &c. R. Co. v. Mahoney*, 29 Cal. 112; *Morris v. Chicago*, 11 Ill. 650; *Rice v. Danville &c. Turnpike Co.*, 7 Dana (Ky.) 81; *Tracy v. Elizabethtown &c. R. Co.*, 78 Ky. 309; *St. Paul &c. R. Co., In re*, 34 Minn. 227, 25 N. W. 345. See as to practice on owner's appeal to district or circuit court, *Craig v. Salina Northern R. Co.*, 102 Kans. 838, 172 Pac. 21; *In re Board of Water Comrs.*, 138 Minn. 458, 165 N. W. 279; post § 1750. A statute giving an appeal to the supreme court in any "action or special proceeding" was held to apply to condemnation cases. *Sacramento &c. R. Co. v. Harlan*, 24 Cal. 334; *Raleigh &c. R. Co. v. Jones*, 1 Ired. L. (N. Car.) 24; *Wilmington &c. R. Co. v. Condon*, 8 G. & J. (Md.) 443.

<sup>3</sup> *St. Louis &c. R. Co. v. Lux*, 63 Ill. 523. The action of the court in sustaining exceptions to the commissioner's report is not an order from which an appeal may be taken. *Tucker v. Massachusetts Cent. R. Co.*, 116 Mass. 124.



from interlocutory orders.<sup>4</sup> In most jurisdictions, an order merely appointing commissioners or appraisers is not a final judgment and no appeal or writ of error will lie therefrom.<sup>5</sup>

Neither is the refusal to dismiss an appeal to the district court, in which case it is to be tried *de novo*, *Minnesota Cent. R. Co. v. Peterson*, 31 Minn. 42, 16 N. W. 456. In Maryland the action of the circuit court in confirming an inquisition in condemnation proceedings is exclusive and final, and appeal or error does not lie to the supreme court, if the railroad company had any right at all to make the condemnation. *Hopkins v. Philadelphia &c. R. Co.*, 94 Md. 257, 51 Atl. 404.

<sup>4</sup> *San Francisco &c. R. Co. v. Mahoney*, 29 Cal. 112; *California &c. R. Co. v. Southern &c. R. Co.*, 65 Cal. 295, 4 Pac. 13; *Denver &c. R. Co. v. Jackson*, 6 Colo. 340; *Jacksonville &c. R. Co. v. Adams*, 29 Fla. 260, 11 So. 169; *Johnson v. Freeport &c. R. Co.*, 116 Ill. 521, 6 N. E. 211; *Tracy v. Elizabethtown &c. R. Co.*, 78 Ky. 309; *Hyattsville v. Washington &c. R. Co.*, 124 Md. 577, 93 Atl. 151; *McNamara v. Minnesota &c. R. Co.*, 12 Minn. 388; *St. Paul &c. R. Co., In re*, 34 Minn. 227, 25 N. W. 345; *North Missouri R. Co. v. Reynal*, 25 Mo. 534; *St. Louis &c. R. Co. v. Evans &c. B. Co.*, 85 Mo. 307; *Hendricks v. Carolina &c. R. Co.*, 98 N. Car. 431, 4 S. E. 184; *Baltimore &c. R. Co. v. Pittsburgh &c. R. Co.*, 17 W. Va. 812; *Panhandle Tract. Co. v. Schenk*, 73 W. Va. 226, 80 S. E. 345. In some of the states a writ of error lies from a court in which the proceedings are

conducted according to the common law. *Peck v. Whitney*, 6 B. Mon (Ky.) 117. See *Peoria &c. Co. v. Peoria &c. R. Co.*, 105 Ill. 110; *Odum v. Rutledge &c. Co.*, 94 Ala. 488, 10 So. 222; *Wilmington &c. Co. v. Condon*, 8 Gill & J. (Md.) 443. As to what orders may be appealed from, see *Spaulding v. Milwaukee &c. R. Co.*, 57 Wis. 304, 14 N. W. 368; *Eureka &c. R. Co. v. McGrath*, 74 Cal. 49, 15 Pac. 360; *San Francisco &c. R. Co. v. Mahoney*, 29 Cal. 112; *La Salle County Elec. Ry. Co. v. Hill*, 260 Ill. 621, 103 N. E. 624; *Lake Shore &c. R. Co. v. Whiting*, 175 Ind. 330, 94 N. E. 326 (statute authorizing appeal from interlocutory order appointing appraisers is not retroactive and does not even affect proceedings then pending); *Cumberland &c. R. Co. v. Pennsylvania R. Co.*, 57 Md. 267; *Warren v. First Division &c.*, 18 Minn. 384; *Rensselaer &c. R. Co. v. Davis*, 43 N. Y. 137; *Beale v. Pennsylvania R. Co.*, 86 Pa. St. 509; *Wisconsin &c. R. Co. v. Cornell &c.*, 52 Wis. 537, 8 N. W. 491; *Esch v. Chicago &c. R. Co.*, 72 Wis. 229, 39 N. W. 129.

<sup>5</sup> *Tennessee &c. R. Co. v. Birmingham &c. R. Co.*, 128 Ala. 526, 29 So. 455 (order of condemnation may be appealed from); *Denver Power &c. Co. v. Denver &c. R. Co.*, 30 Colo. 204, 69 Pac. 568 (refusal to appoint commissioner may be reviewed); *Lafayette &c. R. Co. v. Butner*, 162 Ind. 460, 70 N. E.

There is a difference between an appeal to a trial court and an appeal to a court of errors, for in the latter case the general rule is that only questions of law will be considered, while in the former the case is usually tried *de novo*. It is the rule in many jurisdictions that where the case has been tried *de novo* in the court to which the commissioners' award was taken for review, the supreme court will not consider matters which arose before the case reached the court in which such trial was had.<sup>6</sup> As the right to appeal is statutory the legislature may regulate the mode of taking appeals and provide what questions shall be

529 (no appeal from order of circuit court denying application for appointment of appraisers); *Detroit &c. R. Co. v. Hall*, 133 Mich. 302, 94 N. W. 1066 (no appeal from allowance of attorney's fees); *Detroit &c. R. v. Oakland County Circuit Judge*, 146 Mich. 540, 109 N. W. 846 (order of dismissal a final judgment and mandamus will not lie); *Erie R. Co. v. Steward*, 59 App. Div. 187, 69 N. Y. S. 57 (no appeal from judgment awarding condemnation and appointing commissioners); *Cape Fear &c. R. Co. v. Steward*, 132 N. Car. 248, 43 S. E. 638; *Holly Shelter R. Co. v. Newton*, 133 N. Car. 132, 136, 45 S. E. 549 (no appeal from order of court directing clerk to hear proceedings and appoint commissioners); *Richmond &c. R. Co. v. Johnson*, 99 Va. 282, 38 S. E. 195, 3 Va. Sup. Ct. 233 (no appeal from order appointing commissioners); *White Oak Ry. Co. v. Gordon*, 61 W. Va. 519, 56 S. E. 837. An order setting aside the report of the commissioners appointed to assess damages and directing a new appraisal is interlocutory and no appeal will lie from it. *Eufaula v.*

*Ahrens*, 58 Okla. 180, 159 Pac. 327. A judgment adjudicating the right of the petitioner to condemn certain land and appointing commissioners to assess damages is a final judgment from which an appeal lies where the eminent domain statute provides that the statutory provisions in regard to civil actions shall apply and such statute relative to civil actions allows appeals from final judgments in civil actions. *McLean v. District Court*, 24 Idaho 441, 134 Pac. 536, Ann. Cas. 1915D, 542. Many other cases are reviewed in the note showing what are regarded as final judgments and from what orders an appeal will lie, what in various jurisdictions.

<sup>6</sup> *Patton v. Clark*, 9 Yerg. (Tenn.) 268; *Williamson v. Cass*, 84 Ill. 361. No appeal lies from an order of the court confirming an inquisition condemning lands for the construction of a railroad unless the court exceeds its jurisdiction in passing such order. *George's Creek Coal Co. v. New Central Coal Co.*, 40 Md. 425; *Cumberland &c. R. Co. v. Pennsylvania R. Co.*, 57 Md. 267.

considered on appeal.<sup>7</sup> An award of damages for land taken for public purposes does not constitute a contract within the meaning of the section of the federal constitution forbidding a state to pass laws impairing the validity of contracts.<sup>8</sup> And provision for the review of such proceedings may be made by the legislature even after the termination of the proceedings.<sup>9</sup>

**§ 1366. Time within which appeal may be taken.**—The time within which an appeal may be taken is usually fixed or limited by statute. Where this is so an appeal not taken within such time will be unavailing.<sup>10</sup> The manner of computing the time is the same, in general, as in other similar cases.<sup>11</sup>

**§ 1367. Manner of taking appeal—Parties.**—If an appeal is given and no mode is prescribed for exercising the right, the court will adopt the practice in similar proceedings, so far as

<sup>7</sup> *Oliver v. Union &c. R. Co.*, 83 Ga. 257, 9 S. E. 1086; *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889; *Central Branch &c. R. Co. v. Atchison &c. R. Co.*, 28 Kans. 453, 10 Am. & Eng. R. Cas. 528; *Raleigh &c. R. Co. v. Jones*, 1 Ired. L. (N. Car.) 24; *Skinner v. Nixon*, 7 Jones, L. (N. Car.) 342; *Norfolk &c. R. Co. v. Ely*, 95 N. Car. 77. See *Rothan v. St. Louis &c. R. Co.*, 113 Mo. 132, 20 S. W. 892.

<sup>8</sup> *Garrison v. New York*, 21 Wall. (U. S.) 196, 22 L. ed. 612.

<sup>9</sup> *Baltimore &c. R. Co. v. Nesbit*, 10 How. (U. S.) 395, 13 L. ed. 469; *Henderson &c. R. Co. v. Dickerson*, 17 B. Mon. (Ky.) 173, 66 Am. Dec. 148. Although an irrevocable charter gives a right of appeal to a designated tribunal the legislature may alter the charter by providing for appeal to a different court from that designated. *State v. Weldon*, 47 N. J. L. 59, 54 Am. Rep. 114, 23 Am. & Eng. R.

*Cas.* 134; *Railroad Co. v. Hecht*, 95 U. S. 168, 24 L. ed. 423. We do not believe that it is within the power of the legislature to contract that cases shall be tried in a specified court, since the power to establish courts and regulate practice therein is a governmental power which can not be bargained away.

<sup>10</sup> *Rennick v. Board of Comrs. of Lyon County*, 45 Kans. 442, 25 Pac. 856; *Miller v. Union County*, 48 Ore. 266, 86 Pac. 3; *Seattle &c. R. Co. v. O'Meara*, 4 Wash. 17, 29 Pac. 835.

<sup>11</sup> See generally as to time and its computation, *Central of Georgia R. Co. v. Alabama &c. R. Co.*, 130 Ala. 539, 30 So. 556; *Jamison v. Burlington &c. R. Co.*, 69 Iowa 670, 29 N. W. 774; *Kansas City &c. R. Co. v. Hurst*, 42 Kans. 462, 22 Pac. 618; note in 15 L. R. A. (N. S.) 689.

they can be made applicable.<sup>12</sup> Ordinarily, however, the manner of taking the appeal is prescribed by statute, in which case the provisions of the statute must be substantially complied with or the appeal will be ineffective.<sup>13</sup> An appeal is usually given to either party,<sup>14</sup> and this includes both the condemning corporation and any owner of a distinct interest in the property,<sup>15</sup>

<sup>12</sup> *Peters v. Hastings &c. R. Co.*, 19 Minn. 260; *Dubuque &c. R. Co. v. Crittenden*, 5 Iowa 514; *Twombly v. Madbury*, 27 N. H. 433; *West v. McGurn*, 43 Barb. (N. Y.) 198. Where the statute simply provided that either party might take an appeal from the award of the commissioners to the district court within a limited time, it was held that filing a transcript in the district court constituted taking an appeal. *Gifford v. Republican Valley &c. R. Co.*, 20 Nebr. 533, 31 N. W. 11.

<sup>13</sup> *Klein v. St. Paul &c. R. Co.*, 30 Minn. 451, 16 N. W. 265; *Hartman v. Belleville &c. R. Co.*, 64 Ill. 24; *Nebraska &c. R. Co. v. Storer*, 22 Nebr. 90, 34 N. W. 69; *Jamison v. Burlington &c. R. Co.*, 69 Iowa 670, 29 N. W. 774. See *Kasson v. Bocker*, 47 Wis. 79, 1 N. W. 418; *Curtis v. Jackson*, 23 Minn. 268. In New York a condemnation of land under the statute is a "proceeding" and not an "action" and hence no appeal can be taken under the statute authorizing appeals in actions. *Erie R. Co. v. Steward*, 59 App. Div. 187, 69 N. Y. S. 57.

<sup>14</sup> *Lee v. Northwestern U. R. Co.*, 33 Wis. 222; *People v. May*, 27 Barb. (N. Y.) 238; *Hartman v. Belleville &c. R. Co.*, 64 Ill. 24; *Chesterfield &c. R. Co. v. Johnson*,

58 S. Car. 560, 30 S. E. 919. The corporation can not appeal from an order apportioning the damages among the several owners of the estate taken. *Haswell v. Vermont Central R. Co.*, 23 Vt. 228; *Spaulding v. Milwaukee &c. R. Co.*, 57 Wis. 304, 14 N. W. 368, 15 N. W. 482; *Yazoo &c. R. Co. v. Longview Sugar Co.*, 135 La. 542, 65 So. 638; *Chicago &c. R. Co. v. Baker*, 102 Mo. 553, 15 S. W. 64. See *Chicago &c. R. Co. v. Grovier*, 41 Kans. 685, 21 Pac. 779, 39 Am. & Eng. R. Cas. 146; *Connable v. Chicago &c. R. Co.*, 60 Iowa 27, 14 N. W. 75; *Cedar Rapids &c. R. Co. v. Chicago &c. R. Co.*, 60 Iowa 35, 14 N. W. 76; *Chicago &c. R. Co. v. Easley*, 46 Kans. 337, 26 Pac. 731; *Chicago &c. R. Co. v. Ellis*, 52 Kans. 41, 48, 33 Pac. 478, 34 Pac. 352; *Michigan &c. R. Co. v. Barnes*, 40 Mich. 383; *Troy &c. R. Co. v. Northern &c. Co.*, 16 Barb. (N. Y.) 100.

<sup>15</sup> *Washburn v. Milwaukee &c. R. Co.*, 59 Wis. 379, 18 N. W. 431; *Wilkin v. St. Paul &c. R. Co.*, 22 Minn. 177; *Dixon v. Rockwell &c. R. Co.*, 75 Iowa 367, 39 N. W. 646; *Gage v. Chicago*, 141 Ill. 642, 31 N. E. 163; *Chicago &c. R. Co. v. Ellis*, 52 Kans. 41, 33 Pac. 478. All parties entitled to share in the award have a right to appeal and are concluded thereby if they do

as, for example, a mortgagee,<sup>16</sup> who is made a party to the record.<sup>17</sup>

**§ 1368. Notice—Bond.**—Where notice of an appeal is required by statute it must be given in the manner and within the

not appeal. *Kafka v. Davidson*, 135 Minn. 389, 160 N. W. 1021. The owner of any distinct interest in property in which others also hold an estate may appeal separately. *Lance v. Chicago &c. R. Co.*, 57 Iowa 636, 11 N. W. 612. In this case, the owner and the mortgagee were proceeded against jointly and it was held that the owner could appeal from the award without joining the mortgagee. One joint owner can not prosecute a separate appeal, but all must unite in a single appeal. *Watson v. Milwaukee &c. R. Co.*, 57 Wis. 332, 15 N. W. 468; *Chicago &c. R. Co. v. Hurst*, 30 Iowa 73. Separate appeals by landlord and tenant can not be consolidated. *Ortman v. Union Pacific R. Co.*, 32 Kans. 419. As to when wife of land-owner is not a necessary party to an appeal by the railroad, see *Cleveland &c. R. Co. v. Smith*, 177 Ind. 524, 97 N. E. 164. In *Trustees v. Griffith*, 263 Ill. 550, 105 N. E. 760, Ann. Cas. 1914D, 1136 n, it is held that the holder of the said legal title in trust for another has no interest entitling him to appeal.

<sup>16</sup> *Omaha Bridge & Terminal Co., v. Reed*, 69 Nebr. 5, 14, 96 N. W. 276, and this has been so held where the action had been discontinued as to him. *Michigan Air Line R. Co.*, 40 Mich. 383.

<sup>17</sup> *Cedar Rapids &c. Co. v. Chicago &c. R. Co.*, 60 Iowa 35, 14 N. W. 76. In some jurisdictions any person directly affected or "interested" or "aggrieved" may appeal. *Chicago &c. R. Co. v. Grovier*, 41 Kans. 685, 21 Pac. 779; *Michigan Air Line R. Co. v. Barnes*, 40 Mich. 383. See also note in Ann. Cas. 1914D, 1139, 1142 (as to appeals by tenants and third persons generally). Appeals by tenants in common, see *Ruppert v. Chicago &c. R. Co.*, 43 Iowa 490. It has been held that where the land in controversy is conveyed before the expiration of the time limited for appealing the grantee may appeal. *Carli v. Stillwater*, 16 Minn. 260. But compare *Connable v. Chicago &c. R. Co.*, 60 Iowa 27, 14 N. W. 75; *Rines v. Portland*, 93 Maine 227, 44 Atl. 925. See *Trogden v. Winona &c. R. Co.*, 22 Minn. 198; *Blackshire v. Atchison &c. R. Co.*, 13 Kans. 514; *McIntyre v. Easton &c. R. Co.*, 26 N. J. Eq. 425. In a recent Illinois case it is held that one who is the holder of a bare legal title for the exclusive use and benefit of another has no interest that will entitle him to review of a proceeding to condemn the property. *Trustees v. Griffith*, 263 Ill. 550, 105 N. E. 760, Ann. Cas. 1914D, 1136.

time prescribed,<sup>18</sup> but in a number of jurisdictions parties in court must take notice of the appeal.<sup>19</sup> A bond is also frequently required, and, where such is the case it is deemed to be a condition precedent and must be such as the statute prescribes and filed within the time designated.<sup>20</sup>

**§ 1369. Issues on appeal—Questions determined.**—In some jurisdictions, issues formed in the court below are passed upon in the same manner as if the action were originally brought in the appellate court.<sup>21</sup> The general rule is that questions not made

<sup>18</sup> *Neff v. Chicago &c. R. Co.*, 14 Wis. 370; *Klein v. St. Paul &c. R. Co.*, 30 Minn. 451, 16 N. W. 265; *Maxwell v. La Brune*, 68 Iowa 689, 28 N. W. 18. See also *United States v. Crooks*, 116 Cal. 43, 47 Pac. 870; *Atlantic Coast Line R. Co. v. South Bound R. Co.*, 57 S. Car. 317, 35 S. E. 553; *Woolard v. Nashville*, 108 Tenn. 353, 67 S. W. 801. Where notices of the appeal was required to be served on the opposite party, it was held insufficient to serve notice on the attorney of the railroad company. *Hartman v. Belleville &c. R. Co.*, 64 Ill. 24. See *Contra*, *Hahn v. Chicago &c. R. Co.*, 43 Iowa 333. But where the land-owner was authorized to serve notice of appeal upon an agent of the railroad company, service upon the civil engineer employed to survey and locate its route was held good. *Jamison v. Burlington &c. R. Co.*, 69 Iowa 670, 29 N. W. 774. Under a Wisconsin statute, notice of the appeal need not be served on the opposite party. *Weyer v. Milwaukee &c. R. Co.*, 57 Wis. 329, 15 N. W. 481. Objections to the jurisdiction for this cause are not waived by the

appearance of the defendant in obedience to a summons to testify as a witness. *People v. Osborn*, 20 Wend. (N. Y.) 186. Nor by a special appearance on his part to move or dismiss the appeal for lack of jurisdiction. *Klein v. St. Paul &c. R. Co.*, 30 Minn. 451, 16 N. W. 625. But see *Nicoll v. New York &c. Co.*, 62 N. J. L. 733, 42 Atl. 583, 72 Am. St. 666.

<sup>19</sup> See *Raymond v. Clay County*, 68 Iowa 130, 26 N. W. 34; *Weyer v. Milwaukee &c. R. Co.*, 57 Wis. 329, 15 N. W. 481.

<sup>20</sup> *Weir v. St. Paul &c. R. Co.*, 18 Minn. 155. See also *McVey v. Heavenridge*, 30 Ind. 100; *Leffell v. Obenchain*, 90 Ind. 50; *St. Louis &c. R. Co. v. Morse*, 50 Kans. 99, 31 Pac. 676. But a bond given by one appellant with another appellant as surety has been held sufficient. *Glassburn v. Deer*, 143 Ind. 174, 91 N. E. 376, and courts are not always very strict in enforcing the general rule, especially after acceptance of a bond.

<sup>21</sup> *Phifer v. Carolina Central R. Co.*, 72 N. Car. 433; *Schermeely v. Stillwater &c. Co.*, 16 Minn. 506; *Breitweiser v. Fuhrman*, 88 Ind.

in the court of original jurisdiction will not be considered on appeal.<sup>22</sup> Another generally accepted rule is that damages awarded in condemnation proceedings will not be disturbed on appeal on conflicting evidence particularly where the jury or the judge as the jury viewed premises unless the award is clearly against the weight of the evidence or the jury or the commissioners proceeded upon an erroneous principle or were influenced by passion and prejudice.<sup>23</sup> And where the amount allowed in

28; *Hord v. Nashville &c. R. Co.*, 2 Swan (Tenn.) 597. In some states the appellate court must proceed according to the practice prescribed for the commissioners. *Gold v. Vermont Central R. Co.*, 19 Vt. 478.

<sup>22</sup> *Secombe v. Railroad Co.*, 23 Wall. (U. S.) 108, 23 L. ed. 67; *Booker v. Venice &c. R. Co.*, 101 Ill. 333, 5 Am. & Eng. R. Cas. 357; *Fitchburg R. Co. v. Boston &c. Co.*, 3 Cush. (Mass.) 58. *Webster v. Kansas City &c. R. Co.*, 116 Mo. 114, 22 S. W. 474; *Stone v. Delaware &c. R. Co.*, 257 Pa. 456, 101 Atl. 813; *Quanah &c. R. Co. v. Collett* (Tex. Civ. App.), 190 S. W. 1128; *Baltimore &c. R. Co. v. Pittsburg &c. Co.*, 17 W. Va. 812. See also *Colorado Midland R. Co. v. Brown*, 15 Colo. 193, 25 Pac. 87; *Colorado Fuel & Iron Co. v. Four Mile R. Co.*, 29 Colo. 90, 66 Pac. 902; *Lake Erie &c. R. Co. v. Kokomo*, 130 Ind. 224, 29 N. E. 780; *Benton Harbor Terminal R. Co. v. King*, 131 Mich. 377, 91 N. W. 641; *Mitchell v. Metropolitan El. R. Co.*, 132 N. Y. 552, 10 N. E. 385; *Eno v. Manhattan R. Co.*, 21 App. Div. 548, 48 N. Y. S. 516. Where the circuit court did not obtain jurisdiction to try the case, it was

held that questions involving the report of the commissioners and other steps taken in the case would not be reviewed on appeal. *City of St. Louis v. Glasgow*, 254 Mo. 262, 162 S. W. 596.

<sup>23</sup> *Metropolitan &c. R. Co. v. McFarland*, 20 App. (D. C.) 421; *Conness v. Indiana &c. R. Co.*, 193 Ill. 464, 62 N. E. 221; *Chicago &c. R. Co. v. Morrison*, 195 Ill. 271, 63 N. E. 96; *Lanquist v. Chicago*, 200 Ill. 69, 65 N. E. 681; *East &c. R. Co. v. Miller*, 201 Ill. 413, 66 N. E. 275; *Illinois &c. R. Co. v. Humiston*, 208 Ill. 100, 69 N. E. 880; *Brown v. Illinois &c. R. Co.*, 209 Ill. 402, 70 N. E. 905; *St. Louis &c. R. Co. v. Union Trust & Sav. Bank*, 209 Ill. 457, 70 N. E. 651; *Dowie v. Chicago &c. R. Co.*, 214 Ill. 49, 73 N. E. 354; *Chicago &c. R. Co. v. Loer*, 27 Ind. App. 245, 60 N. E. 319; *Abney v. Texarkana &c. R. Co.*, 105 La. 446, 29 So. 890; *Texas &c. R. Co. v. Wilson*, 108 La. 1, 32 So. 173; *Houston &c. R. Co. v. Kansas City &c. R. Co.*, 109 La. 581, 33 So. 609; *Natchitoches &c. R. Co. v. Henry*, 109 La. 669, 33 So. 725; *Opelaus &c. R. Co. v. Bradford*, 118 La. 506, 43 So. 79; *Marquette &c. R. Co. v. Longyear*, 133 Mich. 94, 94 N. W. 670, 10 Det.

condemnation proceedings for damage to lands not taken is within the range of the testimony, the award for such damage should not be disturbed for errors in instructions which could not have operated to petitioner's prejudice.<sup>24</sup> If an appeal is taken from an award of damages covering more than one tract of land, the order may be reversed as to one of the tracts and affirmed as to another.<sup>25</sup>

**§ 1370. Effect of appeal.**—In some jurisdictions the effect of an appeal is to vacate the proceedings appealed from,<sup>26</sup> but in

Leg. N. 111; *Detroit &c. R. Co. v. Hall*, 133 Mich. 302, 94 N. W. 1066; *Manhattan R. Co. v. Comstock*, 74 App. Div. 341, 77 N. Y. S. 416; *Long Island &c. R. Co. v. Reilly*, 89 App. Div. 166, 85 N. Y. S. 875; *Buffalo &c. R. Co. v. Phelps*, 102 N. Y. S. 214; *Southport &c. R. Co. v. Owners of Platt Land*, 133 N. Car. 266, 45 S. E. 589. The trial court's findings on substantial evidence are not reviewable. *City of St. Louis v. Semple (Mo.)*, 199 S. W. 967; *Ogden &c. R. Co. v. Jones*, 51 Utah 62, 168 Pac. 548. But see where evidence was all in affidavits and written stipulations, *Fairmount &c. Ry. Co. v. Bethke*, 37 S. Dak. 446, 159 N. W. 56.

<sup>24</sup> *Groves &c. R. Co. v. Herman*, 206 Ill. 34, 69 N. E. 36.

<sup>25</sup> *Stockton &c. R. Co. v. Galgiani*, 49 Cal. 139; *Chicago &c. R. Co. v. Hildebrand*, 136 Ill. 467, 27 N. E. 69. See also *Bigelow v. Draper*, 6 N. Dak. 152, 69 N. W. 570. But compare *Peak v. Kings County &c. R. Co.*, 83 App. Div. 631, 81 N. Y. 926. The objection that several tracts of land were improperly joined in a single joint

assessment can not be made for the first time on appeal. *Kankakee &c. R. Co. v. Chester*, 62 Ill. 235. Where a single owner takes several appeals as to different tracts of land for which the damages were assessed in a single proceeding the appeals may be consolidated. *Washburn v. Milwaukee &c. R. Co.*, 59 Wis. 364, 18 N. W. 328. In some jurisdictions, ordinarily, at least where there is but one parcel of land involved, the railroad company can not appeal from only a portion of the award with which it is dissatisfied, but must appeal, if at all, from the assessment or award as an entirety. *Great Northern R. Co. v. Fiske*, 54 Mont. 231, 169 Pac. 44. See generally upon the subject of reversing in part, *Wisconsin &c. R. Co. v. Cornell &c.*, 49 Wis. 162, 5 N. W. 331.

<sup>26</sup> *Kansas v. Kansas Pacific R. Co.*, 18 Kans. 331; *Pool v. Breese*, 114 Ill. 594, 3 N. E. 714. See also *Georgia Granite R. Co. v. Venable*, 129 Ga. 341, 58 S. E. 864; *Jersey City &c. R. Co. v. Central R. Co.*, 48 N. J. Eq. 379, 22 Atl. 728. Where the land-owner appeals, a



other jurisdictions a different rule prevails.<sup>27</sup> So, it has been held that an appeal by some of the parties does not suspend proceedings as to others who do not appeal.<sup>28</sup>

**§ 1371 (1050). Possession pending appeal.**—In some states having constitutions silent as to the time of making compensation, statutes providing that the railroad company shall have possession of the land without other security than that afforded by a definite mode of ascertaining and obtaining judgment for its value have been upheld,<sup>29</sup> but, as elsewhere said, we believe this doctrine to be unsound. Where, however, damages are assessed and tendered or paid into court, then we think it clearly competent for the legislature to provide that the company may enter into possession although there is an appeal. It is held that the right of the railroad company to take possession pending an appeal depends wholly upon the authority of the statute, and a tender of the damages awarded confers no rights upon the com-

discontinuance of the proceeding by the railroad company will permanently vacate the award. *Wright v. Wisconsin Central R. Co.*, 29 Wis. 341.

<sup>27</sup> *Lake Erie &c. R. Co. v. Kinsey*, 87 Ind. 514, 14 Am. & Eng. R. Cas. 309; *St. Louis &c. R. Co. v. Clark*, 119 Mo. 357, 24 S. W. 157. See generally *Peterson v. Ferreby*, 30 Iowa 327; *Broadmoor Land Co. v. Curr*, 133 Fed. 37; *Corbin v. Cedar Rapids &c. R. Co.*, 66 Iowa 73, 23 N. W. 270; *Sedalia v. Missouri &c. R. Co.*, 17 Mo. App. 105; *New York &c. R. Co. v. Townsend*, 36 Hun (N. Y.) 630; *State v. Jones*, 139 N. Car. 613, 52 S. E. 240, 2 L. R. A. (N. S.) 313.

<sup>28</sup> *Schuchman v. Comr's.*, 52 Ill. App. 497; *Fleener v. Claman*, 126 Ind. 166, 25 N. E. 900; *Missouri Pac. R. Co. v. Gruendel*, 3 Kans. App. 53, 44 Pac. 439. Where an

order of condemnation was made and the property owner took an appeal from such interlocutory order, which was ultimately reversed, but in the interval appraisers had been appointed and judgment had been rendered for the damages found from which the condemnor had appealed, it was held that such judgment for damages should be reversed, as of course, on the strength of the reversal of the interlocutory order. *Western U. Tel. Co. v. Louisville & N. R. Co.*, 185 Ind. 690, 114 N. E. 406.

<sup>29</sup> *Raleigh &c. R. Co. v. Davis*, 2 Dev. & B. L. (N. Car.) 451; *McIntire v. Western N. C. R. Co.*, 67 N. Car. 278; *Nichols v. Somerset &c. R. Co.*, 43 Maine 356; *Tuckahoe Canal Co. v. Tuckahoe &c. R. Co.*, 11 Leigh. (Va.) 42, 36 Am. Dec. 374; *Hazen v. Essex Co.*, 12 Cush. (Mass.) 475. See *Mount*

pany not granted by express provision of law.<sup>30</sup> The fact that it has not been finally determined what amount of compensation shall be made for the property taken does not invalidate a law permitting the railroad company to take possession pending appeal upon paying the amount of the commissioner's award or depositing the same in court for the benefit of the land-owner, even in states which require payment of the compensation to precede the taking.<sup>31</sup> The general rule is that the railroad com-

Washington Road Co., *Petition of*, 35 N. H. 134. Similar statutes have been upheld in other states in which the constitutions have since been changed. *New Albany &c. R. Co. v. Connelly*, 7 Ind. 32; *Prather v. Jeffersonville &c. R. Co.*, 52 Ind. 16; *Bates v. Cooper*, 5 Ohio 115; *Compton v. Susquehanna R. Co.*, 3 Bland Ch. (Md.) 386; *Harness v. Chesapeake &c. Canal Co.*, 1 Md. Ch. 248.

<sup>30</sup> *Browning v. Camden &c. R. Co.*, 4 N. J. Eq. 47; *Colvill v. Langdon*, 22 Minn. 565. See also *Chambers v. Cincinnati &c. R. Co.*, 69 Ga. 320; *Lake Erie &c. R. Co. v. Kinsey*, 87 Ind. 514; *Cleveland &c. R. Co. v. Nowlin*, 163 Ind. 497, 72 N. E. 257; *Hamilton v. Maysville &c. R. Co.*, 27 Ky. L. 251, 84 S. W. 778; *Jersey City &c. R. Co. v. Central R. Co.*, 48 N. J. Eq. 379, 22 Atl. 728; *Hausmann v. Trinity &c. R. Co.* (Tex. Civ. App.), 82 S. W. 1052; *Gulf &c. R. Co. v. Southwestern &c. Tel. Co.*, 25 Tex. Civ. App. 488, 61 S. W. 406; *Texas &c. R. Co. v. Orange &c. R. Co.*, 29 Tex. Civ. App. 38, 68 S. W. 801.

<sup>31</sup> *Baltimore &c. R. Co. v. Johnson*, 84 Ind. 420; *Lake Erie &c. R. Co. v. Kinsey*, 87 Ind. 514; *Hastings v. Burlington &c. R. Co.*, 38 Iowa 316; *Downing v. Des Moines*

*&c. R. Co.*, 63 Iowa 177, 18 N. W. 862; *Central Branch R. Co. v. Atchison &c. R. Co.*, 28 Kans. 453; *Arnold v. Covington &c. Bridge Co.*, 1 Duvall (Ky.) 372; *St. Louis &c. R. Co. v. Evans &c. Co.*, 85 Mo. 307; *Cooper v. Chester R. Co.*, 19 N. J. Eq. 199; *Mercer &c. R. Co. v. Delaware &c. R. Co.*, 26 N. J. Eq. 464; *New York Central &c. R. Co.*, *Matter of*, 60 N. Y. 116; *New York &c. R. Co.*, *Matter of*, 98 N. Y. 12; *Schuler v. Northern Liberties &c. R. Co.*, 3 Whar. (Pa.) 555; *Railroad Co. v. Foreman*, 24 W. Va. 662. See also *Savannah &c. R. Co. v. Postal Tel. &c. Co.*, 115 Ga. 554, 42 S. E. 1; *Oliver v. Union Point R. Co.*, 83 Ga. 257, 9 S. E. 1086; *Consumers' Gas &c. Co. v. Harless*, 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505; *Wabash R. Co. v. Ft. Wayne &c. Co.*, 161 Ind. 295, 67 N. E. 674; *Terre Haute &c. R. Co. v. Flora*, 29 Ind. App. 442, 64 N. E. 648. In order to be effectual in giving the railroad company the right to take possession, the deposit must be unconditional, and subject to the absolute control of the land-owner. *Kanne v. Minneapolis &c. R. Co.*, 30 Minn. 423; *Arnold v. Covington &c. Bridge Co.*, 1 Duvall (Ky.) 372. Where the railroad company has appealed

pany may, notwithstanding such appeal, enter upon the land and proceed to construct its road upon paying or tendering the damages assessed below.<sup>32</sup> But if the damages are increased on appeal, the railroad company must pay the additional sum awarded, or it will be held liable as a trespasser ab initio, and may be dispossessed by an action of ejectment where there is no element of estoppel.

from the award, but has deposited the damages awarded and taken possession, the land-owner is entitled to such damages upon proper demand made upon the clerk of the court. *Meyer v. State*, 125 Ind. 335, 25 N. E. 351. A law which permits the railroad company to take possession upon paying into court the amount of the award but provides that the money shall not be paid to the land-owner until the result of the appeal is known, is opposed to a constitutional provision that the payment of compensation must precede the taking. *Meily v. Zurmehly*, 23 Ohio St. 627. A land-owner who accepts the amount of the award is himself estopped to prosecute an appeal. *Baltimore &c. R. Co. v. Johnson*, 84 Ind. 420; *Mississippi &c. R. Co. v. Byington*, 14 Iowa 572; *Whittlesey v. Hartford &c. R. Co.*, 23 Conn. 421; *Burns v. Milwaukee &c. R. Co.*, 9 Wis. 450; *Kile v. Yellowhead*, 80 Ill. 208; *Felch v. Gilman*, 22 Vt. 38.

<sup>32</sup> In most of the states in which payment of the compensation is required to precede the taking, a tender of payment or its equivalent is held to be necessary before possession can be taken. *Graham v. Columbus &c. R. Co.*, 72 Ind. 260; *San Mateo W. W. v. Sharp-*

*stein*, 50 Cal. 284; *Sanborn v. Bel-den*, 51 Cal. 266; *Vilhac v. Stockton &c. R. Co.*, 53 Cal. 208; *Cox v. Louisville &c. R. Co.*, 48 Ind. 178; *Richards v. Des Moines &c. R. Co.*, 18 Iowa 259; *Gear v. Dubuque &c. R. Co.*, 20 Iowa 523, 89 Am. Dec. 550; *Evansville &c. R. Co. v. Grady*, 6 Bush. (Ky.) 144; *O'Hara v. Lexington &c. R. Co.*, 1 Dana (Ky.) 232; *New Orleans &c. R. Co. v. Lagarde*, 10 La. Ann. 150; *Cushman v. Smith*, 34 Maine 247; *Thompson v. Grand Gulf R. Co.*, 3 How. (Miss.) 240, 34 Am. Dec. 81; *Stewart v. Raymond R. Co.*, 7 S. & M. (Miss.) 568; *Memphis &c. R. Co. v. Payne*, 37 Miss. 700; *Walther v. Warner*, 25 Mo. 277; *Ray v. Atchison R. Co.*, 4 Nebr. 439; *Blodgett v. Utica &c. R. Co.*, 64 Barb. (N. Y.) 580; *Ferris v. Bramble*, 5 Ohio St. 109; *Levering v. Philadelphia &c. R. Co.*, 8 Watts & S. (Pa.) 459; *McClinton v. Pittsburg &c. R. Co.*, 66 Pa. St. 404; *Shepardson v. Milwaukee &c. R. Co.*, 6 Wis. 605; *Loop v. Chamberlain*, 20 Wis. 135; *Kennedy v. Milwaukee &c. R. Co.*, 22 Wis. 581; *Bohlman v. Green Bay &c. R. Co.*, 30 Wis. 105. A law providing that the court, before which the proceedings to condemn land for a railroad right of way are pending, may make an order allowing the

§ 1372. **Trial de novo in intermediate court.**—In many, if not most, jurisdictions an appeal is first taken to the circuit or other intermediate court and goes there for a trial de novo rather than as upon a writ of error.<sup>33</sup> Evidence is then heard in general, just as if the case had commenced there,<sup>34</sup> but as to the pleadings and

company to continue in possession, if possession has been taken, and if not, to take and keep possession of the land sought to be condemned until the proceedings are ended, upon paying into court a sufficient sum, or executing a bond to secure the payment of whatever compensation shall be legally assessed, is opposed to a constitutional provision that the payment of damages shall precede the taking of property. *Davis v. San Lorenzo R. Co.*, 47 Cal. 517; *Fox v. Western Pacific R. Co.*, 31 Cal. 538; *Enfield &c. Co. v. Hartford &c. R. Co.*, 17 Conn. 40, 42 Am. Dec. 716 and note; *Lake Erie &c. R. Co. v. Kinsey*, 87 Ind. 514; *Richards v. Des Moines Valley R. Co.*, 18 Iowa 259; *Hibbs v. Chicago &c. R. Co.*, 39 Iowa 340; *Conger v. Burlington &c. R. Co.*, 41 Iowa 419; *White v. Wabash &c. R. Co.*, 64 Iowa 281, 20 N. W. 436; *St. Joseph &c. R. Co. v. Callender*, 13 Kans. 496; *Blackshire v. Atchison &c. R. Co.*, 13 Kans. 514; *Nichols v. Somerset &c. R. Co.*, 43 Maine 356; *Harness v. Chesapeake &c. Canal Co.*, 1 Md. Ch. 248; *Walther v. Warner*, 25 Mo. 277; *Evans v. Missouri &c. R. Co.*, 64 Mo. 453; *Browning v. Camden &c. R. Co.*, 4 N. J. Eq. 47; *Morris &c. R. Co. v. Hudson Tunnel R. Co.*, 25 N. J. Eq. 384; *Redman v. Philadelphia &c. R. Co.*, 33 N. J. Eq. 165; *Blodgett v. Utica &c. R. Co.*, 64 Barb.

(N. Y.) 580; *Dater v. Troy &c. R. Co.*, 2 Hill (N. Y.) 629; *Levering v. Philadelphia & R. Co.*, 8 Watts & S. (Pa.) 459; *McClinton v. Pittsburg &c. R. Co.*, 66 Pa. St. 404; *Loop v. Chamberlain*, 20 Wis. 135.

<sup>33</sup> *Atlanta &c. R. Co. v. Smith*, 132 Ga. 725, 64 S. E. 1073; *Gardner v. Blaine Co.*, 15 Idaho 698, 99 Pac. 826; *Halstead v. Vandalia R. Co.*, 48 Ind. App. 96, 95 N. E. 439; *Kelley v. Augsperger*, 171 Ind. 155, 85 N. E. 1004; *Mississippi &c. R. Co. v. Rosseau*, 8 Iowa 373; *Louisville &c. R. Co. v. Gerard*, 130 Ky. 18, 112 S. W. 915; *Kirkwood v. Cronin*, 259 Mo. 207, 168 S. W. 674; *Miller v. Prairie du Chien R. Co.*, 34 Wis. 533, ante § 1736. It is held on the one hand that the petitioner must on such appeal prove anew all jurisdictional facts put in issue by the exceptions filed below. *Louisville &c. R. Co. v. Gerard*, 130 Ky. 18, 112 S. W. 915. But, on the other hand, it has been held that the defendant who appeals from an award of appraisers has the burden of showing his damages. *Indianapolis Tract. &c. Co. v. Ripley*, 175 Ind. 103, 93 N. E. 546.

<sup>34</sup> *Kellog v. Price*, 42 Ind. 360; *Chicago &c. R. Co. v. Brôquet*, 47 Kans. 571, 28 Pac. 717; *Hord v. Nashville &c. R. Co.*, 2 Swan (Tenn.) 497.

other matters not connected with the trial, this is not ordinarily the case.<sup>35</sup> The general rule is that except as to the question of jurisdiction over the subject, a party must raise in the court of original jurisdiction all the questions that he desires to raise on appeal.<sup>36</sup> And, as elsewhere intimated, it is frequently provided by statute that certain questions can not be tried on appeal. Under some statutes, indeed, the only question open, in general, for trial *de novo* is that of the amount of damage.<sup>37</sup>

§ 1373. (1053a). **Appeal—Miscellaneous matters.**—In Louisiana, the supreme court has jurisdiction of all questions of law and fact, and all findings of an expropriation jury are reviewable on appeal to that court.<sup>38</sup> In that state it is held that the report of commissioners in condemnation proceedings may be set aside by the district court, like the verdict of a jury, on the ground that the amount allowed is too large, but it can not be increased if too small, though the law gives the court the right to “modify” the report of the commissioners.<sup>39</sup> In Indiana, it is expressly provided by statute, that no questions can be determined on appeal from the report of commissioners, condemning a highway across railroad tracks, except those of the regularity of the proceedings and of the amount of damages.<sup>40</sup> And a railroad com-

<sup>35</sup> See *Bell v. Pavey*, 7 Ind. App. 19, 33 N. E. 1011; *Williamson v. Houser*, 169 Ind. 397, 82 N. E. 771; and cases cited in following notes.

<sup>36</sup> *Washington R. &c. Co. v. Newman*, 41 App. D. C. 439; *People v. Chapman*, 127 Ill. 387, 19 N. E. 872; *Booker v. Venice &c. R. Co.*, 101 Ill. 333; *Strebin v. Lavengood*, 163 Ind. 478, 71 N. E. 494; *McKarg v. Jordan*, 172 Ind. 84, 87 N. E. 974; *Evansville &c. R. Co. v. Heerdink*, 174 Ind. 537, 92 N. E. 598; *Chamberlaine v. Highnite*, 30 Ky. L. 85, 97 S. W. 396; *Field v. Vermont &c. R. Co.*, 4 Cush. (Mass.) 150; *Whittley v. Mississippi &c. Co.*, 38 Minn. 523,

36 N. W. 345; *Norfolk &c. R. Co. v. Ely*, 101 N. Car. 8, 7 S. E. 476; *South Carolina &c. R. Co. v. Blake*, 9 Rich. (S. Car.) 228.

<sup>37</sup> See 1 *Elliott Roads and Sts.* (3rd ed.), § 419; ante § 1736.

<sup>38</sup> *Louisiana &c. R. Co. v. Vicksburg &c. R. Co.*, 112 La. 915, 36 So. 803.

<sup>39</sup> *Louisiana Western R. Co. v. Crossman*, 111 La. 611, 35 So. 784.

<sup>40</sup> *Terre Haute &c. R. Co. v. Flora*, 29 Ind. App. 442, 64 N. E. 648. In *Washington* an appeal to the supreme court from an award of damages presents only the question of the propriety and justice of the amount of the award and raises

pany succeeding to the rights of another company pending condemnation by such company, may prosecute an appeal in its own name from the award.<sup>41</sup> Technical exactness and nicety is not demanded in the pleadings on the appeal from the commissioners' actions. Thus, it has been held not error to overrule a motion to make a bill of particulars more definite and certain where it was not misleading, though not as perfect as an ordinary petition should be.<sup>42</sup> So a verdict good in substance, will not be vitiated merely because of some irregularity in form.<sup>43</sup> A land-owner failing to appeal, is conclusively bound by the award and can not avail himself of an appeal by a mortgagee of the premises.<sup>44</sup> But the railroad may bring in such land-owner if necessary to protect its rights.<sup>45</sup> It has been held that a mortgagee would not lose his right of appeal by reason of having filed a claim for payment of the mortgage against the estate of the mortgagor.<sup>46</sup> The question whether certain persons, who were not parties to the condemnation proceedings, were entitled to damages will not be considered on appeal.<sup>47</sup> The statutory provision that an appeal shall be governed by the same law as in other causes, except the judgment of the county court shall not be suspended thereby, has been held not to authorize an appeal by property owners who have accepted money paid into court on the condemnation judgment and executed receipts in full therefor.<sup>48</sup>

no question as to the right to condemn. *Coats-Fordney Logging Co. v. Grays Harbor &c. Co.*, 100 Wash. 491, 171 Pac. 241; *State v. Superior Court*, 100 Wash. 485, 171 Pac. 238.

<sup>41</sup> *Union Traction Co. v. Basey*, 164 Ind. 249, 73 N. E. 263.

<sup>42</sup> *Missouri &c. R. Co. v. Schmuck*, 69 Kans 272, 76 Pac. 836.

<sup>43</sup> *Atlantic &c. R. Co. v. Postal &c. Co.*, 120 Ga. 268, 48 S. E. 15.

<sup>44</sup> *Omaha Bridge &c. R. Co. v. Reed*, 69 Nebr. 514, 96 N. W. 276.

<sup>45</sup> *Omaha Bridge &c. R. Co. v. Reed*, 69 Nebr. 514, 96 N. W. 276.

<sup>46</sup> *Omaha Bridge &c. R. Co. v. Reed* (Nebr.), 92 N. W. 1021, affirmed on rehearing 69 Nebr. 514, 96 N. W. 276.

<sup>47</sup> *Marquette &c. R. Co. v. Longyear*, 133 Mich. 94, 94 N. W. 670, 10 Det. Leg. N. 111.

<sup>48</sup> *Parks v. Dallas Terminal &c. Co.*, 34 Tex. Civ. App. 341, 78 S. W. 533. Under the statute in Mississippi a land-owner who accepts the money assessed by the eminent domain tribunal is estopped from appealing to the circuit court. *Alabama &c. R. Co. v. Mallett*, 118 Miss. 31, 78 So. 952.

§ 1374. **Costs of appeal.**—Questions as to the right to dismiss an appeal, and as to costs and the like, are considered in the cases cited below.<sup>49</sup> Such matters depend largely upon the constitution or governing statute in the particular jurisdiction. As a general rule, however, it may be said that where the land-owner appeals and is successful, he is not liable for costs of the appeal, but is liable in most jurisdictions if he is unsuccessful and does not even increase the amount of damages,<sup>50</sup> while, on the other hand, the weight of authority is to the effect that, where the appeal is by the party seeking to condemn, the land-owner can not be made to pay any of the costs of appeal even though the condemnor may be successful on appeal, because to make the land-owner liable therefor would result in a reduction of the just compensation required by the constitution and awarded by the jury.<sup>51</sup> In the one case the land-owner, having had his damages

<sup>49</sup> Chicago &c. Co. v. Patterson, 26 Ind. App. 295, 59 N. E. 688; St. Louis &c. R. Co. v. Martin, 29 Kans. 750; Norfolk &c. R. Co. v. Rasnake, 90 Va. 170, 17 S. E. 879. See also as to costs, Rawson-Works Lumber Co. v. Richardson, 26 Idaho 37, 141 Pac. 74; Baltimore &c. R. Co. v. Brown's Heirs, 74 W. Va. 149, 81 S. E. 731.

<sup>50</sup> Los Angeles &c. R. Co. v. Rump, 104 Cal. 20, 37 Pac. 859; Oakland v. Pacific Coast Lumber &c. Co., 172 Cal. 332, 156 Pac. 468, Ann. Cas. 1917E, 259 and note; McCaskey v. Ft. Dodge &c. R. Co., 154 Iowa 652, 135 N. W. 6 (condemnor had to pay because land-owner was successful); Music v. Big Sandy &c. R. Co., 163 Ky. 628, 174 S. W. 44, Ann. Cas. 1916E, 689 (land-owner successful and condemnor liable); State v. District Court, 87 Minn. 268, 91 N. W. 1111; Madison County R. Co. v. Gahagon, 161 N. Car. 190, 76 S. E.

696; Redmond v. Perrigo, 84 Wash. 407, 146 Pac. 838. See also note in Ann. Cas. 1912C, 535, 536.

<sup>51</sup> San Joaquin &c. Co. v. Stevinson, 165 Cal. 540, 132 Pac. 1021; Oakland v. Pacific Coast Lumber &c. Co., 172 Cal. 332, 156 Pac. 468, Ann. Cas. 1917E, 259; Rawson-Works Lumber Co. v. Richardson, 26 Idaho 37, 141 Pac. 74; Peoria &c. Trac. Co. v. Vance, 251 Ill. 263, 95 N. E. 1081, Ann. Cas. 1912C, 532 and cases cited in note; In re, New York &c. R. Co., 94 N. Y. 287; Oregon River &c. R. Co. v. Taffe, 67 Ore. 102, 134 Pac. 1024, 135 Pac. 332, 515; Stoltze v. Milwaukee &c. R. Co., 113 Wis. 44, 88 N. W. 919, 90 Am. St. 833. But in the case of In re Bensel, 230 Fed. 932, held that while this is the general rule it does not apply where the condemnor succeeds in reversing a judgment in favor of the land-owner. See also for cases in which land-owners were held

lawfully assessed by a competent tribunal, can not complain of having to pay costs if he voluntarily appeals and is unsuccessful. He has had his day in court and received what has been found to be just compensation, and the legislature in giving him a right to appeal could impose on him such terms as to costs as it might deem just and proper. But in the other case, he does not voluntarily incur the cost and expense of appeal. He is forced to do so by the party seeking to condemn, who in appealing in effect thus continues the proceedings instituted by such party for ascertaining the compensation payable to the land-owner and taking his property against his will. There seems to be good reason for making the distinction drawn by many of the authorities and holding that the land-owner can not be compelled to pay the costs of an appeal by the condemnor, even though the latter may succeed on such appeal in reducing the award, where the constitution requires just compensation and making the land-owner pay such costs would deprive him of it.

§ 1375. (1054). **Certiorari.**—In some jurisdictions an appropriate mode of reviewing proceedings in cases involving the exercise of the power of eminent domain is by certiorari.<sup>52</sup> In some of the states, in cases where the court has failed to acquire jurisdiction of the defendant's person, this writ is the proper reme-

liable for costs where the condemnors appealed and reduced the damages: *Indiana Cent. R. Co. v. Atkinson*, 6 Ind. 149; *Fort St. Union Dept. Co. v. Backus*, 103 Mich. 556, 61 N. W. 787.

<sup>52</sup> *Elbert v. Scott* (Del.), 90 Atl. 587; *Willson v. Gifford*, 42 Mich. 454, 4 N. W. 170; *Chicago &c. R. Co. v. Young*, 96 Mo. 39, 8 S. W. 776; *Freeman v. Ogden*, 40 N. Y. 105; *People v. Hildreth*, 126 N. Y. 360, 27 N. E. 558; *Tennessee Cent. R. Co. v. Campbell*, 109 Tenn. 640, 75 S. W. 1012; *Adams v. New-*

*fane*, 8 Vt. 271; *Seattle &c. R. Co. v. Land*, 81 Wash. 201, 142 Pac. 680; *State v. Ashland*, 71 Wis. 502, 37 N. W. 809. Certiorari is a proper method of review of the necessity or right to condemn in a number of jurisdictions. *Board v. Pittmans & Dean Co.*, 202 Mich. 32, 167 N. W. 978; *State v. Superior Court*, 100 Wash. 481, 171 Pac. 48. It has also been held that refusal to approve a proper bond may be reviewed on certiorari. *American Nat. Gas Co. v. Evans*, 63 Pa. Super. Ct. 162.



dy.<sup>53</sup> This is a common-law writ which is usually granted only where appeal is not available.<sup>54</sup> In most jurisdictions it lies only

<sup>53</sup> *Dunlap v. Toledo &c. R. Co.*, 46 Mich. 190, 9 N. W. 249; *Bixby v. Goss*, 54 Mich. 551, 20 N. W. 581; *South Wales R. Co. v. Richards*, 6 Eng. Railw. & Canal Cas. 197. It is said that, ordinarily, the court will refuse to grant a writ of certiorari where the lack of jurisdiction appears on the face of the proceedings, but will leave the party to his action for trespass. *Baltimore &c. R. Co. v. Northern &c. R. Co.*, 15 Md. 193; *Reg. v. Bristol &c. Ry.*, 11 Ad. & Ell. 202, 2 Eng. Railw. & Canal Cas. 99. One against whom it is sought to enforce a judgment although he was not a party, may apply for a certiorari. *Clary v. Hoagland*, 5 Cal. 476. A writ of certiorari has been granted to review proceedings in which an order was made which the court had no jurisdiction to make, when the petitioner was about to proceed under this void order, to commit a trespass on the land concerning which it was made. *California Pac. R. Co. v. Central Pac. R. Co.*, 47 Cal. 528. In Washington where no review on appeal of the question of public use and interest involved in the exercise of eminent proceedings is allowed it is held that the supreme court had jurisdiction to issue certiorari to bring up for review the record in an action adjudging the right of way of one railroad necessary for another road, that the intended use was a public one, and that the public interest required its appropri-

tion. *Seattle &c. R. Co. v. Bellingham &c. R. Co.*, 29 Wash. 491, 69 Pac. 1107.

<sup>54</sup> *United States v. Beatty*, 232 U. S. 463, 34 Sup. Ct. 392, 58 L. ed. 686; *Cedar Rapids &c. R. Co. v. Whelan*, 64 Iowa 694, 21 N. W. 141; *Dunlap v. Toledo &c. R. Co.*, 46 Mich. 190, 9 N. W. 249; *State v. Fifth Judic. Dist. Ct.*, 29 Mont. 153, 74 Pac. 200; *Boston &c. R. Co. v. Folsom*, 46 N. H. 64; *Tennessee Cent. R. Co. v. Campbell*, 109 Tenn. 640, 75 S. W. 1012; *State v. King Co. Super. Ct.*, 30 Wash. 219, 70 Pac. 484; *State v. Superior Court*, 46 Wash. 303, 89 Pac. 879; The granting of a writ of certiorari is largely in the discretion of the court, and it will not be granted to review the technical errors where substantial justice has been done. *Boston &c. R. Co. v. Folsom*, 46 N. H. 64; *Board v. Magoon*, 109 Ill. 142; *Keys v. Board &c.*, 42 Cal. 252. For other cases in which certiorari has been granted, see *Delaware &c. R. Co. v. Burson*, 61 Pa. St. 369; *Joliet &c. R. Co. v. Barrows*, 24 Ill. 562; *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475; *State v. Montclair R. Co.*, 35 N. J. L. 328; *Fitchburg R. Co. v. Boston &c. R. Co.*, 3 Cush. (Mass.) 58; *Worcester R. Co. v. Railroad Commissioners*, 118 Mass. 561. After the time for an appeal has been suffered to elapse the court will not grant a writ of certiorari to review the proceedings unless some good excuse for the delay is shown. *Dun-*

to correct errors of law and not to review the evidence.<sup>55</sup>

**§ 1376. Certiorari—How obtained—What must be shown.—**

The writ of certiorari is usually granted only at the suit of an interested party in the case,<sup>56</sup> upon petition, stating a sufficient cause,<sup>57</sup> and properly supported, when necessary, by an affida-

lap v. Toledo &c. R. Co., 46 Mich. 190, 9 N. W. 249. See also Slocum v. Neptune Tp., 58 N. J. L. 595, 53 Atl. 301. An error in the amount of damages awarded can not be corrected by certiorari. The proper course is to appeal. Detroit &c. R. Co. v. Graham, 46 Mich. 642.

<sup>55</sup> Betts v. Warren, 5 Harr. (Del.) 4; Ex parte Nightingale, 11 Pick. (Mass.) 168; Hayford v. Bangor, 102 Maine 340, 66 Atl. 731, 11 L. R. A. (N. S.) 940; Detroit &c. R. Co. v. Graham, 46 Mich. 642, 112 N. W. 998; Conover v. Davis, 48 N. J. L. 112, 2 Atl. 667; Morrill v. Morrill, 20 Ore. 96, 25 Pac. 362, 11 L. R. A. 155, 23 Am. St. 95; Elliott Roads and Streets (3rd ed.), § 426. See also Kirby v. Ct. of Comrs. of Marshall County, 186 Ala. 611, 65 So. 163; Atlanta &c. R. Co. v. Redwine, 123 Ga. 736, 51 S. E. 724. It is generally confined to cases in which there is a want of jurisdiction or where it is exceeded and there is no adequate remedy by appeal or otherwise.

<sup>56</sup> See as to special interest being required, Moore v. Hancock, 11 Ala. 245; Richman v. Muscatine Co., 70 Iowa 627, 26 N. W. 24; Central R. Co. v. Hudson &c. Co., 46 N. J. L. 289; State v. Anderson, 130 Wis. 227, 109 N. W. 981, note

in Ann. Cas. 1914D, 1144; 1 Elliott Roads and Streets (3rd ed.), § 427.

<sup>57</sup> Some injury must be shown to have resulted from the errors complained of. Boston &c. R. Co. v. Folsom, 46 N. H. 64; Pagels v. Oaks, 64 Iowa 198, 19 N. W. 905; Pickford v. Lynn, 98 Mass. 491. A timely application for the writ must be made or it will be refused. Wilder v. Hubbell, 43 Mich. 487, 5 N. W. 673; Spofford v. Bucksport &c. R. Co., 66 Maine 26. Where the writ was asked to review the action of the county commissioners in dismissing the petition to revise the award, because of a failure to prosecute the same, it was held that the provisions of the statute directing the dismissal of such a petition if the party failed to prosecute it at the next regular term after it was filed, unless good cause for delay was shown, conferred upon the commissioners authority to decide whether the excuse offered for the delay was sufficient, and that the supreme court would not revise that decision. Portland &c. Co. v. County Commissioners, 64 Maine 505. Where the record of the proceedings of a board of commissioners in locating railroad crossings, and altering the courses of roads, were so defective as to be unintelligible without the aid of parol evidence,

vit.<sup>58</sup> He should show in his petition that justice requires the granting of the writ and should state all that is necessary to make a clear *prima facie* case.<sup>59</sup>

**§ 1377. Certiorari—Proceedings on return of writ.**—Upon the return of the writ, the proceedings of the inferior tribunal, as shown by the record,<sup>60</sup> are examined, and its judgment affirmed

it was held proper to grant a writ of certiorari to review them. *Portland &c. R. Co. v. County Commissioners*, 65 Maine 292. But see *State v. Miller*, 23 N. J. L. 383. In many of the states a party who shows equity may have an injunction in cases where the proceedings are void because jurisdiction does not exist. "An application for certiorari, praying for a review of an adjudication that the right of way of one railroad can be condemned for the use of another railroad, or that it is for a public use, and required by the public interest, and denying the power to appropriate such property because it is already appropriated for the construction and operation of a railroad, states sufficient cause for the issuance of the writ." *Seattle &c. R. Co. v. Bellingham Bay &c. R. Co.*, 29 Wash. 491, 69 Pac. 1107.

<sup>58</sup> *State v. Little*, 49 N. J. L. 182, 6 Atl. 519; *Chambers v. Lewis*, 9 Iowa 583. For verification held sufficient see *Georgia R. &c. Co. v. J. M. High Co.*, 15 Ga. App. 243, 82 S. E. 932. Counter affidavits are admissible to show the waiver of the alleged irregularities. *Spofford v. Busksport &c. R. Co.*, 66 Maine 26; *Bresler v. Ellis*, 46 Mich. 335, 9 N. W. 439. The fact that improper items of injury were con-

sidered in estimating the damages may be shown by affidavit. *Penny*, In re, 7 Ell. & Bl. 660. The affidavits must show positively that the errors have been committed. *Reg. v. Manchester &c. R. Co.*, 8 Ad. & Ell. 413.

<sup>59</sup> *Board v. Magoon*, 109 Ill. 142; *Bell v. Mattoon Waterworks &c. Co.*, 235 Ill. 218, 85 N. E. 214; *Lees v. Childs*, 17 Mass. 351; *Boston &c. R. Co. v. Folsom*, 46 N. H. 64; 1 *Elliott Roads and Streets* (3rd ed.), § 427. See also *Re Penny &c. R. Co.*, 9 E. B. 660, 26 L. J. Q. B. 226.

<sup>60</sup> *Philadelphia &c. R. Co.* In re, 6 Whart. (Pa.) 25, 36 Am. Dec. 202; *Church v. Northern Central R. Co.*, 45 Pa. St. 339. See also *Ann Arbor R. Co. v. Beach*, 110 Mich. 209, 68 N. W. 124; *McCulley v. Cunningham*, 96 Ala. 583, 11 So. 694. It is held that the return to the writ is conclusive. *Traverse City &c. R. Co. v. Seymour*, 81 Mich. 378, 45 N. W. 826; *Forbes v. Delashmutt*, 68 Iowa 164, 26 N. W. 56. As to requisites of return see *Palmer v. Forsyth*, 4 Barn. & C. 401; *Stone v. New York*, 25 Wend. (N. Y.) 157; *Starr v. Rochester*, 6 Wend. (N. Y.) 565. As to what questions may be considered on the hearing, see *Schroeder v. Detroit &c. R. Co.*, 44 Mich. 387,

or set aside, as the proceedings are shown to have been authorized by law and conducted in accordance with correct principles or not.<sup>61</sup> As a general rule, no question which did not properly come before the commissioners can be considered on certiorari to review their action. If they are found to have had jurisdiction, the court will only inquire whether their proceedings have been legally conducted.<sup>62</sup> The office of the writ of certiorari has been so changed, however, in some jurisdictions, by statute or otherwise, that these general rules may not fully apply in the particular jurisdiction and the local statute and decision should always be consulted.

6 N. W. 872; *New Jersey &c. R. Co. v. Suydam*, 17 N. J. L. 25; *Chambers &c. R. Co. v. Carteret &c. R. Co.*, 54 N. J. L. 85, 22 Atl. 995; *Church v. Northern &c. R. Co.*, 45 Pa. St. 339.

<sup>61</sup> Questions of law only are usually considered on certiorari. *Schroeder v. Detroit &c. R. Co.*, 44 Mich. 387, 6 N. W. 872; *German-town Avenue, In re*, 99 Pa. St. 479; *Low v. Galena &c. R. Co.*, 18 Ill. 324; *Everett v. Cedar Rapids &c. R. Co.*, 28 Iowa 417. See *People*

*v. Hildreth*, 126 N. Y. 360, 27 N. E. 558.

<sup>62</sup> *Crandell v. Taunton*, 110 Mass. 421; *Commissioners v. Supervisors*, 27 Ill. 140; *McAllilley v. Horton*, 75 Ala. 491. Commissioners to assess damages for land taken by a railroad company have no authority to decide as to its corporate existence and right to take land in invitum, and a writ of certiorari to review their action brings no such question before the court. *Schroeder v. Detroit &c. R. Co.*, 44 Mich. 387, 6 N. W. 872.













